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A

GENERAL ABRIDGMENT

OF

Law and Equity,

ALPHABETICALLY DIGESTED UNDER PROPER TITLES;

WITH NOTES AND REFERENCES TO THE WHOLE.

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Not Guilty.

(A) Not Guilty. *Pleadable.* In what Caſes.

1. IN *decies tantum* Not guilty is no plea, but not ready to give his verdict. Br. Action ſur le Statute, pl. 14. cites 8 H. 6. 9, & 10.

2. In *writ of maintenance*, he ſhall not ſay not guilty; by which he ſaid, that he did not give, &c. and ſo not guilty; but the not guilty was not entered, but only that he did not give robes &c. Br. Action ſur le Statute, pl. 14. cites 8 H. 6. 9, & 10.

3. Note, that of *general pardon of felony* &c. all are bound to take notice of it, ſo that *if the felon will plead not guilty*, yet *the judges ought to refuſe it*, by reaſon of the pardon. Br. Notice, pl. 1. cites 26 H. 8. 7.

4. In action upon the caſe for *a thing which lies in feaſance, as* for *burning of goods or deeds* &c. Not guilty is a good plea; *contra for non-feaſance* of a thing which he ought to do, as making a bridge, park-pale, ſcouring a ditch, &c. Br. Action ſur le Caſe, pl. 111. cites 2 E. 6. S. P. Ibid. pl. 77.

5. *Error* was brought *upon a judgment in debt upon the ſtatute of* 32 *H.* 8. for that the defendant pleaded not guilty, which was urged to be no plea in this action; but all the Court held it good when the *action is grounded on a penal ſtatute*. Cro. E. 257. pl. 34. Mich. 33 & 34 Eliz. Savery v. Tey.

6. In *debt* brought by a farmer of a rectory *upon the ſtatute of* 2 *E.* 6. *for carrying away his corn, the tythes not being ſet out*, and demanding the treble value not guilty was pleaded; and all the Court reſolved, that it was an iſſue well enough in this action; for it was not for a * *non-feaſance*, but for a *male-feaſance*, wherein the tort is ſuppos'd. Cro. E. 766. Trin. 42 Eliz. B. R. Wortley v. Herpingham.

* In an action for a non-feaſance, not guilty is not any plea; for *they are two negatives*, which cannot make an iſſue any more than two affirmatives; but in action for a mis-feaſance it is otherwiſe. Cro. E. Trin. 39 Eliz. B. R. Yielding v. Fay.

7. *And in an action upon the ſtatute, which prohibits a thing upon which a penalty is demanded*, the iſſue may be not guilty, or non debet,

Not

debet, and ſo it has been often rul'd in this Court; wherefore the iſſue was joined accordingly. Cro. E. 766. in Caſe of Wortley v. Herpingham.

For more of Not Guilty in general, ſee Actions, and other proper titles.

2] Notice.

See Acceptance—Condition (A. d) —— Eſtate (O. b)

(A) *In what Caſes* Men *ought to take Notice* of Things *without* any *Notice given* by any other [*as to the making or diſpenſing with a Forfeiture.*]

Cro. C. 497. S. C. —A freeman and citizen of London was *choſen ſheriff*, and for not ſerving thereof, an action was brought againſt him on a by-law, for 400 l. forfeiture. It was objected, that no notice was given of thiselection, and it might be, that he was abſent at the time of election. But Holt. Ch. J. in delivering the opinion of the Court ſaid, that *every freeman and citizen, being a member of*

[1. IF there be *curia legalis of a manor held twice a year*, in which all thoſe who have common in a great moor, parcel of the manor, have uſed time out of mind &c. to appear, or to be amerc'd for it, or to be eſſoigned, and there is a cuſtom, that the ſteward has uſed at the ſaid Court to elect and ſwear a homage out of the commoners appearing to enquire of the oppreſſions and offences concerning the common, and that the ſaid homage has uſed to make ordinances, Anglicè *by-laws for the better preſervation of the common*, and that all commoners have uſed to obey thoſe by-laws under a reaſonable pain &c. And after, *at ſuch Court, an ordinance is made by the homage, that no commoner ſhall put in his ſheep in a certain part of the moor* (ſhewing it by bounds) *under the pain of* 3 *s.* 4 *d. to the lord;* and this ordinance *is publiſhed and proclaimed in the ſame Court.* Though there be not any expreſs notice to J. S. who is a commoner, and he after puts in his beaſts againſt the ordinance, the lord may *diſtrein* and avow for this 3 s. 4 d. forfeited (having power *by cuſtom* to diſtrein for it) without alleging any notice given of the ordinance to him; becauſe it is in nature of a ſtatute law made by the commoners; for by intendment, all the commoners agreed at the firſt, that the homage ſhould make ſuch ordinances to bind them; and the cuſtom is, that all commoners ought to appear at Court or to be amerc'd. And therefore if he appears, he had notice, it being publiſhed and proclaimed, and if not, it was his own default; and it being done by the homage, and not by the lord nor ſteward, the commoners ought to take notice of it. Trin. 14 Car. B. R. between *James* and

and *Tinteney*. Adjudged per Curiam in writ of error, upon a judgment in Bank upon a demurrer upon ſtrict avowry. Intratur. 9 Car. Rot. 234. or Trin. 11 Car. Rot. 753.]

the body politick, *is ſuppoſed to be preſent where the whole body reſides*; and tho' in fact one of them was abſent, yet it was his duty to have been there, and ſhall be obliged to *take notice of this election at his peril*. Beſides, the election is made in view of the city, of which all perſons as members of the body politick are to take notice; and the proclamation is alſo made in the moſt notorious place of the city, viz. on the huſtings, where every perſon may take notice of it; and judgment was given for the plaintiff. 5 Mod. 418. 442. Trin. 11 W. 3. B R. The city of London v. Vanacre.——1 Salk. 142. S. C.——Carth. 484. S. C.——12 Mod. 272. S. C.

If a *common nuſance is preſented at a tourn or leet*, the ſheriff or ſteward may either amerce the perſon preſented, and alſo order him to remove the nuſance by ſuch a day, under pain of forfeiting a certain ſum, or may order him to remove it under ſuch a pain, without amercing him at all. But ſerjeant Hawkins ſays it ſeems doubtful, whether ſuch a perſon be bound at his peril to take notice of and obey ſuch order, being made in his abſence, unleſs expreſs notice be given him of it. 2 Hawk. Pl. C. 61. cap. 10. ſ. 32.

2. The law will not compel one to take notice of *acts done between ſtrangers*, or of any *incertainty*, on pain of forfeiture of his eſtate or intereſt. But in ſuch caſes notice ought to be given to thoſe that are to be loſers. 8 Rep. 93. in Fraunces's Caſe.

3. Tenant infeoffs his ſon and heir and dies, the *lord accepts the rent* from the heir not having notice of the *feoffment*, yet he ſhall have his arrearages and reliefs. Cro. E. 572. cites 4 E. 3. Releaſe 11.

4. A. made a *leaſe to commence after* the determination, forfeiture, or *ſurrender of a former leaſe*, with clauſe of *re-entry for non-payment* of the rent afterwards. *A. took a ſecret ſurrender of the firſt leſſee*, and after that ſurrender a *rent-day incurr'd*, and no rent was paid by the ſecond leſſee; and yet adjudged that his eſtate is not void, becauſe A. *ought to give notice* to him of the ſurrender. Arg. Goldsb. 140. pl. 49. cites 18 & 19 Eliz. 354. pl. 32. & 17 Eliz. [3]

5. *Acceptance* of rent is no diſpenſation with the forfeiture, without notice of the forfeiture. Cro. E. 572. Trin. 39 Eliz. C. B. Harvy v. Oſwell.

6. *A. infeoff'd B. in fee upon condition*, that *if A. within a year after B's death, ſhall pay 20l. to the heirs or executors of* B. *he may re-enter.—B. enfeoffs C. and dies, leaving M. his wife and W. his heir his executors.* A. paid the 100l. to W. but being a colourable payment only, was not effectual, [though had the payment been real, it ſeems the entry of A. had been lawful.] In this caſe A. was not bound to give *notice* to C. either *of the payment or death of B.* for C. is a ſtranger to the payment, and may know the death of B. as well as A. Jenk. 261, 262. pl. 61. cites 39 Eliz. 5 Rep. 95. b. Goodal's Caſe.

7. *Feoffee* of land, or *bargainee of the reverſion by deed indented and inroll'd*, ſhall not take advantage of a *condition of non-payment of rent* reſerved upon a leaſe, upon a demand by them, without notice given thereof to the leſſee. 8 Rep. 92. in Fraunces's Caſe, cites it as the opinion of Popham Ch. J. in Mallorie's Caſe—— And cites 5 Rep. 113. S. C.

So of Bargainee of the manor by deed indented and involled; cited and affirmed for good law, 8. Rep. 92. b. in Fraunces's Caſe.

8. If the *eſtate of the lord* of a manor *ceaſes by limitation of an uſe, and the uſe and eſtate of it is transferred to another, who demands the rent of a copyholder, and he refuſes* to pay it to him, this is no forfeiture, unleſs notice be given to the copyholder of the alteration of the uſe and eſtate. 8 Rep. 92. a. in Fraunces's Caſe, cites Hill. 1 Jac. Beconſhaw v. Southcote.

9. A. was *leſſee for 90 years, and aſſigned to B. ten years of the term. B. covenanted to repair &c. A. deviſed the reverſion* or reſidue of the term *to J. S.* and died. *J. S. brought action of covenant againſt B.* One queſtion was, if the action would lie, no notice having been given of the grant? And it was held by Coke Ch. J. and Foſter J. that there needed not any notice in this caſe; becauſe here *is no penalty in this caſe as there was in* Malorie's Caſe; for *there was a condition.* Godb. 161. pl. 227. Paſch. 8 Jac. C. B. Briſtow v. Briſtow.

N. B. The unloading of the ſhip is not mentioned as part of the condition of the bond, as it ſeems it ſhould have been, and as it is in the S. C. but upon another point; for which ſee Condition (M. b.) pl. 9.

10. In debt on bond conditioned *to pay* 100 *l.* for freight for his ſhip 40 *days after he ſhould return with his ſhip to ſuch a port of diſcharge*, verdict was for the plaintiff. It was mov'd in arreſt of judgment, that no notice was expreſs'd to be given of the unloading of the ſhip, and that this being a *collateral thing, and penal to the defendant*, he ought to have notice of it: but Roll, Ch. J. ſaid, that one party might as well take notice of this as the other; for the thing to be done is not to be done either by the plaintiff or defendant; and the iſſue being found againſt the defendant judgment was afterwards given for the plaintiff. Sty. 30, 31. Trin. 23 Car. Lere v. Cholwitch.

11. If one *holds ſtakes upon a wager*, he muſt at his peril *take notice* who it is that *wins the wager*. Per North Ch. J. Freem. Rep. 264. Mich. 1679. in Caſe of Rowley v. Dad.

12. A. on ſale of wines to *B. covenanted to ſave B. harmleſs againſt J. S. and others*; a *difference* was taken Arg. between a covenant to ſave harmleſs *for enjoying lands*, and for enjoying
[4] *goods*, that in the firſt caſe there ought to be a diſturbance *upon title*, but in the other caſe any diſturbance is ſufficient; therefore if J. S. had brought an action, and been nonſuited, yet it had been a breach of covenant; ſo if he had brought action, and died, and yet his title could not appear; and tho' no notice was given, judgment was affirmed in error. Skin. 160. Hill. 35 & 36 Car. 2. B. R. Dod. v. Jenkinſon.

(A. 2.) *Requiſite. In what Caſes* in general.

1. A Man was *reſtored by parliament to land forfeited, and had writ to the eſcheator to put him in poſſeſſion*, and *he return'd diſturb'd by N. who* came and *ſaid that he had no notice of the reſtitution*

tution by parliament, &c. And by the juſtices he is excuſed till notice; by which iſſue was taken, that they occupied after notice: ſo ſee that notice is requiſite upon an act of parliament; the reaſon ſeems to be inaſmuch as it is a particular matter; for it ſeems of a general act all are bound to take notice. Br. Parliament, pl. 35. cites 43 Aſſ. 29.

2. If *debt* is *brought againſt executors*, and *pending the writ they pay debts to others*, this is good till they have notice of the ſuit; contra of payment after the notice. Br. Notice, pl. 16. cites 2 H. 4. 21.

3. The *parties* who are bound to ſtand *to the arbitrement of others* ought to take notice *of the award*. Br. Notice, pl. 18. cites 8 E. 4. 1. 10. Br. Arbitrement, pl. 37. cites S. C. and ſays it was made to the

much argued whether notice ought to be given, eſpecially where the obligation is arbitrator himſelf; but that it was not adjudged.——8 Rep. 92. in Fraunces's caſe, cites 18 E. 4. 18. and that there it was agreed by Brian, Vaviſor and Cateſby J. that the obligor ought to take notice at his peril, and ſaid that it was ſo adjudged in the ſame king's time in B. R. And that ſo the law is without queſtion, againſt a ſudden opinion in 8 E. 4. fol. 1. a.——Br. Dette, pl. 124. cites 1 H. 7. 5.—S. C. cited 8. Rep. 92. b. in Fraunces's Caſe; for having bound himſelf thereto, he has taken upon himſelf to take notice at his peril.

4. If a man be *bound to account, and to pay the arrears which ſhall be found upon the account*, it is no *plea that he has accounted before ſuch auditors, and is ready to pay* the arrears *if the auditors will give him notice of them*; for he ought to take notice thereof; quod nota; per Cur. and ſo upon arbitrement he ſhall take notice. Br. Dette, pl. 168. cites 18 E. 4. 18. Br. Notice, pl. 13. cites S. C.

5. If *tenant for life leaſes for years, and dies within the term*, and the firſt leſſor brings treſpaſs, the *termor ought to take notice of the death of the tenant for life*. Br. Notice, pl. 15. cites 22 E. 4. 27. He muſt *remove* in convenient time, to be reckoned from the

death of the tenant for life, whether he had notice of it or not; for he in reverſion is preſumed to be no more privy to it than himſelf. Per Rainford. Vent. 201. in caſe of Fry v. Porter. cites 22 E. 4. 27, 28.

6. Uſes were *limited* by a fine under this proviſo, that *if the conuſor at any time during his life pay &c. 20l. at the font-ſtone in the cathedral church of Sarum, then the uſes to be to the conuſor and his heirs*. The queſtion was, if a readineſs or tender to pay the 20l. in the abſence of the conuſor, or any deputy or ſervant appointed to receive it for him, be a performance without giving notice beforehand? And Wray, Dier and Manwood ſeemed of opinion that it was not; becauſe no day or time certain is limited to attend the receipt &c. but during the life of the conuſor, which is uncertain to the conuſee &c. D. 354. pl. 32. Mich. 18 & 19 Eliz. Barrough's Caſe. S. C. cited 8 Rep. 92. b. in Fraunces's Caſe.

7. Where a man makes an actual *revocation of an authority*, and before notice the other executes his authority, the revocation being without notice is no revocation. 2 Brownl. 291. Hill. 7 Jac. C. B. Vivion v. Wild.

8. Notice is not requiſite where one is *bound by bond* to do an act. Hob. 14.—8 Rep. 92. b.—Mo. 602. [5]

This was a condition for payment of money; but otherwise it is where a thing is of that nature, that being done, no *ſubſequent notice can retrieve*; Per Hale Ch. J. Vent. 203. in Lady Anne Fry's Caſe.

9. Where a condition requires ſuch *an act to be done, as may be done after notice*, it has been queſtioned whether the law ſhall not *protract the time* limited for performance until notice be had. Cro. Car. 577. Hill. 16 Car. B. R. Mayor and Commonalty of London v. Alford.

10. None is bound by the law to give notice to another *of that which that other perſon may otherwiſe inform himſelf of*. Mich. 22 Car. B. R. except he tie himſelf by ſpecial covenant and agreement to do it; for the law will not put an unneceſſary trouble upon any man without his own conſent. 2 L. P. R. 253.

11. Tho' a *condition to be performed to a ſtranger* ought generally to be perform'd ſtrictly, yet this is to be intended only in ſuch caſes where the party had certain notice of all circumſtances requiſite for payment thereof. Lane 100. Hill. 8 Jac. in the Exchequer. Gooch's Caſe.

Vent. 201, 204. in Caſe of Fry v. Porter.—— * As where the promiſe was, that if a *ſtranger on his coming from beyond ſea ſhould affirm ſo and ſo*, which he did, it was held that this act being to be done by a ſtranger, and not by the plaintiff, the conuſance thereof lies as well in the notice of the defendant as of the plaintiff, and ſo notice not neceſſary to be given. Cro. J. 493. Trin. 16 Jac. B. R. Powle v. Hagger.——Jenk. 334. pl. 71. S. C.

12. Notice is not neceſſary where the * *thing lies as much in the cognizance of the one as the other*. Arg. ſaid 'tis a general rule. Hard. 42. Hill. 1655.—But where it lies more properly in the conuſance of the plaintiff than of the defendant, notice is neceſſary. Ibid. and judgment accordingly. Harris v. Farrand.

If *two perſons* are *equally concerned*, neither is to give notice to the other; otherwiſe if *one is more privy* (as heir is more privy to a condition annexed to an eſtate than a ſtranger) or more concern'd than the other. 2 Lev. 21. Mich. 23 Car. 2. B. R. Williams v. Fry.——1 Mod. 300. ——3 Mod. 28.—— Where it *lies as well in the notice of the defendant as of the plaintiff*, the defendant ſhall take notice at his peril. Per Cur. Freem. Rep. 285. Trin. 1674. in Caſe of Corny and Curtis v. Collidon.

13. Where *eſtates ceaſe by limitation of uſes*, and the land is limited over to another, no notice need to be given; per Bridgman Ch. J. Cart. 172. Hill. 18 & 19 Car. 2. in Caſe of Rundale v. Eely & al.

14. There is a *difference* where the *limitation of the eſtate and condition* are *coupled together in a will* or deed, and where the condition is in a *collateral will* or deed, as to point of notice; per Bridgman Ch. J. Cart. 172. in Caſe of Rundal v. Eely.

15. *So* another difference is where *a day is appointed, and where not*. Arg. Lat. 97. in Caſe of Alfright v Blackmore.

16. *So* there is a diverſity, where the *act is to be done by two ſtrangers*, and where *by a ſtranger and a party*; for where the party is party that ought to do the act, there upon doing it he ought to give notice; but notice is not requiſite where the act is to be done by two ſtrangers; for there the plaintiff may take notice as well as the defendant. Arg. Sid. 36. Paſch. 13 Car. 2. C. B. Brown v. Stephens.

17. Where a man undertakes to do a thing, and the *perſon is certain*, ſo that he may inform himſelf, and there is no agree-

ment

ment that notice ſhall be given, he muſt take notice himſelf of the thing to be done, as of the quantum of money to be paid &c. Lev. 47. Mich. 13 Car. 2. B. R. PRICE v. CAR, EMERSON & al. Otherwiſe where the perſon is *uncertain*. Cro. J. 433. . . . . v. Henning. Poph. 165. Cro. J. 433. ——— v. Hening— 1 Sand. 33.

18. *Where* no man is bound to give notice, every man is *bound to take* notice; but yet *reaſonable time* for notice is required. Nor are any perſons required to take notice where it is *impoſſible to take* it. Reſolv'd per Curiam. 2 Show. 300. Paſch. 35 Car. 2. B. R. Verdon v. Deacle. Cart. 172. in Caſe of Rundall v. Lely. cites Cro. C. 391. Gimlet v. Sands.

——Skin. 180. Arg. denies the ſuppoſition, and cites TOPHAM's Caſe, who detained one after the diſſolution of parliament, as he heard by uncertain rumour and diſcourſe; yet he [6] ſhall be excuſed tho' no perſon is bound to give him notice. So in the common caſe of one's keeping a dog uſed to kill ſheep, he ſhall not be liable till notice is given; yet no one is bound to give him notice. Paſch. 36 Car. 2. B. R. in Caſe of Malloon v. Fitzgerald.

19. There are but *three caſes* in which notice is not neceſſary; 1ſt. In caſes of *condition precedent*; 2d. Where the thing is *of a public nature*; 3d. Where *the party impoſes the thing on himſelf*. Arg. 2 Show. 317. Mich. 35 Car. 2. B. R. in Caſe of Malloon v. Fitzgerald.

20. Notice is *diſpenſed with* where it becomes *impoſſible* by the act of the party, as by his abſconding. 1 Salk. 214. Paſch. 6 W. 3. B. R. Nurſe v. Frampton.

21. Where a *certain perſon is mentioned*, as if it were if J. S. pay ſo much money &c. no notice is neceſſary; *but* if it be *as any body* ſhould pay, which is uncertain, there muſt be notice. 12 Mod. 44. Trin. 5 W. & M. Anon.

22. Per Holt Ch. J. in caſe of *marriage of one ſelf*, notice need not be averr'd; becauſe marriage is of itſelf notorious; but Powel doubted. 11 Mod. 48. Paſch. 4 Ann. B. R. Smith v. . . . . .

(A. 3) *Requiſite in* what Caſes. In *Aſſumpſits*.

1. UPON a treaty between A. and B. for the purchaſe of land, A. in conſideration of 20*l.* paid by B. promiſed *that if B. liked not the land he would repay the* 20l. *in a fortnight*. In aſſumpſit by B. he alleged in facto, that he did not like the land, and that A. had not repaid the 20*l.* and had judgment. Whereupon it was aſſigned for error among other things, becauſe it was not alleged that he gave notice of the diſlike within a fortnight, that being a thing ſecret to himſelf, whereof the defendant cannot take notice to pay the money; but the Court held that he ought to take notice thereof at his peril; for he hath *bound himſelf* thereto *by his expreſs promiſe*. Cro. E. 834. Trin. 43 Eliz. B. R. Eaſt v. Thoroughgood.

2. Plaintiff declared that the *defendant and divers others copyhold tenants of the manor of D. were plaintiffs in Chancery againſt*

W. lord of the manor to aſcertain their fines by decree, and that in conſideration the plaintiff at his coſts and labour ſhould procure a decree there for enjoyment of their copyholds at a fine certain, the defendant promiſed to pay the plaintiff after ſuch decree obtained 3 *l. when he ſhould require it.* A decree was obtained accordingly. It was reſolved that perſonal notice need not be given to the defendant of the decree obtained; becauſe it appears by the declaration, that the defendant was one of the plaintiffs in Chancery in the ſuit in which the decree was granted, ſo that he himſelf *is party to the decree*, and therefore might have as good notice of the ſucceſs in the ſuit and decree as the plaintiff. And adjudged for the plaintiff. Yelv. 121. Hill. 5 Jac. B. R. Aſh. v. Doughty.

Jenk. 282. pl. 11. cites S. C.—311. pl. 92. S. C. that notice was not neceſſary; for defendant might have notice by B. or otherwiſe; and that notice by ſuit and proof in this caſe is ſuffi- [7] cient; and that the borrower was not bound to ſeek A. to give him notice.

3. A. promiſed J. S. that *if he would borrow of B.* 100 *l. he* (viz. A.) *would repay it at ſuch a time, and on ſuch conditions as ſhould be agreed upon between the ſaid J. S. and B.*——*The money was lent and the day of payment agreed upon but J. S. died before the day.* The money was not paid at the day. B. brought an action againſt the executor of J. S. and recovered; and thereupon the executor brought action againſt A. upon his promiſe to J. S. and judgment being for the executor, error was brought; and it was inſiſted, that the plaintiff had not alleged any notice given to the defendant of the agreement. But it was adjudged by three judges againſt one, that tho' *where a penalty is to be recovered*, notice is not requiſite, yet *otherwiſe* it is *where damages* are; for in ſuch caſe the bringing the action is notice ſufficient. Bulſ. 12. Hill. 7 Jac. Haverley v. Leighton.

3 Bulſ. 86. contra—See condition (A. d.)

4. Upon a *promiſe* (as to pay ſo much at the other's marriage) notice is not neceſſary; ſecus on a * *bond*, becauſe of the penalty. Vent. 78. cites Bulſ. 12 & 13.

* Hodges v. Moor.——Crane v. Compton.

5. One aſſumes to *ſave harmleſs J. S. of all obligations* wherein he ſhall be *bound for J. N.* And in an aſſumpſit brought, he ſhews that he was bound in an obligation for J. N. from which he was not ſaved harmleſs, and does not ſhew that he gave any notice to the defendant; yet it was held good enough; per Houghton J. Cro. J. 433. Trin. 15 Jac. B. R. in Caſe of . . . v. Henning.

Hard. 42. Hill. 1655. Parris v. Farrand.—Cro. J. 492. . . . v. Henning, cites Twiſt v. Holms.

6. A. promiſed to pay B. for an horſe which B. bought of C. *ſo much as B. paid to C. for it:* B. requeſts payment without ſaying how much it coſt, and good; for A. ought firſt to demand of B. upon the requeſt, how much it coſt; and B. need not give A. notice without the demand as aforeſaid. Jo. 207. Trin. 4 Car. B. R. Jacob v. Cook.

7. Indebitatus aſſumpſit by E. againſt L. on a promiſe *to pay* him 2 *s. a-piece for every cloth he ſhould buy for the defendant*, and declares

declares for ſo much money due unto him, and hath a verdict; the defendant moves in arreſt of judgment, That it is not averred by the plaintiff that he gave any notice to the defendant how many cloths he had bought for him, and ſo it is not certain what is due to him. To this it was anſwer'd, That the clothes were bought for the defendant himſelf, and he may very well take notice of the number of them, without any notice given him. 2dly, That here is a *requeſt ſet forth for the payment* of the money, and this implies a notice. But Roll replied, That the requeſt *doth not imply a notice,* and ſo is Twist's Caſe; and beſides the notice ought not to be by implication, *but muſt be averred certainly;* yet let it be moved again. Sty. 53. Mich. 23 Car. B. R. Tanner v. Lawrence.

8. Upon an aſſumpſit to pay a ſum upon the plaintiff's *return from Rome* to England, there needs no notice. The plaintiff is not bound to ſeek the defendant. Jenk. 282. pl. 11.

9. Where the duty accrews upon the *private act of the plaintiff* there ought to be notice in aſſumpſit; *but* not where it is poſſible for the defendant to know it. Jenk. 282. pl. 11. cites Hob. 51.

10. Action of debt upon an aſſumpſit by the defendant *to enter into a judgment unto the plaintiff for ſo much monies as Sir John Hall did owe unto the plaintiff, if the plaintiff would take common bail of him the defendant, if Hall ſhould die before ſuch a day;* and for not performing his promiſe the action was brought. Upon *non aſſumpſit* pleaded, there was an iſſue joined, and a verdict found for the plaintiff. The defendant moved in arreſt of judgment, and ſhewed, that it doth not appear, that there was any *notice given* by the plaintiff to the defendant, *how much money was due* to the plaintiff from Sir John Hall, as there ought to be. Roll Ch. J. anſwered, You did undertake to know, at the time of the aſſumpſit, how much money he did owe, and notice is not neceſſary; and if it were he might have gone to Sir John Hall to tell him, and ſo it ſhall not only be intended to be in the knowledge of the defendant himſelf, but that he might have alſo knowledge of it by others. Jermain juſtice doubted; but Nicholas and Aſke, judges, were of Roll's opinion, and the plaintiff order'd to take his judgment, if better matter were not ſhewn. Sty. 148. Mich. 1649. B. R. Johns v. Leviſton.

11. If one be bound by an *aſſumpſit generally to do a thing* to another, *he to whom the promiſe is made muſt give him notice when he will have him to do it,* becauſe it is in his election when he will have it done. 2 L. P. R. 239. [8]

But if he *promiſes that another perſon ſhall do it to him,* there he to whom the thing is to be done, is not bound to give notice to that other perſon when he will have it done, but the *party muſt procure it at his peril.* 13 May, 1651. Paſch. B. R. For it may be he may not know that other perſon, and there is no privity of contract between them two, as there is betwixt the other two. 2 L. P. R. 239.

12. J. S. ow'd A. 30 l. by bond; *B. promis'd* that *if A. delivered up the ſaid bond he would pay A. the ſaid* 30 l. A. ſet forth this

11 Mod. 48. Smith v. .... ſeems

to be S. C. and there per Holt Ch. J. *Where either party might have notice by their own inquiry*, notice is not neceſſary; as here in this caſe, the bond muſt be intended to be deliver'd to the obligor, tho' he is a third perſon, and he might have applied to him to have notice, and therefore ought to take notice of the delivery.

this matter, and further ſaid, that he *deliver'd up the ſaid bond to J. S.* whereof B. the defendant had notice. It was held, that there needed no notice; becauſe the *defendant knew whom to reſort to*; and the *difference is, where a perſon is nam'd, and where not.* 2 Salk. 457. Paſch. 4 Annæ B. R. Smith v. Goff.

(A. 4) Requiſite. In what Caſes. In *Matters of Practice in Superior Courts.*

For general rules are the general practice of the Court, whereof every one muſt take notice that hath to do there; but particular rules are made upon particular and extraordinary matters happening in the proceedings upon the motion of one of the parties made to the Court, of which the other may be ignorant, and therefore is to have notice of them given unto him. 2 L. P. R. 234.

1. THE plaintiff and defendant are both bound at their peril to take notice of the *general rules* of practice of this Court; *but* if there be a *ſpecial particular rule* of Court made for the plaintiff, or for the defendant, he for whom the rule is made ought to give notice of this rule unto the other; or elſe he is not bound generally to take notice of it, nor ſhall be in contempt of the Court, altho' he do not obey it. 2 L. P. R. 204. cites Paſch. 24 Car. B. R.

2. If a *declaration* be *engroſſed and put into the office, although it be not filed*, yet is the defendant's attorney bound to take notice of it. Mich. 22. Car. B. R. For it is the duty of the plaintiff's attorney to put the declaration into the office, and the officer in the office is to file it; and though it be filed, yet may the defendant's attorney take a copy of it. 2 L. P. R. 235.

For if they knew them not, yet they may inform themſelves by their counſels and attorneys: but this is only to be underſtood of the *general rules, and not of particular rules* made upon the motion of either party; for of ſuch rules there ought to be notice given to the party concerned by the other for whoſe advantage the rule is made. 2 L. P. R. 236. cites Paſch. 24 Car. B. R.

3. The plaintiff or defendant are both bound to take notice *of ſuch rules* of the Court *as do concern the proceedings of their cauſe*, at their own perils. 2 L. P. R. 236. cites Hill. 22 Car. B. R.

4. When counſel are *to argue a matter in law* in Courts, the *judges ought to have notice* thereof given unto them before the day, except it be where the Court have appointed a ſet day for it: or *if there be not* ſuch notice given, then *the cauſe is to be put in the paper* of cauſes, that it may come on in courſe to be ſpoken unto. Paſch. 23 Car. B. R. And by putting it in the paper the judges have notice; for they have a paper of the cauſes to be ſpoken to in matter of law, the day before they be ſpoken to, by the officer of the Court. 2 L. P. R. 236.

[9] 5. When either the plaintiff or defendant doth intend *to move the Court in any matter which may prove diſputable*, the party that thus

thus intends to move *ought to give notice* to the other party, that he doth intend to move the Court in it, *and to expreſs for what* he will move, *and when*. Mich. 1650. B. S. that he, againſt whom the motion is to be made, may not be ſurpriſed, but may have time to provide, and may attend the Court to defend himſelf, and anſwer the motion, which the Court will give him time to do; ſo that if ſuch notice be not given him, the motion will be to no purpoſe as to the deciding of the difference in queſtion. 2. L. P. R. 238.

6. One is not bound to give notice to another *of a rule of Court made againſt him, except part of the rule be, that notice ſhall be given unto him of the rule*. Trin. 1651. B. S. For it is intended, that his attorney, or ſolicitor, was in the Court when it was made, and that he did take notice of it from them; or elſe, that there needs no notice in the caſe, becauſe the party ought to have done that which he was ordered to do, with the rule made in the caſe. 2 L. P. R. 239, 240.

7. A *writ of error was ſued out and allowed about the very ſame time that the execution was ſerv'd, but before:* the Court was of opinion, that being ſu'd out and allow'd before the execution was ſerv'd, it muſt be ſet aſide, tho' the defendant had no notice of it. 8 Mod. 373. Trin. 11. Geo. Moorfoot v. Chivers.

8. A motion was made *to enlarge a rule*, but the party not coming on the day on which the rule was made to ſhew cauſe, and having given no notice of the motion, the Court refus'd to enlarge the rule 'till notice given; for that in ſuch caſe notice ought always to be given. Rep. of Pract. in C. B. 67. Mich. 4 Geo. 2. Dale v. Careleſs.

The Court will enlarge no rule for ſhewing cauſe, unleſs notice be given of the motion to enlarge

ſuch rule and affidavit made of ſuch notice. Rules and orders in C. B. Mich. 2 Geo. 2. 1728.

9. On a motion in arreſt of judgment the laſt day of the term, the Court ſaid, That no *motion in arreſt of judgment* ſhould hereafter be made *on the laſt day of the term* without notice. Rep. of Pract. in C. B. 106, 107. Trin. 7 & 8 Geo. 2. Camp, qui tam, &c. v. Gale.

(A. 5.) Requiſite *to avoid being*, or to make a Man *a Tortfeaſor*.

1. OF *a particular act of parliament* a man is not bound to take notice till he can have thereof notice; but of a *general act* of parliament, every one is bound to take notice at his peril, immediately; note the difference. Br. Notice, pl. 9. cites 43 Aſſ. 29.

2. Where I retain a *ſervant*, and after he *goes from me* and is retained with another, *I cannot take him without notice* given *to the*

For where a man *retains a ſervant of*

another, and has no notice of the first retainer, *the second master*, scilicet, request. Br. Notice, pl. 4. cites 21 H. 6. 9.

this is not trespass, nor action does not lie. B. R. Notice, pl. 8. cites 9 E. 4. 33. ——S. P. And so of lord of a villein. Br. Notice, pl. 2. cites 50 E. 3. 21.

3. A man who *retains a servant* ought to take notice of every *former retainer in the same county*, *contra* of the retainer *in another county*; for where a man retains a servant in another county than where the first master retain'd him, the first master cannot re-take him without giving notice to the second master, unless the second master has other notice of it. Br. Notice, pl. 20. cites 17 E. 4. 7.

4. If a man *imprisons another tortiously* in a house, *and delivers the key of the house to his servant*, there, *if the servant has notice* [10] *thereof* and does not deliver him out, this is imprisonment in the servant. Br. Notice, pl. 24. (bis) cites 22 E. 4. 44.

5. A. *licensed B. to lay his hay on A's land till B. could conveniently sell it.* Two years after the licence A. leased the land to J. S. who put in his cattel, and they eat up the hay. Montague Ch. J. and Doderidge J. held that B. ought to have had notice from the lessee before he had put in his cattle. But it was resolved, that the plaintiff had a convenient time (viz. 2 years) for the removing of his hay, and therefore judgment was given against him. Poph. 151. Hill. 17 Jac. Webb v. Paternoster.

6. In *trover &c. for taking his cattle and selling them*, the defendant *justified by warrant of commissioners of sewers for not paying a tax* by them set towards repairs of the sea walls. Upon demurrer several exceptions were taken, and among them was this, viz. That the plea did not set forth, that any notice was given to the plaintiff *of the tax made before the distress taken*, and for that and the other exceptions Roll Ch. J. concluded that the plea was not good, to which Bacon J. accorded, and rule was given for judgment accordingly nisi causa &c. Sty. 12, 13. Pasch. 23 Car. Whitley v. Fawsett.

(B) *What is* Notice.

1. IN trespass, the defendant said, that a bargain was had between them at D. *that the defendant should go to S. and see the plaintiff's corn, and if it pleased him upon the view, and should give the plaintiff* 40 d. *for every acre, that he should have it*; by which he went and view'd the land, and was pleased with it, and took it, which is the same trespass; and per Littleton, Choke and Brian J. this is no plea, because he does *not shew that he is paid*; but *contra if a day of payment had been agreed*; for if a man cheapens wares at a price certain, and the vendor agrees to the price, this is no bargain, nor shall he take the wares if he does not

not firſt pay, or has a day of payment given; and as to the notice to be given to the vendor, here it ſeems to me, that when he took the corn, this is notice to himſelf that he was pleaſed with the corn. Br. Contract &c. pl. 25. cites 17 E. 4. 1.

2. A. being ſeiſed of land in truſt and confidence for B. and his heirs, treats with J. S. for the ſale thereof, and during the treaty, *a ſtranger ſays to the vendee, Take heed how you buy ſuch land, for A. has nothing in it but upon truſt for* B. and another comes and ſays to the vendee, That it is not as the ſtranger informed him; for that A. is ſeiſed abſolutely, whereupon J. S. buys the land. The queſtion was, in Chancery, to whoſe uſe the vendee ſhould be ſeiſed, and if this be ſufficient notice? and it was decreed, that it was not; for if *flying reports* ſhould be admitted, every man's title might be ſlandered. Goldsb. 147. Hill. 43 Eliz. Wildgooſe v. Wayland.

3. Tenant of a manor *covenanted to find neceſſary proviſion for the ſteward &c. whenever* he ſhall keep Court there; per Doderidge, perſonal notice need not be given; for general notice, as proclamation at Court, is given him. Palm. 532. Paſch. 4 Car. B. R. Biſhop of Rocheſter v. Young.

4. If *money be promiſed on marriage with a daughter, requeſt* is notice enough. Lat. 15. Hodges v. Moor.——But if the promiſe be *by a ſtranger*, there ought to be notice. Lat. 97. Alfright v. Blackmore.

So of a *niece*, the action lies without notice. Sid. 36 Paſch. 13 Car. 2. C. B. Brown v. Stephens.——Hard. 42. Hill. 1655. in Caſe of Harris v. Ferrand.

5. *Exception* is *of leaſes for three lives*, in one of ſuch leaſes there is a *covenant to renew* paying 20 *l.* This is notice *imply'd*; for they ought to ſee the covenants; per Finch K. Paſch. 27 Car. 2. Chan. Caſes 260. Tanner als. Davis v. Florence. [11]

6. A *recital of a deed*, which refers to the *incumbrance*, is notice againſt a purchaſor. Mich. 28 Car. 2. 1 Chan. Caſes 291. Biſco v. Earl of Banbury.——So where a deed *refers to a will*. Mich. 30 Car. 2. 2 Chan. Caſes 246. Moor v. Bennet.

7. In all caſes where a purchaſor can't make a title but by a *deed which leads him to another fact*, the purchaſor ſhall not be a purchaſor without notice of that fact, but ſhall be preſum'd cognizant thereof; for it is *craſſa negligentia* that he ſought not after it. Mich. 30 Car. 2. 2 Chan. Caſes 246. Moor v. Bennet.—So if the title muſt be by a *will*. Arg. Hill. 1682. Vern. 149. Bovey v. Smith. G. Equ. R. 8. Tr. 7 Ann. Vane v. Ld. Bernard.

8. A. having notice of a *decree*, to which he was no party, pays money contrary to that decree; it was order'd that he ſhould pay the money over again. Vern. 57. 122. Hill. 1682. Harvey v. Mountague.—This notice was only by being *preſent in Court when the decree was pronounced*. Ibid.

(C) *How* the Notice muſt be; *and by whom* to be given.

1. THE notice of *deprivation or reſignation* ought to be given *by the ordinary* himſelf, and *not by a ſtranger*. Br. Notice, pl. 25. cites Doct. and Stud. lib. 2. cap. 31.

Cro. Car. 392. S. P.

2. When notice ought to be given, the *law appoints who ſhall give it*; where none is bound to give it, defendant ought to take notice of it at his peril. Cart. 172. Hill. 18 & 19 Car. 2. C. B. in Caſe of Rundale v. Ely & al.—cites Cro. Car. 391. Gimlet v. Sands.

3. Notice *directed* to be given *by act of parliament* muſt be *certain and particular*. 6 Rep. 29. b. Trin. 44 Eliz. B. R. in Green's Caſe.

4. If one be bound by the *rules of the Court, to give unto another perſonal notice* of a thing, *it is not ſufficient that notice be left at the dwelling houſe of the party*. Mich. 23 Car. B. R. For perſonal notice is notice given to the perſon of the party himſelf, and not to another, or at the dwelling houſe of the party; for notice may be given there, and yet the party may not know it: and uſually where perſonal notice is to be given for the party to do a thing, it is very penal to him if he do it not. 2 L. P. R. 237.

(D) Good. *To whom* it muſt be.

Notice to *repair* given *at the houſe* is not ſufficient, but it ought to be to the *perſon of the leſſee*, and Popham agreed to this. Owen 114. Streetman v. Everſly.—Notice *to aſſignee of part of the term*, or at the houſe, is not ſufficient. Yelv. 36. Paſch. 1 Jac. B. R. Sweton v. Cuſhe.

1. NOTICE *to repair* to an occupier of the houſe, and who is not leſſee or aſſignee of the term, nor has any intereſt in the term, is not ſufficient, but it *ought to be to the perſon intereſted* in the term, who is liable to reparations. Owen 114. Hill. 44 Eliz. B. R. Streetman v. Evarſly.

2. Condition was to pay ſo much as an apprentice ſhould embezzle &c. within 3 months after proof made by confeſſion &c. and notice thereof given. *Notice was given to obligor, but he dying left an executor*; notice now *muſt be given to the executor alſo*. Cro. J. 302. Mich. 13 Jac. B. R. Gold v. Death.

[12]

Whether notice to a counſel or agent once imploy'd and *goes not thro' with*

3. Tho' notice to a *man's counſel* be notice to the party, yet where the counſel comes to have notice of the title in another affair, which it may be he has forgot when his client comes to adviſe with him in a caſe with other circumſtances, that ſhan't be ſuch a notice as to bind the party; per Ld. Keeper North, Hill. 1684. Vern. 287. in the Caſe of Preſton v. Tubbin.——

Conſtructive notice o counſel muſt be at the particular time. Arg. Gibb. 211. per Reynolds Ch. B. 213. Fitzgerald v. Ld. Falconbridge.——Held in Dom. Proc. that notice to counſel is not ſufficient. *the buſineſs* ſhall be notice to the party himſelf dubitatur, per Ld.

Cowper? G. Equity, R. S. Trin. 7. Annæ. Vane v. Ld. Bernard.——The party that intends to move the Court *in a queſtionable matter*, ought to give notice thereof *to the party againſt whom he intends to move, or to his attorney or ſolicitor*, and *not to his counſel*; for ſuch notice is not good: for the counſel is not concerned to take notice of any thing but from his client, nor bound to ſeek out his client, to give him notice. 2 L. P. R. 242.

(D. 2) Good. *What* is *by Preſumption*; to one where it ſhall affect another.

1. A. *Purchaſed lands for B. his ſon, which C. had contracted before for the purchaſe of*, and of which B. had no notice, but A. had. The Court declared, that this notice to the father was notice to the ſon, and ſhould affect him, tho' he was the purchaſor, and not the father. Chan. Caſes 38. Mich. 15 Car. 2. Merry v. Abney and Kendal. S. C. and almoſt the ſame words as in Chan. Caſes 38. and ſeems to be taken from it. 2

Freem. Rep. 151.——Abr. Equ. Caſes 330. pl. 1. cites S. C. by name of Abney v. Merry.——N. Chan. R. 59. S. C. 13 Car. 2. by name of Hollowell &c. v. Abney &c.——MS. Tab. tit. Notice, cites 16 Dec. 1724. Coote and Mamon, that notice to the father was preſum'd to be good notice to the ſon.

2. A. deviſed land to B. in truſt for C.——B. ſells the land to D.——D. ſells to E.——C. brings a bill. D. confeſſes notice in his anſwer of the *truſt*. This *confeſſion by anſwer* of D. will *bind* E. as to the title E. derives from D. Vern. 486. Mich. 1687. Walley v. Whaley, Gaudy and Warner.

3. A. treating for the purchaſe of a copyhold eſtate has notice of a *mortgage* ſurrender, ſo that A. *purchaſes in B's name*, and then procures B. to become purchaſor; *B. pays the conſideration money without notice* of the mortgage. Tho' B. did not employ A. and tho' the purchaſe was made before B. knew any thing of it, yet *B's approbation afterwards made A. his agent ab initio*, and the notice which A. had ſhall affect B. Per Cowper C. Paſch. 1700. 2 Vern. 609. Jennings executor of Guidott v. Moor, Blincorn & al.

(E) Good. *At what Time.*

1. *Covenant to pay for* the better ſupport and *maintenance of his wife* 200*l. within* 2 *years next after* he ſhall be *required, to ſuch perſons as ſhe* ſhall by deed ſealed and delivered in preſence of three witneſſes, aſſign and appoint. She doth *appoint* 200*l.* to be paid to A. *and dies before notice* to the covenantor; after her death they give notice; he pays it not. The queſtion was,

was, whether, this being for her ſupport and maintenance, the notice ought not to be in her life-time? Per Cur. it need not. Skin. 34. Hill. 33 & 34 Car. 2. B. R. Roe and Marſhall.

[13] (F) Good. As to *Matters of Practice* in the Superior Courts.

1. IF one give *notice* to another *that he will move* the Court *in one thing, and tells him in what*, and *at the time he moves* the Court *in another matter, and not in that* whereof he gave notice, that he would move the Court in; this is not good notice of the motion, but the Court will give the party farther time to anſwer the motion. By Rolle Ch. J. For by ſuch deceitful notice the party concerned cannot prepare to anſwer the motion; and *ſuch notice is accounted no notice*. 2 L. P. R. 240.

2. By a notice fix'd up in the prothonotary's office, Hill. 7 Geo. 1733, attornies are deſired to obſerve, that *in notices to appear to be ſerv'd upon defendants with copies of proceſs, purſuant to the late* * *act of parliament* the day of the return of ſuch proceſſes muſt be inſerted, although it happens to be upon a *Sunday*. Rules and Orders of the Court of C. B.

* 5 Geo. 2. cap. 27.

3. By an order made in Eaſter term 10 Geo. 2. 1736, all notices are directed to be *given before* 9 o'clock *in the evening*. Rules and Orders of the Court of C. B.

(G) Of what the *Law* takes Notice.

See Intendment. Intent.

THE common law doth not take notice *of the intentions of the party to do any unlawful act*, except it be in caſe of high treaſon. Trin. 22 Car. B. R. For man's law is to regulate the words and actions of men and not the thoughts, of which it cannot have conuſance; but God's law extends to the thoughts, and tends to the regulation of them alſo. 2 L. P. R. 235.

(H) Pleadings.

Mo. 845. & 848. S. C. but not S. P. —3 Bulſ. 55. S. C. not S. P.— Hob. 92, 93. S. C. and P.

1. A *Bond* was given by the father *to the maſter of an apprentice to recompence any waſt &c. to be done by the apprentice, within three months after due proof thereof, either by confeſſion of the apprentice, or otherwiſe howſoever, and notice thereof given &c.* The father died. The ſon by writing under his hand confeſſed waſt to the amount of 400 *l.* In debt againſt the executor upon the bond, judgment was given for the plaintiff upon a demurrer; and a writ of error being brought, exception was taken to the replication, that tho' it did allege that notice was

given by him to the defendant, yet it did not allege that this *notice was given to the defendant after the death of the teſtator*; for if it was in his life-time, it was to no purpoſe, and the ſtrongeſt ſhall be taken againſt him who pleaded it, and this was held by all the juſtices and barons to be a material exception, and an incurable fault; for it *ſhall not be aided by any intendment*; and for that reaſon judgment was reverſed. Cro. J. 381. Mich. 13 Jac. B. R. Gold v. Death.

2. In aſſumpſit the declaration was, That the *defendant in conſideration of* 10*l. received would pay the plaintiff* 50*l. when he returned from Hamburgh into England*, and alleg'd that he went over ſea unto Hamburgh aforeſaid, and returned ſuch a day to the pariſh of St. Clements Danes, and that he demanded the money, and the defendant had not paid. After verdict and judgment for the plaintiff, it was aſſign'd for error, that plaintiff did not allege he gave notice to the defendant of his return; [14] and tho' it be *alleg'd that* the defendant *habens notitiam inde*, and upon ſuch a day requeſted had not paid; yet it was held inſufficient; for *he ought to have alleged expreſs notice, and ſhewn the day and place of ſuch notice given.* The judgment was reverſed. Cro. C. 571. pl. 9. Hill. 15 Car. B. R. Anon.

3. Debt was brought on a *bond*; the condition was *to give notice* to the obligee *if he ſhould ſell ſuch land.* The *defendant pleaded that he gave notice ſecundum formam & effectum conditionis*, and it was held to be a bad plea; for he ought to *ſhew how* he gave notice, that the Court may judge whether or no it was according to the condition; as when a man pleads a diſcharge. Freem. Rep. 247. Hill. 1677. Harwood v. Helyard.

4. In *avowry* of a diſtreſs *for refuſing the office* of conſtable it is too general to ſay *notitiam habuit*; but it ſhould be pleaded that he was *ſummoned within a convenient time to take the oath* before a juſtice of the peace, which is the courſe uſually taken; for the ſteward of the leet has no authority after the adjournment of the Court. 12 Mod. 88. Hill. 7 W. 3. Fletcher v. Ingram.

[For more of Notice, ſee Bills of Exchange, Conditions, Purchaſor, and other proper titles.]

(A) Novel Aſſignment.

1. NOVEL aſſignment *is in the nature of a replication*, and it is uſed *for the better* ſetting down, and *aſcertaining of the time and place* &c. which was *not before well aſſigned*, but generally in the declaration. Reg. Plac. 109. cap. 3.

As when the plaintiff declares of treſpaſs clauſum fregit, cutting down graſs &c. in ſuch a pariſh and county, the defendant pleads and ſays, that the place where &c. are 10 acres of &c. and are his own freehold, per quod he entered &c. as into his own freehold &c. Reg. Plac. 109. cap. 3.——Then the plaintiff ſays, the cloſe and place where &c. are 20 acres of &c. lying in the pariſh of &c. and called and known by the name of &c. other than the ſaid acres mentioned in the defendant's plea, and for that the defendant hath not anſwered to the treſpaſs in the 20 acres newly aſſigned, the plaintiff pet' judic' & dampna ſua occaſione tranſgr' Ibid.——To this new aſſignment the defendant muſt plead, if he hath any thing in bar thereof, Ibid. cites Br. tit. Treſpaſs.

2. This new aſſignment *is uſed often to clear a title which* comes in queſtion upon it; and here if the title appears to be the plaintiff's, he ſhall recover damages; but he recovers no poſſeſſion, as in ejectment. Ibid. cites Compl. Sollicitor. 219.

3. If the *defendant juſtifies by jointenancy and ſurvivor*, the *plaintiff may ſhew that it is other land in the ſame vill, and give name*, and that the tenant died ſeiſed and he entered by ward, and was poſſeſſed till the defendant did the treſpaſs, and of which he had conceived his action, and ſo a man may make a new aſſignment *as well in other actions as in common action of treſpaſs*. Br. Treſpaſs, pl. 205. cites 24 H. 6. 3.

S. P. Br. Deputy, pl. 11. cites 9 E. 4. 23.

4. The *defendant intitled himſelf to ſix boxes and charters*, and the *plaintiff ſhewed that he demanded ſix other boxes and charters*, and becauſe he did not anſwer to it demanded judgment, and prayed delivery &c. And there Littleton ſaid that it was held by him and his companions that *in any action where the certainty is put in the count or in the writ, the plaintiff cannot aſſign that his action is of another thing* &c neither in aſſiſe, nor in writ of entry ſur diſſeiſin, nor in writ of entry upon the ſtat. R. &c. Br. Treſpaſs, pl. 183. cites * 5 E. 4. 23.

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This ſhould be 9 E. 4. 23. b. pl. 27.

5. In treſpaſs *of a horſe taken*, the *defendant pleaded gift of the plaintiff*, and the *plaintiff ſaid that he had a white horſe and a black horſe, and he gave to the defendant the black horſe, and he took the white horſe*, this is no plea; for the defendant has anſwered to the horſe of which the plaintiff made his plaint. Br. Treſpaſs, pl. 284. cites 9 H. 7. 6.

And in aſſiſe of rent, if the tenant pleads in bar of one rent, the plaintiff may ſay that *b[illegible] was of another rent.* Br. Treſpaſs, pl. 284. cites 9 H. 7. 6.

6. New aſſignment *larger than the declaration* is good in treſpaſs,

paſs, but not in ejectione firmæ. Winch. 65. Paſch. 21 Jac. C. B. Avis v. Gennie.

7. If the novel aſſignment aſſigns *in one acre of land in quodam campo, without the name of the acre or buttels*, it is not good. Reg. Plac. 203. cap. 5. cites Dyer 264. 2 Cro. 594. 3 Cro. 355. 492.

8. The plaintiff declared that he was ſeiſed of a ſhip which he employed *pro commodo ipſius*, and ſhewed how &c. and that upon her return the defendants ſeiſed the ſhip, *March* 1. &c. *& huc uſque detinent per quod &c.* the defendant pleads *actio non, quia* they are incorporated *&c.* and ſhews the charter *&c.* and that they ſeiſed the ſhip upon ſuſpicion *&c. prætextu* of a proceſs out of the admiralty *quæ eſt eadem captio & detentio;* and after by deed between the plaintiff and defendants in behalf of the *Eaſt India* Company *agreatum fuit*, that &c. It was alſo agreed that the plaintiff ſhould ſubmit to the judgment of the Court of Admiralty, and that there ſhall be a releaſe of all actions to the Company, and all the members of it, and ſhew that the plaintiff releaſed, and they ſhew it to be the ſame caption &c. The plaintiff replies, and prays oyer of the agreements, and takes proteſtation *&c. and pro placito dicit*, that the defendants took the ſhip *March* 1. which was before the caption upon the proceſs in the Admiralty, and that this is the caption upon which the action is brought, and concludes &c. upon which the defendant demurr'd; this ſeems to be a *novel aſſignment*, and adjudged that the agreement will not aid, becauſe 'tis but conveyance, and not relied upon; and it was ſaid that the defendants can take no benefit of the releaſe in their natural capacity. Skin. 281. 284. Hill. 2 W. & M. B. R. Price v. Child.

9. *Treſpaſs* for taking the cattle in D. The defendant *pleaded, that the locus in quo was* 20 *acres* &c. *where he had common*, and juſtifies for damage feaſant; the plaintiff *replied*, that *he took them in ſuch a place (viz. another)*. And it was agreed per Holt Ch. J. and Powel, that the plaintiff might have a new aſſignment. 1 Salk. 453. Trin. 2 Ann. B. R. Coke v. Evans.

10. Treſpaſs for *taking and carrying away his goods in D.* The defendant *pleaded* that the locus in quo was *his freehold, and that he took the goods damage feaſant* &c. The plaintiff demurr'd generally, and had judgment; for the *action being tranſitory, there is no locus in quo ſuppoſed;* otherwiſe in treſpaſs quare clauſum fregit in D. the clauſum is a locus in quo; but in the principal caſe there is no place in particular ſuppoſed, only *D. is alleged for a venue;* therefore if the defendant will make the place material, it muſt come on his part to ſhew a place certain. Alſo in treſpaſs quare clauſum fregit in D. if the defendant plead liberum tenementum, and iſſue be joined thereupon, it is ſufficient for the defendant to ſhew any cloſe that is his freehold; but if the plaintiff gives the cloſe a name, he muſt prove a freehold in the cloſe named. So adjudged in C. B. and the judgment

affirmed in B. R. upon a writ of error. 2 Salk. 453. Hill. 2 Ann. B. R. Helvis v. Lamb.

[See more at Treſpaſs (U. a. 4), and other proper titles.]

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[16]

(A) Nudum Pactum.

1. NUdum pactum as it is defin'd in the civil law, *eſt ubi* nulla ſubeſt cauſa præter conventionem. Sed ubi ſubeſt cauſa fit obligatio & parit actionem. *Item* nuda pactio eſt tenuis & deſtituta tam nomine proprio quam mutatione rerum & factorum manens in ſimplici paciſcentium colloquio. Pl. C. 309. b. in Caſe of Sharington and Pledall v. Strotton.

2. The *reaſon why* the law has provided that contract by words ſhall not bind without conſideration is, becauſe words are ſpoke or uttered many times by men without much conſideration or deliberating. Arg. Pl. C. 308. b. Mich. 7 & 8 Eliz.

Br. Dette. pl. 206. cites S. C. Brook ſays, it ſeems that action upon the caſe upon aſſumpſit lies thereof, but not debt; for there is not quid pro quo——S. P. Br. Dette, pl. 36. cites 44 E. 3. 21.

3. In debt a man received 10 l. againſt N. and one P. came to the plaintiff, and ſaid, that if he would releaſe the 10 l. to N. he would be his debtor; by which he releas'd, and the plaintiff brought debt againſt him who promiſed; and it does not lie by the opinion of the Court; for ex * *nudo pacto non oritur actio.* Br. Dette, pl. 79. cites 9 H. 5. 14.

* S. P. Pl. C. 302. in Caſe of Sharrington and Pledall v. Strotton.——Ibid. 308. b.——10 Mod. 295. Joſſelyn v. Lacier.

4. If a man *takes upon himſelf to do ſuch a thing, and does not expreſs what he ſhall have for his labour*, the bargain is void; per Rolfe; quod nota, that it is no bargain if there be not quid pro quo. Br. Contract, &c. pl. 5. cites 3 H. 6. 36.

Br. Juriſdiction, pl. 53. cites S. C.—— * The reaſon was, becauſe the buyer of the debts could not have quid proquo. Br. Conſcience, pl. 4. cites S. C.

5. In debt *upon an obligation*, the *defendant ſaid, that at another time this matter was debated in Chancery, and there decreed* ut ſequitur, viz. he *bought of the plaintiff certain debts*, which were *due* to him *by ſeveral perſons for the ſum in the obligation*, and becauſe they were only things in action of which no property paſs'd from the plaintiff to him, therefore he prayed remedy in conſcience; and upon ſubpæna the now plaintiff, then defendant, appeared, and the matter was adjourned into the Exchequer chamber; and there, before all the juſtices of the one bench and the other, the matter was well debated, and agreed, that *

that * in conſcience the obligation ought to be cancell'd or releas'd; upon which the Chancellor awarded in the Chancery, that the obligation be brought in and cancell'd, or that the now plaintiff releaſe it; which the then defendant, now plaintiff, refuſed, by which he was committed to the Fleet, there to remain till he would do it, who yet remains there, which is the ſame obligation; judgment &c. And the beſt opinion was, that it is no bar, for the obligation remains in force. Quære if it had been awarded, that the obligation ſhould be void. Br. Dette, pl. 119. cites 37 H. 6. 13.

—Upon nudum pactum there ought to be *no more help in Chancery, than* there is *at the common law.* Cary's Rep. 7. cites 15 H. 7.

6. Where the thing, for the doing whereof a promiſe is made, is a *matter of charity*, as the curing a poor man, or repairing a way, it is not nudum pactum. Arg. Pl. C. 305. b. 306. in Caſe of SHARINGTON and PLEDALL v. STROTTON.—— cites 17 E. 4. 5. Br. Debt, 161. M. 37 H. 6. 9. Per Moyle. Doctor and Student, 105.

7. Every *deed* imports in its ſelf a conſideration, viz. the will of the maker, and therefore it never ſhall be ſaid to be a nudum pactum, where the *agreement* is by deed. Arg. Pl. C. 309.—— See tamen Chan. Caſes 239. Mich. 26 Car. 2. Negus v. Fettiplace.

[17]

8. A. in conſideration he was indebted to B. in 20 l. *promiſed to deliver* diverſe cattle to C. to the uſe of B. Here is no conſideration expreſſed which can relate to the *diſcharging the debt* of 20 l. and ſo the promiſe is but nudum pactum; and B. notwithſtanding the promiſe, is ſtill at liberty to bring his action againſt A. for the money. Sti. 330. Godwin v. Batkin.

9. Twenty pounds were promiſed a wife to *procure a releaſe* from her huſband (the debt being ſatisfied by payment and ſecurity, which is a releaſe by law, and a payment) this is nudum pactum. 1671. 3 Ch. R. 70. Stuckly v. Cook.

N. Ch. Rep. 80. S. C. Stukely v. Cooke.

10. A. is poſſeſſed of Black-acre, to which B. has *no manner of right*, and A. deſires B. to *releaſe him all his right* in Black-acre, and promiſes him, in conſideration thereof, to pay him ſo much money; ſure this is a good conſideration, and a good promiſe; for it put A. to the trouble of making a releaſe; per Holt Ch. J. 12 Mod. 459. Paſch. 13 W. 3. in Caſe of Thorp v. Thorp.

[For more of Nudum Pactum, ſee Accord, and other proper titles.]

Nul tiel Perſon, or Uill.

(A) Pleadings. Nul tiel *Perſon.*

S. P. Br. Negativa, pl. 6. cites 40 E. 3. 36, 37.

1. IN *precipe quod* reddat, the *tenant vouch'd A.* and the *ſheriff returned the writ of ſummons, that the demandant A. is dead,* by which the *tenant vouch'd B. ſiſter and heir of the ſaid A.* and the *demandant ſaid,* that there is *no ſuch B. Priſt.* &c. and the iſſue accepted, without ſaying no ſuch B. ſiſter and heir of A. but generally that no ſuch B. Br. Iſſues joines, pl. 73. cites 40 E. 3. 37.

2. Counterplea was ſuffered where *K. was vouch'd as ſiſter and heir of A.* The demandant ſaid, that no ſuch ſiſter and heir of A. and permitted, and therefore is not pregnant. Br. Negativa, &c. pl. 56. cites 41 E. 3. 28.

3. *Quare impedit* by the *King,* who *made title by the heir in his ward, becauſe J. S. was ſeiſed of* 4 *acres of land in D. with the advowſon appendant, and preſented and deſcended to the heir as ſon of N. ſon of W. ſon of M. ſon of the ſaid J. S.* there it is no plea that *no ſuch W.* in rerum natura; for *W. is in the meſne conveyance,* which is *not traverſable.* Br. Traverſe per &c. pl. 353. cites 43 E. 3. 7.

4. Treſpaſs *againſt M. and G.—M. ſaid,* that *no ſuch G. in rerum natura,* for he was dead before the writ purchaſed; judgment of the writ; and notwithſtanding this the writ was awarded good. Br. Brief, pl. 69. cites 44 E. 3. 18.

5. In treſpaſs the *defendant juſtified for diſtreſs for rent ſervice, and the plaintiff alleged unity of poſſeſſion in the land and rent in J. S. anceſtor of the defendant;* to which the *defendant ſaid, that he never had ſuch anceſtor,* and a good plea. Br. Traverſe per &c. pl. 356. cites 2 H. 5. 11.

6. Appeal againſt ſeveral, and the one ſaid, that there *was no ſuch John in rerum natura the day of the writ purchaſed,* and no plea, but *ſhall ſay, that he was dead* the day of the writ purchaſed, *or that there was never ſuch John in rerum natura*; nota. Br. Brief, pl. 24. cites 27 H. 6. 6.

[18] 7. Treſpaſs againſt ſeveral, of *aſſault, battery, and taking of bows and arrows, and a coat of mail,* and one of the defendants ſaid that there is no ſuch *in rerum natura,* as one named in the writ, judgment of the writ; and held there that this is a good plea. Br. Treſpaſs, pl. 37. cites 35 H. 6. 50, 51. and 20 H. 6. 30. and 37 H. 6. 36. and 14 H. 6. 3.

8. *So* for the one to plead the *death of the other.* Br. Treſpaſs, pl. 37. cites 35 H. 6. 50, 51.

9. *Appeal*

9. *Appeal againſt J. N. of D. in the county of N. yeoman, and others;* the *one of the others who was principal ſaid, that there was no ſuch J. N. of D. in the county of N. yeoman* in rerum natura *the day of the writ purchaſed*, &c. *and to the felony not guilty.* And per Huſſey and Jenney, the plea is double and treble; but it is a good plea, that *no ſuch J. N. in rerum natura the day of the writ* &c. or *no ſuch J. N. yeoman in rerum natura* &c. or *no ſuch J. N. of the county of N. in rerum natura. Quere*; for the argument was, whether all as above ſhall be his name, as knight, duke, earl, &c. which are dignities; for dignities ſhall be parcel of the name: but 35 H. 6. 4. thoſe ſupra are only additions to the name, and not parcel. Br. Double, pl. 155. cites 21 E. 4. 71.

It was held *pregnancy*, viz. one, *if there was ſuch J. N. of D.* another, *if there was ſuch J. N. of the county of N.* another, *if there was any J. N. yeoman*; and therefore pregnancy: And per Huſſey Ch. J. *any of them by itſelf had been a good plea.* Br. Negative, pl. 44. cites 21 E. 4. 71.——S. P. Br. Brief, pl. 262. cites S. C. and pl. 387. cites 21 E. 4. 6.

10. Replevin *againſt A. B. and C.* who imparl, and at the day *A. and B. ſaid that there was no ſuch C. in rerum natura*, judgment of the writ, & non allocatur; for it is *after imparlance*; contra before imparlance. Quod nota Br. Brief, pl. 464. cites 4 H. 7. 17.

11. Debt upon a bond, and no ſuch perſon as the plaintiff in being was pleaded; reſpond' ouſter was awarded; for *after attorney made and entered* on record, the defendant cannot plead ſuch a plea. 12 Mod. 539. Trin. 13 W. 3. Ball v. Smith.

(B) Pleadings. Nul tiel *Vill.*

1. *PRecipe* quod reddat in N. *No ſuch vill nor hamlet in the ſame county* is a good plea, and the writ ſhall abate. Quod nota. Br. Brief, pl. 144. cites 38 E. 3. 34.

So in waſt againſt M. late wife of Thomas Earl of A. the defendant pleaded to the writ, becauſe it is *brought in A. B. and C.* and *no ſuch vill as C. in the ſame county*: And per Martin, it is a good plea to all the writ without anſwer to the reſidue, for it goes to all the writ. Br. Brief, pl. 6. cites 2 H. 6. 11.

Contra, if he *ſays that there are two C's, and none without addition*; for there is ſuch a vill with addition, and the plaintiff ſhall recover by view of the jury: note the diverſity. Br. Brief, pl. 6. cites 9 H. 6. 42.——Br. Waſte, pl. 9. cites S. C.——S. P. Br. Additions, pl. 7. cites S. C.——*But* in wait *in A. and B.* it is a good plea to the writ that *A. is a hamlet of B. and not a vill by itſelf*: per Cur. But per Paſton, he ſhall ſay in this caſe that no ſuch vill. Ibid.

2. A. brought *treſpaſs of land* lying in *Kingſton*; it was objected, that there is *no ſuch vill* as Kingſton *without addition in the ſame county*; and no plea. Br. Brief, pl. 425. cites 11 H. 4. 61.——But 9 H. 6. no ſuch vill is a good plea, by reaſon of the viſne, but theſe words (without addition) make a diverſity. Ibid.

S. P. Br. Additions, pl. 6. cites 9 H. 6. 28, 29. For if he be guilty in any Kingſton it is ſufficient.—Ibid. cites 6 H. 7. 3. contra per Cur.——*So ſuing of ſuperſedeas by J. N. naming him J. N.* of D. it is no eſtoppel to ſay that there are *two D.'s, and none without addition*; for it ſtands with &c. *Contra* to ſay *that nul tiel vill*: for this is contra: ſo of warrant of attorney; but yet the attorney had ſuch liberty upon the diverſity aforeſaid. Br. Eſtoppel, pl. 82. cites 19 H. 6. 35 & 36.

3. *Nuper obiit in A. B. and C. in the iſle of P.* the tenant ſaid, that no ſuch vill as A. and B. in the iſle, and non allocatur; [19] for *iſle ſhall not have relation but to the laſt vill*; but Brook ſays quod mirum! Br. Brief, pl. 157. cites 7 H. 6. 8.

4. Treſpaſs in *B.* the defendant ſaid that there are two *B.'s in the ſame county*, viz. *Eaſt-B. and Weſt-B. abſque hoc, that there is B. only*; judgment of the writ; and per Cott. J. it is *no plea in aſſiſe*; for the plaintiff recovers by view of the jury; *but a good plea in treſpaſs*, by reaſon of the viſne. Br. Additions, pl. 25. cites 8 H. 6. 18.

5. Treſpaſs *againſt J. A. of B. S.* the *defendant ſaid that he* &c. was converſant and *dwelling at B. H. and not at B. S.* the *plaintiff* (ſaid) that *'tis all one vill, and known by the one and by the other*; the *defendant ſaid that*, * *not known by the one and by the other*; and held † no plea for the plaintiff, but *ſhall ſay known by the name of B. S. only*, or that there is *no ſuch vill as B. H. in the ſame county*. Br. Maintenance de Brief, pl. 28. cites 8 H. 6. 32.

* This is no iſſue for the defendant, that *not known by the one name, and by the other*, by which the *defendant* relinquiſh'd his plea, and *ſaid that there was no ſuch vill as B. S. nor hamlet nor lieu conus out of the vill and hamlet in the ſame county, Priſt*: Weſton ſaid there is ſuch a vill as B. S. Priſt; and the others e contra. Br. Iſſues joines, pl. 15. cites S. C. —— † Wherefore the plaintiff *ſaid that he was of B. S. the day of the writ purchaſed*. Br. Iſſues joins, pl. 15. cites S. C.

Treſpaſs at B. in the pariſh of S. No ſuch vill as B. is a good plea *by* the *common law*, but *not by* the *ſtatute* of additions. Br. Brief, pl. 404. cites 2 R. 3. 1.

6. *No ſuch vill* as D. is a good plea *in treſpaſs*. Br. Brief, pl. 13. cites 9 H. 6. 29. per Babb. —— & 6. H. 7, 3. Accordingly per Cur.

7. *Debt againſt J. N. of B.* who at the exigent *purchaſed ſuperſedeas accordingly*, and came *and ſaid that nul tiel vill as B.* &c. by formal pleading and was not received by reaſon of the ſuperſedeas which eſtopp'd him; for *he has affirm'd it*; and per Paſton he *ought to have put proteſtation that nul tiel vill as B.* and therefore he was awarded to anſwer over. Quære &c. Br. Eſtoppel. pl. 84. cites 19 H. 6. 44.

8. In annuity the count was, that the *prior of M. in Southwark granted to the plaintiff in London* ſuch a day and year &c. *and profert* hic in curia *the writing* aforeſaid, the date whereof is in the chapter-houſe of the ſaid houſe: per Chocke; the defendant may ſay that no ſuch vill, hamlet nor place known in L. where the plaintiff would falſely alledge that the houſe is in L. which in fact is in S. and not in L. Br. Count. pl. 60. cites 5 E. 4. 6.

9. Action againſt J. N. of D. where there is no ſuch vill, hamlet nor place known &c. he may ſay that there is no ſuch vill &c. *or ſay that he was of S. abſque hoc, that he was of D.* and *ſo in precipe* quod reddat in D. he may ſay that no ſuch vill, &c. or that they lie in S. and not in D. Per Littleton and Moyle. Br. Brief, pl. 365. cites 8 E. 4. 5.

10. In

10. In debt the defendant being named of D. *ſaid that there is no ſuch vill nor hamlet* called D. *nor lieu conus out of vill and hamlet* &c. Judgment of the writ; and by the Reporter, if there be *a houſe in C. which is called D. and the defendant is named of it*, he may plead as above, and there the plaintiff ſhall be compell'd to name him of C. which is the vill, and not of D. which is the lieu conus in the vill. But if ſuch place be out of vill and hamlet, and known by name of D. then the plaintiff may name him of it. Br. Dette, pl. 171. cites 21 E. 4. 37.

For more of Nul tiel &c. ſee Fines (E a.), Record, Treſpaſs, and other proper titles.

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* Nuſance.

[20]

* Nuſance is threefold; 1. *Publick or general.* 2. *Common.* 3. *Private*, or ſpecial. Publick is that which is to the nuſance of the whole realm. Common is that which is to the common nuſance of all paſſing by. Private is that which is to a houſe or mill &c. 2 Inſt. 406.

Fol. 137.

(A) Nuſance Common. *Who ought to reform* Common *Nuſances.*

[1. IF a *river be ſtopp'd* to the common nuſance of the country, and it *has never been mounded* [*or cleanſed*], *nor* is it *known who ought to mound* [*or cleanſe*] *it* of right, but *A. has the lordſhip of one part by the river, and B. of the other part, and they have piſchary* in the ſame river, and 4 *vills have their paſſage in* the ſame river for their eaſement. The 4 vills in this caſe, who have common paſſage and eaſement of the ſame river, ought to mound [*or cleanſe*] it: but if the 4 vills had not ſuch eaſement and paſſage, then A. and B. who have the piſchary there, ought to mound [*or cleanſe*] it. 37 Aſſ. 10.]

The caſe was that the river had been ſtopped by flinging into it the bodies of perſons dying of the plague.

(B) Nuſance. *What is puniſhable.*

[1. IF a man *lays logs of wood in a highway ſparſim*, and there ſuffers them to *lie for* 2 *months*, or other ſuch time, tho' there be a paſſage with turnings and windings between the logs, yet this is a nuſance puniſhable in a leet; for it is an impediment of the paſſage of the lieges of the King. Hill. 15 Ja. B. R. adjudged.]

[2. *But*

[2. *But in London*, or other place, the *unlading of billets in the high-ſtreet* (which is the highway) before my houſe for my uſe, is not any nuſance for the *neceſſity*. Hil. 15 Ja. B. R. agreed per Curiam.]

[3. *But* if he *ſuffers them to continue there* for a long time after the unloading, it is a nuſance puniſhable. Hil. 15 Ja. B. R. agreed per Curiam.]

1 Roll. 463. pl. 6. S. C.

[4. If J. S. *ſeiſed in fee of certain land* adjoining to the highway, *incroaches part of the highway* and adds it to his franktenement, and dies, and *his heir*, to whom the land adjoining deſcends, *continues the ſaid incroachment*, but does no new act, yet he may be indicted for the continuance of this nuſance; for the * continuance of it is a new nuſance. Mich. 11. Car. B. R. between *Lee* and *Boothby*. Per Curiam adjudged. This being moved in arreſt of judgment, after a verdict at bar for the plaintiff. Intratur Trin. 11. Car. Rot. 1002.]

* 2 Le. 103. Waſhbone v. Mordant —See Roſwell v. Prior.

5. The *ſuffering a publick bridge to be in decay* is a publick nuſance. Per Holt. Ch. J. 6 Mod. 255, 256. Mich. 3 Annæ. B. R. The Q. v. Saintiff.

[21] See (F)

(C) General. *What* ſhall be ſaid a Nuſance.

Cro. C. 184. S. C. Jo. 221. S. C. S. C. cited 2 Salk. 459.

[1. IF a man *hangs a gate* upon a poſt, and ſhuts it with a catch upon another poſt *a-croſs the highway*, ſo that men cannot paſs without opening of the gate, but by opening of it they may well paſs, yet this is a common nuſance; for the gate in a way, made de * novo, where *no gate was before*, is an impediment to the King's people in their paſſage; for ſome men are ſo feeble for age or infirmity, that they cannot open ſuch gate, being on horſeback, and ſome men have ſuch horſes that will not come quietly to a gate to open it; and they who go with horſes loaden, or with a cart, or who drive cattle, muſt go and open the gate when they come to it, and when they are doing this, their horſes or cattle will run from them, and divers others inconveniencies: but gates which have been in highways *time out of mind* &c. are not any nuſance. Becauſe it may be intended that they began by † compoſition when the owner of the land conſented to the way, or put there upon an *ad quod damnum* brought, and then found no nuſance, or other ſuch reaſonable cauſe. P. 6 Car. B. R. between *James* and *Hayward*, adjudged upon a demurrer, per Curiam except Crook, who was againſt the judgment, and he cited 2 E. 4. 9. where it is admitted to be lawful to erect ſuch gate.]

* Fol. 138

Mich. 9 W. 3. B. R. in caſe of Lodie v. Arnold.

† Hawk. Pl. C. 199. cap. 75. ſ. 9.

2. It was preſented that one A. had *incloſed a cloſe, in which the people of B. had common, to the nuſance of the people of the vill*, and becauſe it is no nuſance unleſs done in a highway, or water, to the nuſance of a commonalty, and alſo *upon this matter action is given by aſſiſe to the people of the vill*, therefore the defendant went quit. Br. Nuſance, pl. 23. cites 27 E. 3. 6.

3. By

3. By 18 *Car.* 2. *cap.* 2. *ſ.* 1. Importation of cattle *is a publick nuſance, and ſhall be ſo adjudged.*

S. 3. *Nothing in this act ſhall hinder the importation of cattle from the Iſle of Man, ſo as the number of the ſaid cattle do not exceed* 600 *head yearly, and that they be of the breed of the Iſle of Man, and be landed at the port of Cheſter.*

4. 19 *Car.* 2. *cap.* 3. *ſ.* 3. enacts, That *no building ſhall be erected within the cities and liberties of London and Weſtminſter, but ſuch as ſhall be purſuant to ſuch rules of building, and with ſuch materials as are therein after appointed; and according to ſuch ſcantlings as are ſet down in a table in this act ſpecified. And if any perſon ſhall build contrary, and be convicted by the oaths of* 2 *witneſſes, before the Lord Mayor, or any* 2 *juſtices of peace for the city, the houſe ſo irregularly built ſhall be deem'd a common nuſance, and the builder ſhall enter into a recognizance for demoliſhing the ſame, or otherwiſe to amend the ſame; and in default of entering into ſuch recognizance, the offender ſhall be committed to gaol till he ſhall have demoliſhed, or otherwiſe amended the ſame; or elſe ſuch irregular houſe ſhall be demoliſhed by order of the Court of Aldermen.*

5. A *ſoapboilery* in Woodſtreet is a nuſance: ſo is a *calenderman* in Bread-ſtreet, try'd before Hale, Ch. J. So is a *brewhouſe* on Ludgate-hill; for that ſuch trades ought not to be in the principal parts of the city, but in the out-ſkirts. 2 Show. 327. Mich. 35 Car. 2. B. R. The K. v. Pierce.

6. The owner of a *glaſs-houſe at Lambeth* was indicted for maintaining thereof, and was convicted and fin'd. 2 Salk. 458. Hill. 1 W. & M. B. R. The King and Queen v. Wilcox.

S. P. Vent. 26. Paſch. 21 Car. 2. B. R. Anon.

7. 9 *and* 10 *W.* 3. *cap.* 7. *ſ.* 1. enacts, That *it ſhall not be lawful for any perſon to make, ſell, or utter any* ſquibs, rockets, ſerpents, *or other fireworks; or any caſes, moulds, or other implements for the making of any ſuch fireworks; or for any perſon to permit any ſquibs &c. to be thrown or fired from his houſe or lodgings, or from any place thereto adjoining, into any publick ſtreet, highway, or paſſage; or for any perſon to throw or fire, or to be aſſiſting in the throwing or firing of any ſquibs &c. in or into any publick ſtreet, houſe, ſhop, river, highway or paſſage; and every ſuch offence ſhall be adjudged a common nuſance.*

[22]

8. By 10 *and* 11 *W.* 3. *cap.* 17. *ſ.* 1. *All* lotteries *are publick nuſances, and all patents for lotteries are void and againſt law.*

9. 6 *Geo.* 1. *cap.* 18. *ſ.* 19. enacts, That *all undertakings by publick ſubſcriptions, relating to fiſheries, and other affairs of trade, and acting as corporate bodies without charter, or under charters intended for other purpoſes, or under obſolete charters, and tending to the common grievance of his Majeſty's ſubjects in their trade, and all publick ſubſcriptions, receipts, payments, transfers, and all proceedings therein ſhall be deemed publick nuſances, and all offenders therein, being convicted upon information or indictment, in any of his Majeſty's Courts of Record at Weſtminſter, Edinburgh, or Dublin, ſhall be liable to ſuch puniſhments, whereto perſons convicted for publick nuſances, are by any laws of this realm liable; and ſhall moreover incur*

incur ſuch farther pains &c. as were provided by the ſtatute of proviſion and præmunire 16 *R.* 2. *cap.* 5.

10. 5 *Geo.* 2. *cap.* 16. *ſ.* 8. enacts, That *all buildings in the town of* Blandford Forum *ſhall be covered with lead, ſlate, or tile, and no perilous trade in reſpect of fire, viz. diſtiller, candlemaker, ſoap-maker, baker, or brewer, ſhall be uſed in the market-place; and all buildings which ſhall be covered or repair'd contrary to this act, and all houſes built contrary to the direction of the Court, ſhall be adjudged publick nuſances; and all perſons exerciſing the ſaid trades contrary to this act, ſhall be deemed guilty of common nuſance.*

(D) Nuſance. *What Perſons may make* a Nuſance. [*to whom, and to what*;] and who ſhall have *Aſſiſe* for it.

S. P. 3 Le. 13.—S. P. 4 Le. 167. and 224.

[1. DY. 8 El. 250. 88. *Leſſee for life* of land *having a way over the land of S.* from his land to a park which was in the hands of the leſſor, and from the park to his land; *S. ſtops the way.* Per Curiam aſſiſe lies.]

Tenant for life, in tail, or fee ſimple, may have aſſiſe to redreſs a nuſance done to his freehold. F. N. B. (183) (I)——But leſſee for years ſhall have caſe only, becauſe he has no freehold. Ibid. 184, 185. (G)

[2. *But*, Fitzh. Nat. Brev. 184. (G), *leſſee for years* ſhall not have aſſiſe of nuſance.]

3. *Tenant for term de auter vie* ſhall have writ of nuſance. Br. Nuſance, pl. 16. cites 4 E. 3.

4. Powel ſaid, there could not be a nuſance to a market or franchiſe, but to a highway &c. but the Reporter adds a quære, 11 Mod. 67. Mich. 4 Annæ. Anon.

(E) *For what Things* or Cauſes Aſſiſe of Nuſance lies.

3 Le. 13. S. P.—But if the ſtoppage be *by a ſtranger*, then only *action on the caſe* lies. 2 Le. 181. cites 33 H. 6. 26. per Priſot.

[1. DY. 8 Eliz. 250. 88. A man had a *way over the land of J. S.* to his own land *by preſcription*, *J. S. ſtops* the way, and aſſiſe lies, per Curiam.]

[23] 2. If a man has a *way to his franktenement, or* to his *common, which is eſtopp'd by a houſe* made, or the like, aſſiſe of nuſance lies, but *contra of a way to the church*; per Herle. Br. Nuſance, pl. 37. cites 4 E. 3.

3. It lies for *levying of a goſs to intercept the courſe of fiſh coming from the ſea, uſque ad gurgitem meam ſuperiorem.* F. N. B. 184. (A) in the notes there (b) cites 46 Aſſ. 9.

(F) * Com-

(F) * Common. *What* Act or Thing ſhall be ſaid a *Common Nuſance.*

* A common nuſance may be defin'd to be *an offence againſt the public, either by doing a thing which tends to the annoyance of all the King's ſubjects, or by neglecting to do a thing which the common good requires.* Hawk. Pl. C. 197. cap. 75. ſ. 1.

[1. IF the tenant of a manor who is a *free-tenant erects a dove-cote de novo without any licence* upon his tenement, and ſtores it with pigeons, and ſuffers them to fly out of the houſe, by which they devour the grain of the King's ſubjects throughout the country, yet this is not any common nuſance; for if it ſhould be a common nuſance, no one could preſcribe to have ſuch houſe; for none can preſcribe to make a nuſance. Alſo, if this ſhould be a nuſance, it could not be done by any licence; for neither the lord of the manor, nor the King himſelf, ſhall give *licence* to any to commit a nuſance. Trin. 16 Ja. B. R. between † *Dewell* plaintiff, and *Saunders* and *Tedder* defendants. Adjudged in a treſpaſs for taking of beaſts for an amercement in the leet of the lord of Northumberland lord of the manor of Iſtleworth Sion, where the defendants in the right of the lord confeſſed the taking, and pleaded the matter, and averr'd it to be a common nuſance. Yet it was adjudged as above for the plaintiff upon a demurrer; becauſe in law upon the ſpecial matter it is not any nuſance; and this was adjudged by the full conſent of the whole Court. See the ſame caſe. Paſch. 16 Ja. B. R. 1. Contra Co. 5. *Boulſton* 104. b. reſolved.]

† Poph. 141. S. C. by the name of the E. of Northumberland's Caſe.

In the Caſe of Prat v. Stearn, it was held by Coke Ch. J. that it was a common nuſance, and inquirable in a leet; but the other juſtices ſeemed to doubt thereof; but as to the matter they would not ſpeak, becauſe the preſentment was not good. Cro. J. 382. Mich. 13 Jac. B. R.

[2. If a man *makes candles in a vill*, by which he cauſes a *noiſome ſcent to the inhabitants*, yet this is not any nuſance; for the *needfulneſs* of them will diſpenſe with the noiſomeneſs of the ſmell. Paſch. 3 Ja. B. R. adjudged. Rankett's Caſe.]

Fol. 139.

Hawk. Pl. C. 190. cap. 75. ſ. 10. cites S. C. and ſays, that the reaſonableneſs of this opinion ſeems juſtly to be queſtionable, becauſe whatever neceſſity there may be that candles be made, it cannot be pretended neceſſary to make them in a town; and that the trade of a brewer is as neceſſary as that of a chandler; and yet it ſeems to be agreed, that a brewhouſe erected in ſuch an inconvenient place where the buſineſs cannot be carried on without incommoding greatly the neighbourhood, may be indicted as a common nuſance.——A preſentment was at a leet for erecting a *glaſshouſe*, and Twiſden J. ſaid, he had known an information adjudged againſt one for erecting *a brewhouſe near Serjeant's Inn*; but it was inſiſted, that a man ought not to be puniſhed for erecting any thing neceſſary for the exerciſe of his lawful trade; and it being anſwered, that it ought to be in convenient places, where it may not be a nuſance, the other juſtices doubted, and agreed, that it was unlawful only to erect ſuch things *near the King's palace.* Vent. 26. Paſch. 21 Car. 2. B. R. Anon.

[3. If a man *divides a meſuage in a town for poor people to inhabit*, by which it will be more dangerous in time of infection of the plague, this is a common nuſance. Paſch. 10 Car. B. R Such indictment of one Brown for dividing a meſuage in the vill of Hertford held good, and he put to plead to it, and then ſaid,

Hawk. Pl. C. 199. cap. 75. ſ. 11. cites S. C.

ſaid, that ſuch indictments are frequent in London for dividing of meſuages.]

Not only in reſpect of its endan-

4. *Keeping a bawdy-houſe* is a common nuſance. 1 Salk. 384. in Caſe of the Queen v. Williams, cites * Hob. 95.

[24] gering the publick peace by drawing together diſſolute and debauch'd perſons, but alſo in reſpect of its apparent tendency to corrupt the manners of both ſexes by ſuch an open profeſſion of lewdneſs. Hawk. Pl. C. 196. cap. 74. cites Kitch. 11. a. and 3 Inſt. 205.—— * This ſeems to be miſcited.

5. 13 & 14 *Car.* 2. *cap.* 18. *ſ.* 7. *All* exportation of wool *&c. in the ſaid act mentioned, in the manner prohibited in the ſaid act, is declared to be a common nuſance.* So of *leather*, by 14 Car. 2. cap. 7.

6. In 8 Car. 1. Noy pray'd a writ to prohibit a *bowling-alley erected near St. Dunſtan's church*, and had it; cited per Hale Ch. J. Mod. 76. in Jacob Hall's Caſe.

7. The ſetting up a *ſtage for rope-dancing* is a nuſance in ſe, and in ſuch caſe a prohibitory writ iſſued, and made the party pull down his ſtage. Per Holt Ch. J. 5 Mod. 142. cites it as Jacob Hall's Caſe.

But ſee Skin. 625. S. C. and the reaſons there, why a playhouſe

8. But *a playhouſe* is no nuſance in itſelf, but only by conſequence, as the acting plays draws the people and coaches and ſharpers together. 5 Mod. 142. per Holt Ch. J. Mich. 7 W. 3. in Caſe of the King v. Betterton.

might be deem'd a nuſance in ſe.——Hawk. Pl. C. 198. cap. 75. ſ. 7. ſays it has been holden, that a common playhouſe may be a nuſance if it *draws together ſuch number of coaches or people &c. as prove generally inconvenient to the places adjacent*; and that it ſeems that they having been originally inſtituted with a laudable deſign of recommending virtue to the imitation of the people, and expoſing vice and folly, are *not nuſances in their own nature, but* only become ſo *by accident.* [Quære tamen, and ſee Mr. Collier of the Immorality of the Stage.]

9. *Houſe ſtanding on the highway, being ruinous and likely to fall down*, is a nuſance and indictable, and ſuch indictment lies againſt the occupier, tho' he be but tenant at will. 1 Salk. 357. Trn. 2 Annæ B. R. The Queen v. Watts.

10. *Bringing a great ſhip* of 300 ton *into Billingſgate dock* is a publick nuſance. 6 Mod. 145. Paſch. 3 Annæ B. R. The Queen v. Leich.

11. If a *man with a cart uſes a common pack or horſe-way ſo as to plow it up*, and render it the leſs convenient for riders, the Court aſk'd if this would not be a nuſance indictable. 6 Mod. 145. Paſch. 3 Annæ. The Queen v. Leich.

12. *Scolding often repeated to the diſturbance of the neighbourhood* makes it a nuſance, and as ſuch it always has been puniſhable in the leet, and therefore indictable. 6 Mod. 213. Trin. 3 Annæ B. R. The Queen v. Foxby.

S. P. 10 Mod. 336. per Cur. Trin. 2 Geo. 1. The King v. Dixon & Ux.

13. *Common gaming-houſes* are common nuſances. Hawk. Pl. C. 198. cap. 75. ſ. 6.

Noy. 103. is the Caſe of KIND v.

14. Serjeant Hawkins ſays, it ſeems certain, that it is a common nuſance *to divert part of a publick navigable river*, whereby the

the current of it is weaken'd and made unable to carry veſſels of the ſame burthen as it could before. Hawk. Pl. C. 199. cap. 75. ſ. 11. cites Noy 103.

MANFIELD, that M. was fin'd 200l.

for diverting part of the river *Thames*, by which he weakened the current of the river to carry barges &c. towards London and other houſes of the King upon that river. And ſuch a thing cannot be done without an ad quod damnum; becauſe that river *is an highway*. And alſo the doing it ought to be by the King's patent.

(F. 2.) *Private.* Pigeon Houſes.

[1. *A Lord of a manor* by force of his right ſeignioral *may lawfully* without any licence *erect a dovecote de novo upon his land parcel of the manor* and ſtore it with pigeons, and ſuffer them to fly out and fly back again. For in the country it is received as a law; and a thing received in the country without precedent or authority to the contrary (as it ſeems) is to be taken for law; and it may ſtand with reaſon, that he ſhall have ſuch prerogative as lord, becauſe generally the pigeons feed in the fields next adjoining upon the lord and tenants. And when the lord departs with the tenements, the law hath ſaved to him his prerogatives, *rights and pre-eminencies which are due to him as lord.* Co. 5. *Boulſton*, agreed. Tr. 16 Ja. B. R. between * *Dewell* plaintiff and *Saunders* and *Tedder* defendants, agreed per Curiam.] [25]

* 2 Roll R. 3. S. C. — Cro. J. 490. S. C. Mo. 453. S. C.—— Cro. E. 548. S. C. Hill. 39 Eliz. C. B. by the name of Boulſton v. Hardy.— Erecting of a dovecote by a freeholder who is not lord of the manor, nor owner of the rectory, and repleniſhing it with doves is not any nuſance inquirable or puniſhable in a leet; 4 H. 6. 10. 27 Aſſ. pl. 6. 9 H. 4. 4. For nothing is inquirable there but what is a common nuſance to all people; and this is not ſo, but can be a nuſance to thoſe only whoſe corn they eat, and therefore is no common nuſance; for if it were, neither the lord of the manor nor the parſon could erect a dove-houſe more than any other freeholder; per Montague, Crooke, Doderidge and Houghton; and therefore they held the opinion reported 5 Rep. 104. b. in this point to be no law, and no direct reſolution in point of judgment. Cro. J. 491. Trin. 16 Jac. B. R. Dewell v. Sanders.

[2. *But* it ſeems that *a tenant of a manor cannot* lawfully erect a dovecote de novo upon his tenement *without licence;* for this is a right ſeignioral appertaining to the lord only, who has a prerogative over his tenants, (and tho' it be not a common nuſance to erect ſuch dovecote, yet it ſeems, that it is *a particular nuſance for which the lord may have action upon the caſe or aſſiſe, as in caſe of erecting a mill to the nuſance of my mill).* Co. 5. *Boulſton* 104. b. reſolved. Contra Trin. 16 Ja. B. R. between *Dewell* plaintiff and *Saunders* and *Tedder* defendants, reſolved per Curiam, contra Papon. tit. Droit Seignioral, fo. 793. and tit. de Servitut. fo. 827.]

BOULSTON's Caſe, 5 Rep. 104. was only obiter and not agreeing with the reaſon of the principal; per Houghton J. quod fuit conceſſum per tot. Cur. and per Doderidge J. it cannot be a publick nuſance; for that ought to be immediate or general. 1. Immediate it cannot be, for the erecting a dovecote cannot in itſelf be a nuſance. 2. It is not general but particular to the neighbouring inhabitants; and it has been allow'd on all ſides, that a man may have a dovecote *by preſcription*, which could not be if it were a nuſance, to which Mountague agreed. Poph. 141. Trin. 15 Jac. B. R. E. of Northumberland's Caſe.

S. P. And it is ſo far countenanced by the law, as to be demandable in a præcipe before any land whatſoever which is not built upon, and that the owner may juſtify the taking another's hawk which he ſhall find at his dove-houſe flying at his pigeons. Hawk. Pl. C. 198, 199. cap. 75. ſ. 8. And the Serjeant ſays, from hence it ſeems clearly to follow, that tho' a tenant who builds a dove-houſe without

without the lord's licence may *perhaps be liable to an action on the caſe at the ſuit of the lord*, whoſe prerogative is ſaid to be incroach'd upon by ſuch erection without his licence, yet he cannot be puniſh'd for it by a publick proſecution.

Leſſee for years of parcel of a manor, the reverſion to the Queen in fee erected a pigeon-houſe, and an information being brought in the Exchequer, Manwood Ch. B. and Gent. B. Popham

[3. *Rot. Parliamenti* 4 *H.* 4. *Numero* 64. The commons pray, that no man nor woman, nor parſons, nor vicars of holy church, nor no man or woman of religion henceforward have any pigeon-houſes in any vills, if they and every of them have not *lands in the ſame vills to the value of* 40*s. per ann.* and if any people of ſuch condition have any pigeon-houſes at preſent, that they do not receive, nor ſuffer to be received nor harboured any pigeons in their pigeon-houſes in time to come, *upon pain to pay to the King* 100*s.* And that the juſtices of peace in their *ſeſſions*, ſtewards of lords and bailiffs of franchiſes, inquire in their *Court Leets* of the nuſance of ſuch pigeons, and thereof make puniſhment by *amercement and* by *fine*.]

[Anſwer. *The King will adviſe*.]

attorney-general, and all the counſel at the bar, took the law to be, that the pigeon-houſe ſhould be accounted as a common nuſance, and therefore an injunction was granted againſt the building it. For Manwood ſaid, that *none can erect a dove-houſe de novo, but the lord of the manor and parſon of the church*, and in the old law it was inquirable in the Leet amongſt common nuſances. And at the time of this motion Ld. Burghley came into Court, and he being the high treaſurer ſaid, that Plowden was of opinion that none but the Ld. of the manor or the parſon of the church may erect a dove-houſe; and ſaid, that he had heard Mountague Ch. J. ſay the ſame in a great aſſembly. Mo. 238. pl. 372. Paſch. 29 Eliz. Bond's Caſe.

[26] Fol. 140.

(G) Nuſance. *What* ſhall be ſaid *a Private Nuſance.*

[1. IF the tenant of the land *plow the ſoil over which another has a way*, this is a nuſance to the way; for it is not ſo eaſy to him as it was before. 2 *H.* 4. 11.]

F. N. B. 184. (A) and in the notes there (b) it is ſaid, Note, If the market be on the ſame day, it ſhall be intended

[2. If a man *levies a market or a fair to be held the ſame day that my fair or market is held in a vill which is next to my fair or market*, by which my fair or market is impair'd, this is a nuſance to my market or fair; for the *grant of the King* of ſuch fairs or markets *is always* * *with a clauſe* that it ſhall *not be to the nuſance of another* fair or market. † 22 H. 6. 14 b. 11 H. 4. 47 b. 41 E. 3. 24 b.]

a nuſance, but if it be *on another day* it ſhall not be ſo intended, and therefore it ſhall be put in *iſſue, whether it be a nuſance or not*, cites 11 H. 4. 5. in a ſcire facias for the King to repeal a patent. And adds, Note, a market was granted to be held in D. on Saturdays, 2 miles diſtant from C. where the King had a market on Tueſdays.

* But if it be a nuſance, tho' *it has not that clauſe*, the 2d patent is void againſt him to whom it is a nuſance. F. N. B. 184. (A) in the notes there (b) cites 22 H. 6. 14.——And 2 inſt. 406. ſays that the niſi fit ad nocumentum feriarum vicinarum in the grant of a fair is put but for example; for if it be ad aliquod damnum either of the King or Subject in any other thing, the fair ſhall be revok'd.——† Br. Action ſur le Caſe, pl. 57. cites S. C.——2 Saund. 174.——Raym. 195. Yard v. Ford.——Vent. 98. S. C

F. N. B. 184. (A) in the notes there (b) at the end.—3 Lev. 221. &c. Trin. 1 Jac. 2. C. B. The King v. Sir Oliver Butler.

[3. *So* it ſhall be, tho' the King grant the laſt fair or market *without ſuch clauſe*; for the King cannot take away my frank-tenement and I am bound to maintain my fair or market for the people. 22 H. 6, 15.]

[4. *So* if I have *a ferry by preſcription*, if another erects another ferry upon the ſame river near to it, by which my ferry is impair'd, this is a nuſance to me; for I am bound to ſuſtain and repair the ferry for the eaſe of the lieges, otherwiſe I ſhall be grievouſly amerced. 22 H. 6. 14 b.]

[5. If a man has a ſue, that is to ſay, *a ſpout above his houſe*, by which the water uſed to fall from his houſe, *and another levies a houſe paramount the ſpout, ſo that the water cannot fall as it was wont, but falls upon the walls* of the houſe, *by which the timber of the houſe periſhes*, this is a nuſance. 18 E. 3. 22 b. Co. 9. 54. Baten.] This caſe is cited 9 Rep. 54. a. Mich. 8 Jac. C. B. in Baten's Caſe.

[6. If a man *ſtops a ſtream of water*, which runs thro' his land, *by which my land is ſurrounded*, it is a nuſance to me. 9 E. 4. 35. Curia.]

[7. If I have a *mill by preſcription* in my ſoil, and *another erects a new mill* upon his ſoil, *by which the ſtream to my mill is ſtreightened or ſtopped, or* by which *too great abundance of water comes* to my mill, by which *my mill is endamaged*, ſo that my mill cannot grind ſo much as it was wont, this is *a* nuſance to my mill. 22 H. 6. 14.]

[8. If a courſe of *water runs to my mill*, and the tenant of the land where &c. *diverts part of* the courſe, ſo that my mill *cannot grind one quarter where it was wont to grind ten quarters* a day, *aſſiſe* lies, and *not caſe*. 2 H. 4. 11. b.]

[9. *So* if he *puts ſtakes in his freehold in the water*, by which I cannot have ſufficient water to my mill, this is a nuſance to my mill. 9 E. 4. 35. per Curiam.]

[10. If I have a houſe by preſcription upon my ſoil, and another erects a *new houſe* upon his own ſoil next adjoining, ſo near to my houſe that it *ſtops the light of my houſe*, this is a nuſance to my houſe; for the light is of great comfort and profit to men. 22 H. 6. 15. per Markham. Co. 9. 58. b. Reſolved Bland's Caſe.] See Stopping Lights.

[11. *So* if he erects his houſe upon his own ſoil ſo near my houſe, that it *cauſes the rain to fall*, and * pour down *upon my houſe*, it is a nuſance. 22 H. 6. 15. per Markham.] [27] (* Orig. funderer.)

[12. *So* if a man erects a houſe, whereof *part overhangs my houſe*, it is a nuſance to my houſe; * for the water muſt neceſſarily fall upon my houſe; & cujus eſt ſolum ejus eſt uſque ad celum; and it takes away his air, and prevents him to exalt his houſe. 9 Co. Baten 54. adjudged.] * Fol. 141.

[13. If a *limekiln* be erected ſo near my houſe, that when it burns, *the ſmoke* of it ſo *enters into the houſe, that none can inhabit* there, this is a nuſance. Co. 9. 59. William Aldred's Caſe.]

[14. If a man has a *water-courſe running in a* foſſe *of the river up to his houſe for neceſſary uſes*, and a glover *makes a limepit* for calves-ſkins and ſheep-ſkins ſo near to the ſaid water-courſe, that the corruption of the limepit corrupts it, this is a nuſance. 13 H. 7. 26. Co. 9. Will. Adred. 59.]

[15. If a man erects in his own ſoil *a houſe for hogs*, ſo *near*

my hall and parlour, and there puts his hogs, ſo that by reaſon of the ſtink and unwholeſome ſmells, I and my ſervants cannot continue in the hall and parlour, and other parts of my houſe, this is a nuſance; for good air is neceſſary for the life of men. Co. 9. Will. Aldred 57. b. adjudged.]

[16. The *ſtopping of wholeſome air* is a nuſance as well as the ſtopping of the light. Co. 9. Will. Aldred 57. b. per Wray.]

[17. *But* if a man *ſtop my proſpect*, no action lies for it; for this is not of neceſſity, but only for pleaſure. Co. 9. Will. Aldred 57. per Wray.]

So of a *brewhouſe and privy* in the ſaid houſe, and *burning ſea-coal* in the

[18. If a dyer erects a *dy-houſe* ſo near my houſe, by which I dare not dwell in this my houſe for the ſtink of the ſmoke and other naſtineſs, this is a nuſance. Co. 9. Will. Aldred 59. Book of Entries, Nuſance 406. b.]

ſaid brew-houſe, ſo that by the ſmoke, ſtench and unwholeſome vapours coming from the ſaid coal and privy, the plaintiff and his family cannot dwell in his houſe without danger of their health: adjudged by all the Judges on conſideration for the plaintiff. Hutt. 135. Mich. 4 Car. Jones v. Powell.——Palm. 537. S. C. but no judgment——But where there has been an *ancient brewhouſe time out of mind, altho' in Cheapſide or Fleet-ſtreet* &c. this is not any nuſance, becauſe it ſhall be *ſuppoſed to be erected when there were no buildings near; contra if* a brew-houſe ſhould be *now erected* in any of the ſtreets or trading places; this ſhall be a nuſance, and an action on the caſe lies for whomſoever ſhall receive any damage thereby; and accordingly in an action brought by one Robins a *laceman* in Bedford-ſtreet againſt a brewer *for a nuſance* from the brewhouſe *to the goods in his ſhop* (it being a brewhouſe of ten years ſtanding) the jury gave for two years damages 60*l*. L. P. R. Nuſance 246. cites Trin. 8 W. 3. C. B. Robins's Caſe.

19. Winch J. ſaid, that where one erected a *houſe ſo high that the wind was ſtopt from the windmills in* Finſbury Fields, it was adjudged that the houſe ſhould be broken down. Winch 3. Paſch. 19 Jac. Anon.

Cro. J. 184. pl. 3. S. C.

20. If a private man has a way over the land of J. S. by preſcription or grant, J. S. cannot make a *gate acroſs the way*; per Jones J. Jo. 222. Paſch. 6. Car. B. R. in Caſe of James v. Hayward.

21. A private nuſance may be committed 4 *manner of ways*, viz. *faciendo*, *non faciendo*, *permittendo*, & *non permittendo*. 2 Inſt. 406. (d)

See Actions (L. c)

(H) Aſſiſe. In what Caſes Aſſiſe lies. *Aſſiſe and not Caſe.*

S. P. As for levying, ſtopping &c. but of *non-feaſance*, as not ſcowring &c. action on the caſe lies. Br. Nuſance, pl. 9. cites 11 H. 4. 82. 83.——S. P. Br. Action ſur le caſe, pl. 44. cites S. C.——Br. Nuſance, pl. 31. cites S. C.——And ſo it appears by the word (*levavit*) and thoſe other words (*de facto alicujus*) in the beginning of the ſtatute 13 E. 1. cap. 24. 2 Inſt. 406.

[1. FOR acts of *miſfeaſance* aſſiſe lies. 11 H. 4. 83.]

[28]

Per Cur. and Coke, he may have either aſſiſe or caſe, tho'

[2. If *tenant* of the land *plows* all the land in which I have *common or paſture*, I ſhall have aſſiſe and not caſe. 2 H. 4. 11. b.]

it was moved in arreſt of judgment that it appear'd that the plaintiff had a *freehold* in the land. Cro.

Cro. E. 198, 199. Mich. 32 & 33 Eliz. Leverett v. Townſend.——2 Le. 134. S. C.——3 Le. 263. S. R.

[3. If I have a way over the land of B. and he *plows my way*, aſſiſe lies, and not action upon the caſe. 2 H. 4. 11. adjudged.] Br. Action, ſur caſe, pl. 29. cites S. C. per Markham.———Br. Nuſance, pl. 8. cites S. C.

[4. If the tenant of a wood *cuts all the wood in which I have common of eſtovers*, aſſiſe lies and not caſe. 2 H. 4. 11. b.]

[5. If a man levies a *foſſe or hedge acroſs my way*, aſſiſe lies and not caſe. * 2 H. 4. 11. 11 H. 4. 26. 83. 21 E. 3. 2. b. 2 Aſſ. pl. 1.] * Br, Action, ſur caſe, pl. 29. cites S. C. per Markham. Br. Nuſance, pl. 8. cites S. C.——Adjudged that action of the caſe lies, tho' he may have aſſiſe. D. 250. b. Marg. pl. 88. ſays it was ſo agreed per tot. Cur. Paſch. 28 Eliz. B. Aſton's Caſe.———Cro. E. 466. Paſch. 38 Eliz. S. C. adjudged, and Popham ſaid that he had ſeen it ſo in experience ſeveral times. Alſton v. Pamphyn.

[6. If a man levies a foſſe *or hedge* where water runs *by which my meadow is ſurrounded*, aſſiſe lies. 11 H. 4. 26. 83.] If one makes a ditch &c. *croſs a river which runs to my mill, tho'* the ditch be *made on his own ſoil*, it is in my election to have aſſiſe of novel diſſeiſin or of nuſance. F. N. B. 183, 184. (O) in the notes (b) cites 32 Aſſ. 2.

[7. Aſſiſe does not lie for a *laches* of my doing [what I ought to do]. 11 H. 4. 83.] See (Q) pl. 1. in the notes there.

[8. *As* if he who ought *to repair a bridge* doth not do it, by which the bridge falls, no aſſiſe lies. 11 H. 4. 83.] See (Q) pl. 1. in the notes.

[9. *So* if a man who ought *to ſcour a ditch* does not do it, by which my meadow is ſurrounded, no aſſiſe lies. 11 H. 4. 83.] An action on the caſe only lies; but if he *ſtops it up*, an aſſiſe of nuſance lies; per Thirning. F. N. B. 183. (N) in the notes there (a) cites S. C.

[10. If a man has a *way from his meadow over the land of another*, he may have aſſiſe of nuſance for it. 20 Aſſ. 18.] F. N. B. 183. (N).

[11. *So* aſſiſe lies for a way *from his houſe* over the land of another. 20 Aſſ. 18.] F. N. B. 183. (N).

[12. A man ſhall not have aſſiſe of nuſance for a *way in groſs*, but action upon the caſe or action of covenant; becauſe it is *not annex'd to any* * *franktenement* † 11 H. 4. 26. Curia. 21 E. 3. 2. b. 21 Aſſ. pl. 1. 20 Aſſ. 18. Brook. Chemin 7. * Fol. 142. Br. Nuſance, pl. 9. cites 11 H. 4. 25.——F. N. B. 183. (N) in the notes (a).———S. P. but if a *way appendant* be ſtopped, aſſiſe of nuſance lies. Br. Action, ſur le caſe, pl. 39. cites † S. C.——S. P. if not appendant or appurtenant to his freehold; as if a man build a houſe over the way which I have to my houſe or to the church, I ſhall have an aſſiſe of nuſance. F. N. B. 184. (E).

[13. *So* if a man *grants a way over his land to ſuch land or mill, where the grantee has nothing in the land or mill at the time*, tho' he *purchaſes it after*, yet he ſhall not have aſſiſe of this way; becauſe it continues in groſs in as much as he had not the land or mill to which the way ought to annex at the time of the grant made. (Quere if the grant be not *void*) 21 E. 3. * 2. 6. 21 Aſſ. pl. 1.] * It ſhould be 21 E. 3. 2. b.

[14. *But* if a way be granted over land *to me to my franktene-*

* It ſhould be 21 E. 3. 2. b.

ment, aſſiſe lies of this way, tho' the grant be within time of memory; becauſe it is annex'd to the franktenement. 21 E. 3. * 26. 21 Aſſ. pl. 1.]

F. N. B. 183. (N) in the notes there (a) ſays, that for a way to a church he ſhall only have a writ on his caſe, becauſe he has no freehold in the church. cites 4 E. 2. Nuſance 8. But that it ſeems contra as to a way to a church which one has *ratione tenuræ*. And adds, Quere if not an action on the caſe, or a writ of aſſiſe at his election.

[15. Aſſiſe lies for a *way to the church from his houſe*. 20 Aſſ. 18. 33 H. 6. 26.

F. N. B. 183. (N) in the notes there (a) cites S. C.——But if it be all ſtopp'd, aſſiſe of nuſance lies. Br. Nuſance, pl. 3. cites S. C.——Pl. 13. cites 14 H. 8. 31. S. P. but if he ſtops it in toto, then aſſiſe lies.——S. P. per tot. Cur. And *ſo of a river or courſe of water*, and the like. Br. Nuſance, pl. 13. cites 14 H. 8. 31.——S. P. Br. Action ſur le caſe, pl. 12. cites 33 H. 6. 26.—So Ibid. pl. 64. cites 14 H. 8. 31. per all the juſtices.

[16. If a man *ſtraitens my way*, and does not ſtop it totally, no aſſiſe lies, but action upon the caſe. 33 H. 6. 26.]

F. N. B. 183. (N) in the notes there cites S. C. and ſays, that it ſeems that in an aſſiſe, or on a quod permittat, you need only name the tenant of the freehold where the ſtoppage is.——S. P. per Priſot. Br. Action ſur le Caſe, pl. 12. cites S. C.—F. N. B. 183. (N) in the notes there at the end. S. P. cites 22 H. 6. 15.——S. P. per Markham. Br. Action ſur le Caſe, pl. 57. cites 22 H. 6. 14.

[17. If the *tenant of the land ſtops my way appertaining to my franktenement*, an aſſiſe lies; but otherwiſe it is if a *ſtranger* ſtops it, for there no aſſiſe lies, but action upon the caſe. 33 H. 6. 26.]

[18. If a man *grants* to another *to have annual ferne and ſtraw in his houſe throughout the year in winter for two cowes for life*, if the grantee be diſſeiſed of it, he may have an aſſiſe. 4 E. 4. 2. b.]

Br. Nuſance, pl. 25. cites S. C. and that it ſeems it lies only to remove the nuſance.——*But his leſſee for years* ſhall have an action on the caſe only, and not an aſſiſe.—3 Le. 13. pl. 31. 18 Eliz. C. B. Anon.

19. *A man leaſes his land for years*, yet he himſelf ſhall have aſſiſe of nuſance; quod nota; nevertheleſs, it ſeems there, that he ſhall not recover damages. Br. Aſſiſe, pl. 457. cites 23 H. 3. and Fitzh. Aſſiſe, 437.

Aſſiſe of nuſance, or action on the caſe lies for *diverting majorem partem curſus aquæ &c.* F. N. B. 184. (B) in the notes there (a) cites D. 284.——* If a man has a *water-courſe to his mill*, and *part is turned into another courſe*, ſo that the mill which before ground 10 quarters a day, can grind now but five quarters, treſpaſs lies upon the caſe, per Rede; but Markham denied it, and ſaid, that aſſiſe lies. As *qui minus* lies where a man cuts all the wood where I have eſtovers. Br. Action ſur le caſe, pl. 29. cites 2 H. 4. 11.

20. If a man *turns aſide a water-courſe, ſo that the mill of his neighbour cannot grind*, aſſiſe *lies de libero tenemento*, if the mill and miſturning are in one and the ſame vill; *but if they are in two vills, then aſſiſe of nuſance in the mill where the miſturning was*. Nevertheleſs, if he * *ſtraitens the water, ſo that the mill cannot grind ſo readily as it was wont*, then it ſeems that aſſiſe of nuſance or action upon the caſe lies. Br. Aſſiſe, 146. cites 9 Aſſ. 19.

Br. Aſſiſe, pl. 62. cites S. C.

21. Aſſiſe of nuſance was brought of *ſtraitning the way which the plaintiff ought to have to his mill*, and the *defendant* alleged unity

nity of poſſeſſion of the land where &c. *and of the mill, in one W.* judgment &c. within time of memory; and the *plaintiff ſaid, that after this W. had two daughters, and died ſeiſed, and the mill was allotted to the one in partition, and the land to the other, and the way was reſerv'd to her who had the mill* &c. And there it was agreed, that the *reſervation* is good of this, or of rent-charge upon partition without deed, and the aſſiſe awarded; quod nota; and ſo ſee that it *ſeems appendant upon the reſervation*, for otherwiſe aſſiſe does not lie; but this ſeems to be of aſſiſe of novel [30] diſſeiſin, but otherwiſe it may be of aſſiſe of nuſance. Br. Nuſance, pl. 11. cites 21 E. 3. 2.

22. If a man *levies a market to the nuſance of my market*, I ſhall have aſſiſe of nuſance; per Hank. Br. Nuſance, pl. 10. cites 11 H. 4. 47. And whether the market be by preſcription, or by letters patents, I need not tarry till I have avoided the letters patents of the later market by courſe of law, but may have an aſſiſe of nuſance. 2 Inſt. 406.———I may have aſſiſe of nuſance, *or action upon the caſe*. Br. Action ſur le caſe, pl. 57. cites 22 H. 6. 14. per Paſton, which Newton agreed.

23. *And of diſturbance of perſons coming to the market, by which I loſe toll*, action upon the caſe lies. Ibid.

24. Caſe does not lie, nor an aſſiſe of nuſance where it is *damnum abſque injuria*, as for erecting a *mill* near my mill, whereby I loſe the cuſtom &c. of the inhabitants. Note, F. N. B. 184. (A) in the notes there (*a*) cites 22 H. 6. 14.——So for ſetting up a *grammar ſchool*. Ibid. cites 11 H. 4. 47.

25. If I have a *fair or* * *ferry* over the water, and *another levies another fair* or ferry to my nuſance, I ſhall have aſſiſe of nuſance, or action upon the caſe; per Paſton, quod Newton conceſſit. Br. Action ſur le caſe, pl. 57. cites 22 H. 6. 14. * *But* per Markham, the *ferry does not impair his franktenement*, and therefore action upon the caſe lies. Br. Action ſur le caſe, pl. 57. cites 22 H. 6. 14.

26. *And* if a man *levies a houſe, and ſtops the light of my houſe, or cauſes the rain to fall upon my houſe*, or other thing which impairs my franktenement, I ſhall have aſſiſe of nuſance; per Markham. Br. Action ſur le caſe, pl. 57. cites 22 H. 6. 14.

27. Action upon the caſe was brought, becauſe where he has a *mill in* T. time out of mind, the water was running from the vill of A. to his mill, there has the *defendant made a trench to let the water out of its courſe*; and notwithſtanding the plaintiff might have aſſiſe of nuſance, yet by the opinion of the Court the action well lies. Br. Action ſur le caſe, pl. 71. cites 21 H. 7. 30.

28. Where a man *ſtops my conduit*, I ſhall have aſſiſe of nuſance; per Row. Br. Nuſance, pl. 13. cites 14 H. 8. 31. S. P. Br. Action ſur le caſe, pl. 64. cites S. C. But action upon the caſe lies againſt S. where the river of S. have run to the vill of N. and he has *levied a mill, ſo that the river does not run as well as it was wont, and has made flood-gates, ſo that the river ſurrounded the meadow.*

29. *Caſe* was brought for *ſtopping of a way over the land of the defendant*, 3 Le. 13. pl. 31. and

4 Le. 167. and 224. ſeem to be S. C.

defendant, viz. *from the houſe* of the plaintiff *to a park*, and from the park to the houſe again, *at all times of the year, for all carriages* by preſcription, and it appears that the *plaintiff had a leaſe for life in the houſe, but not in the park as his leſſor had*; and the preſcription was traverſed and found for the plaintiff by verdict; but judgment was arreſted, becauſe the plaintiff ought to have had * *nuſance and not caſe*. D. 250. b. pl. 88. Paſch. 8 Eliz. Yevance v. Holcombe.

* D. 250. b. Marg. pl. 88. ſays, that this caſe was denied to be law. Paſch. 28. Eliz. B. in Aſton's Caſe.

D. 250. b. Marg. pl. 88. ſays, that many precedents

30. Where the *plaintiff and defendant have both franktenement* it muſt be nuſance; otherwiſe caſe is good. 3 Le. 31. pl. 31. [Mich.] 8 Eliz. C. B. Anon.

were ſhewn by the clerks where judgment had been given that caſe lies; for that it is at the * election of the plaintiff to have the one or the other, and cites Mich. 28 & 29 Eliz. B. R. Villet v. Parkhurſt.——And adds, that according to this judgment the law is clearly taken at this day. And that it was adjudged contra, and this caſe denied to be law. Mich. 8 Jac. B. R. Pollard v. Calies.

* S. P. Cro. J. 198, 199. Mich. 32 & 33 Eliz. B. R. Leveret v. Townſend.——S. C. 3 Le. 263. and 2 Le. 184.

Where the *plaintiff counted that he was ſeiſed*, exception was taken that the action ought to have been aſſiſe, and not caſe, and for that and other exceptions it was adjudged that the plaintiff nil capiat per breve. Mo. 449. Paſch. 38 Eliz. C. B. Beſwick v. Comden.

[31] A. counts that he was ſeiſed in fee of a houſe and land, to which he had common appurtenant in ſuch a place, and that he and all thoſe whoſe &c. have had a *way* from the place in which &c. and that *defendant totaliter had ſtopped up* his way whereby he could not come to his common, but *altogether loſt the uſe thereof* &c. It was inſiſted in error, that it ſhould have been aſſiſe and not caſe, in regard that the *inheritance is in queſtion*, and ſo upon the firſt motion held diverſe of the juſtices and barons, but upon conſideration had of D. 250. b. 11 H. 4. 2 H. 4. and others, they reſolved that the action was well brought; for that the plaintiff had election to bring the one or the other; for tho' a *difference* had been taken *where the way is wholly ſtopp'd up*, ſo that he loſes the uſe thereof altogether, and thereby his common, that there an aſſiſe ſhall lie, but where it is ſtopt *but in part*, that caſe lies, and not aſſiſe, they conceived it not to be any difference; for he may elect to have the one or the other action, eſpecially as this caſe is, where it *appears not that the ſtopping was made by him who is the tenant of the freehold*, but it might be done by a *ſtranger* who has nothing to do with the land, or by one who has *only a term* therein. And therefore reſolved that the action was well brought, and affirm'd the judgment. Cro. E. 845. Trin. 43 Eliz. in Cam. Scacc. Cantrell v. Church.

In an action upon the caſe, the *plaintiff* declares that he was *ſeiſed in fee* of Black-acre, and that he had a way to it by ſuch and ſuch a gate &c. and that the *defendant* had *faſtned the gate with a lock*. And upon not guilty it was found for the plaintiff; and now moved in arreſt of judgment, and adjudged that that action of the caſe is well brought, and that he is not put to an aſſiſe. 1ſt. Becauſe it does not appear if the defendant claims a franktenement in the land, by which &c. for it may be a ſtranger's, and then the aſſiſe does not lie againſt him. 2d. That is only a diſturbance of a way pro tempore, of which a man cannot have an aſſiſe; as where the party meddles with the franktenement, as in digging or making of a ditch. Noy. 112. Trin. 2 Jac. C. B. GAMFORD v. NIGHTINGALE, cites 2 H. 4. 11. 14 H. 8. 31. Dyer 319. b.

31. *But* if the *plaintiff or defendant had* but an eſtate *for years* &c. then an action on the caſe would lie, and not an aſſiſe. 3 Le. 13. pl. 31. ut ſupra.

(I) Aſſiſe and *Not Treſpaſs*.

[1. *WHERE* a man *may have aſſiſe of nuſance* for nuſance *to his way*, he ſhall not have treſpaſs; becauſe he *ought to have the moſt real action*. 19 H. 6. 29.]

[2. If

[2. If I have a *water-courſe over my own land*, and a *ſtranger* comes upon my land, and makes a trench, by which he *turns the water*, I may have an aſſiſe of nuſance againſt him, tho' I might have treſpaſs or aſſiſe of novel diſſeiſin. 32 Aſſ. 2. adjudged. Vide contra 13 H. 7. 26. b. Curia.]

3. Where the *defendant makes a trench in the ſoil of the plaintiff to the nuſance of other land of the ſame plaintiff*, yet aſſiſe of nuſance lies, and he ſhall not be drove to aſſiſe of the land nor to treſpaſs. Br. Nuſance, pl. 25. cites 32 E. 3. 8.

(I. 2) Actions. What. * *Quod permittat* for whom. In what Caſes and Pleadings.

See Actions (N. b)—— Quod permittat.

* The *diverſity* between a *quod permittat*, or an aſſiſe for a nuſance, *and* an action upon the *caſe* for the nuſance is, that a quod permittat and a writ of aſſiſe are *to abate the nuſance*; but an action on the *caſe is only to recover damages*; therefore, tho' the nuſance be removed, the plaintiff is intitled to his damages which accrued before. 2 L. P. R. 244.

1. *BEfore the ſtatute of W.* 2. 24. He to whom nuſance was done was driven to his quod permittat (which was a † writ of right in its nature, wherein was great delay) againſt the alienee; and this was becauſe there was no writ of aſſiſe of nuſance in the regiſter, but what ſuppoſed that the tenant in the aſſiſe levavit, which is remedied by this act. 2 Inſt. 405.

† S. P. And yet he who is but *leſſee for life* ſhall have and maintain it. 2 Lutw. 1588. in the Caſe of Shalmer v. Pulteney.——Cites 4 E. 3. 45.

2. *And* before that ſtatute no quod permittat did lie *for a parſon* of a church *of a nuſance done in the time of his predeceſſor* againſt the diſſeiſor or his heir, being an injury and wrong; and the reaſon was, that there was no writ in the regiſter in the caſe. 2 Inſt. 406, 407. [32]

3. In caſe upon a nuſance, the plaintiff counted that he was ſeiſed of two acres of land ſuch a day, and that the defendant *erected and exalted* &c. *& cuſtodivit & manutenuit, & adhuc* cuſtodit & manutenet &c. by which the river overflow'd the lands of the plaintiff. It was objected, that cuſtodire & manutenere are not ſufficient words of tort, and ought to have been that he levied or repaired de novo, or *exaltavit* &c. Becauſe *the original offence is before the plaintiff's title to the land* for any thing that appears in the caſe. And that in this caſe, quod permittat lies by the ſtatute, and not action upon the caſe; for by *tort done to a poſſeſſion, which* poſſeſſion *is transferred to another*, the other *had no remedy by the common law*, for which reaſon the ſtatute gave a quod permittat; and therefore the Juſtices awarded quod nihil capiat per breve. Mo. 449, 450. Paſch. 38 Eliz. C. B. Beſwick v. Comden.

S. C. cited 5 Rep. 101. b. in Penruddock's Caſe, but cites it as in Hill. 35 Eliz.

4. A. *built a houſe ſo that it over-hang'd the houſe of B. three foot.* Afterwards *A. convey'd* his houſe *to C. and B. convey'd* his houſe *to D.* who brought a quod permittat. And it was reſolved that the dropping of the water in the time of the feoffe

This caſe was afterwards affirmed in error brought in B. R.

is a *new tort*, and by the permitting the continuance of it, and *not reforming it upon requeſt*, a quod permittat lies againſt the feoffee of A. and D. ſhall recover damages. But without requeſt it lies not againſt the feoffee, tho' it lies againſt him who did the tort without any requeſt. 5 Rep. 100. b. 101. a. Trin. 40 Eliz. C. B. Penruddock's Caſe.——Als. Clark v. Penruddock.

‹Rep. 101. b —Jenk. 260. pl. 57. S. C. and that D. cannot abate the nuſance or have quod permittat in this caſe, before he has requeſted C. to abate it. For *C. is a ſtranger to the tort.*

5. In this writ there is *no need to ſhew how he has the eſtate* (of the laſt perſon that was ſeiſed in fee of both eſtates) in the houſe to which the nuſance was done. 2 Lutw. 1588. in the Caſe of SHALMER v. PULTENEY, cites 9 Rep. 53. Batten's Caſe.

Ibid. cites F. N. B. 184. [B] that it lies de fabrica, which the Court held as uncertain as ædificium.

6. A quod permittat was brought proſternere *quædam ædificia* ad nocumentum &c. And the Court held, that a quod permittat will lie de ædificio. And the Court held, that whether the *nuſance* was *by the tenant or a ſtranger*, the plaintiff may maintain a quod permittat; for it *is the ſame prejudice to the plaintiff*. 2 Salk. 458. Mich. 8 W. 3. C. B. Palmer v. Poultney.

(K) *Who ſhall have it.*

S. P. For of nuſance *before his intereſt* he ſhall not have aſſiſe; for the *making of the thing is the* diſſeiſin and *cauſe of nuſance.* Br. Nuſance, pl. 16. cites 4 E. 3. 3.——*But if it was uſed and made in the time of another, and after* is *diſcontinued, and* after *renewed in the time of another*, as the heir or leſſee for life; there per Herle J. the *heir or leſſee* ſhall have the aſſiſe. Ibid.

[1. IF a man *ſtops my way* by a ditch or hedge, and afterwards I die, and *my heir* finds the way open and uſes it, if he be diſturbed he may have an aſſiſe; becauſe this is *a new nuſance.* 4 Aſſ. 3. per Herle.]

S. P. Tho' it was moved in arreſt of judgment, becauſe the nuſance is ſuppoſed to be done be- [33] fore the plaintiff's title commenced, yet Gawdy held the declaration good; for an action on the caſe declares the whole matter, ſo that it is not material when the nuſance was erected; *for he that is hurt by it ſhall have an action*, which Fenner agreed; for it may be the nuſance was not by the ſtopping till the running of the water, and the action being brought as the truth is, is well brought, and Wray being abſent, they commanded judgment to be entered, if nothing ſaid to the contrary. Cro. E. 191. S. C.

[2. If a man be *ſeiſed of* certain *land adjoining to a* certain *river, and another ſtops the river with* certain loads of *earth, and the tenant of the ſaid land adjoining leaſes the land to another for years*, and after the ſtoppage aforeſaid of the ſaid river continues, by which the land of the leſſee is *ſurrounded*; the *leſſee* ſhall have action upon the caſe againſt him for it. For tho' the ſtoppage was before his time, yet the *continuance* after was a tort and damage to the leſſee; for by this his land was ſurrounded. Mich. 32 & 33 Eliz. B. R. adjudged between Weſtburn and Mordant.]

(K. 2) *Againſt whom* it lies.

1. NUſance ſhall be brought *againſt tenant of the franktenement.* Br. Nuſance, pl. 6. cites 50 E. 3. 11.

2. If a man *has a way over the land of three ſeveral tenants, and the one ſtops* the way, *aſſiſe* of nuſance *ſhall be againſt all*, per Priſot, but Danby *contra*; for it ſhall be againſt him only who did it; but per Priſot all the tertenants *ſhall be named.* Br. Nuſance, pl. 3. cites 33 H. 6. 26.

(L) Againſt whom it lies. Againſt *the Heir.*

[1. IF a man *builds a houſe acroſs a trench, which is to refreſh a fiſh-pool*, in deterioration of the fiſh, *and dies*, aſſiſe of nuſance lies againſt the heir if he refuſes to reform it. 17 E. 3. 9. b.] Vide (M) pl. 6.

[2. *So* if the anceſtor *levies a* longain *near the pool, by the* * *food of which the fiſh periſh* in great number, aſſiſe lies againſt the heir if he refuſes to reform it. 17 E. 3. 9. b.] * Orig. Pavoir. The year-book ſhews it to mean (food).

[3. If a man builds a *kiln to burn chalk* to the nuſance of my houſe and trees next adjoining, and after *diſcontinues the uſe of it*, and then dies, and his *heir renews the uſe* of it again, this is a new nuſance made by the heir, and a *quod permittat* lies againſt him for it. 4 Aſſ. 3. But otherwiſe it would be, if the kiln never was diſcontinued in the life of the father, but had been always uſed, and the heir continued the uſe in the ſame manner; for there no quod permittat lies againſt him. 4 Aſſ. 3.] Fol. 143.

4. If a man *builds any thing which is a nuſance to the freehold* of another, and dies, he to whoſe nuſance it is, ſhall have a writ of *quod permittat* againſt his heir that did the nuſance. F. N. B. 124. (H).

(M) [Againſt whom it lies.] *Feoffee.*

[1. IF a man *builds a houſe croſs a trench which runs into my fiſh-pool*, and after aliens it, aſſiſe lies againſt feoffee if he refuſes to amend it. 17 E. 3. 9. b. It ſeems it is to be intended of a feoffee.]

[2. *So* if a man levies a longain *ſo near to a trench which runs to my pool, that my fiſh periſh of the food* [*brought in thereby*] and afterwards aliens the longain, aſſiſe lies againſt the alienee, if he refuſes to amend it. 17 E. 3. 9. b. It ſeems intended an alienee.] See (L) pl. 3. in the notes.

[3. If a man *ſtops my way* by a foſſe or hedge, and after aliens the land, and *after I find the way open, and enter and uſe it*, if the feoffee

feoffee diſturbs me, I may have an aſſiſe of nuſance. 4 Aſſ. 3. per Herle.]

The reaſon why at common law aſſiſe of nuſance lay not againſt him who levied the nuſance, and him to whom the tenement was transferr'd, was, becauſe there was not found any writ of aſſiſe of nuſance in the regiſter but what ſuppoſed that the tenants in the aſſiſe levaverunt; and this cannot be ſaid when the tenement is transferr'd to another; for he did not levy the nuſance, but the other only; and now this ſtatute gave writ of aſſiſe in ſuch caſe; and this ſtatute extends only to aſſiſe of nuſance againſt him who did the nuſance and his alienee, 9 Rep. 55. a. Mich. 8 Jac. C. B. in Baten's Caſe.———It does *not* extend *to the alienee of the alienee.* 2 Lutw. 1588. cites S. C.———It ſeems by the ſtatute that the action ſhall be *brought againſt him that did the tort and the tertenants* after the alienation. F. N. B. 124 (H) [290] in the notes (a).

4. 13 *Ed.* 1. *cap.* 24. enacts, That *the party grieved ſhall have a writ as well againſt the alienee of a houſe, wall &c. which is a nuſance, as againſt him that erected it.*

5. There is a writ in the regiſter for the *feoffee of him to whom the nuſance was done againſt the feoffee of him* by *whom* it was done, to compel him to reform the nuſance. F. N. B. 124. (H)——But this writ is not given by the ſtatute, but may ſue &c. by the ſtatute *W.* 2. *in caſu conſimili &c. cap.* 24. *Ibid.* 125.

Cro. E. 402. Trin. 37. Eliz. B. R. Vide (N. 2)

6. Action on the caſe was brought, *quare malitioſe cuſtodivit quandam ripam, by which the water of the river ſurrounded his land;* and it appeared that the bank was levied before by the feoffor of the defendant; and adjudged that the action lies for the *continuance* againſt the feoffee, and that it would lie *againſt an heir* in ſuch caſe. Mo. 353. Hill. 6 Eliz. Beſwick v. Combden.

S. C. cited Cro. E. 402. in S. C.—— and S. C. of Rolf v. Rolfe, cited 5 Rep. 101.

7. One *houſe* was built ſo near another houſe, that the one *annoyed the other with continual dropping*, and afterwards feoffment was made of the new houſe; and it was adjudged that action on the caſe would lie againſt the feoffee *for the continuance.* Mo. 353. pl. 475. in Caſe of Beſwick v. Combdon, cites Paſch. 25 Eliz. Rolfe v. Rolfe.

in Penruddock's Caſe, and that it was brought *by the heir of the one againſt the heir of the other*; and that it was adjudged that the action lay, becauſe the *defendant upon requeſt made to him by the plaintiff did not reform the nuſance* made by his father, but permitted it to continue to the prejudice and damage of the plaintiff, but cites it as Mich. 24 & 25 Eliz. B. R.

8. If one *levies a bank in a river, by which part of my land is ſurrounded*, and afterwards I *make a feoffment* of my land to J. S. *and afterwards another part is ſurrounded by reaſon of that bank*, he ſhall have *aſſiſe* of nuſance. Per Popham. Quod fuit conceſſum. Cro. E. 403. Trin. 37 Eliz. B. R. in Caſe of Beſwick v. Cunden.

9. If the *wrong-doer reforms the nuſance before the aſſiſe or quod permittat* brought, the action lies not; howbeit if the party had any *particular loſs* by the nuſance, he ſhall *recover damages* for the ſame in an action on the caſe, ne querentes cederent a curia ſine remedio. 2 Inſt. 406.

2 Salk. 460. Hill. 13. W. 3. B. R. S. C.

10. *Defendant* being *poſſeſſed for years* of a piece of ground adjoining to an ancient meſſuage with ancient lights, whereof the plaintiff was poſſeſſed for years, *did erect a houſe* thereupon,

whereby

whereby the *plaintiff's* ſaid *lights were ſtopp'd*, for which the *plaintiff brought a former action, and recover'd damages*; after which the *defendant grants over the ground with the nuſance* to another *reſerving rent*; and after the plaintiff brings this action againſt the defendant for the continuance of that nuſance; and adjudged well brought, and would have been good againſt either. *But if* this action here were brought *by* an *alienee* of the land, to which the nuſance was, againſt the erector, and the erection had been before any eſtate in the alienee, the queſtion would have been greater, becauſe the erector never did any wrong to the alienee: but here they agreed to give judgment for the plaintiff. 12 Mod. 635. 640. Hill. 13 W. 3. in Caſe of Roſwell v. Prior.

(M. 2) *Pleadings* in Actions *againſt the Heir, Feoffee* &c.

[35]

See Actions (N. b) &c.

1. 13 Ed. 1. 24. *ENacts that the party grieved ſhall have a writ as well againſt the alienee of a houſe, wall &c. which is a nuſance as againſt him that erected it; and when the writ ſhall be againſt the party himſelf that levied the nuſance, it ſhall be in this form*, (viz.) Queſtus eſt nobis A. quod D. injuſte &c. levavit domum, murum muratum &c. & alia quæ ſunt ad nocumentum &c. *and if ſuch writ be ſued againſt the alienee of ſuch nuſance, it ſhall be ſaid* Queſtus eſt nobis A. quod B. &c. levaverunt &c.

Before this act an aſſiſe of nuſance *lay not againſt him that levied the nuſance, and againſt his alienee*, ſo as by the alienation of the wrongdoer the aſſiſe of nuſance failed. 2 Inſt. 405.

2. The alienee may have *aid of him in reverſion or remainder*. F. N. B. 124. (H) [290] in the notes (a) but adds a quære, and cites 30 E. 3. 26. 4 Aſſ. 3. Reg. 194.

(N) Nuſance. *How* it ſhall be *brought*.

[1. AN aſſiſe lies quare *arctavit viam*. 48 Aſſ. 4. 48 E. 3. 28. 11 H. 4. 26.]

See (P) pl. 6. — * Br. Nuſance, pl. 7. cites S. C.

[2. An aſſiſe lies quare *arctavit curſum aquæ*. 48 Aſſ. 4. * 48 E. 3. 27. b.]

[3. If a man ſtraightens the courſe of the water *to my mill, ſo that the water cannot deliver itſelf ſo readily as it uſed to do*, an aſſiſe quare arctavit curſum aquæ lies. 48 Aſſ. 4.]

Br. Nuſance. pl. 7. cites 48 E. 3. 27. per Perſey.

(N. 2) *Pleadings* in general in Actions, and *what recovered*.

1. IF nuſance be done, and the party *abates the nuſance*, he ſhall not have treſpaſs; for he might have recovered *damages in aſſiſe* if he had taken the aſſiſe, and now the aſſiſe is gone.

But where the *tenant of the land reforms* the

nuſance *pending the aſſiſe*, yet the plaintiff ſhall recover damages. Ibid.

gone. Br. Action Sur Caſe, pl. 29. cites 2 H. 4. 11. per Thirning.

4 Le. 167. 324. S. R.

2. In pleading of the ſtopping a way the word *obſtupavit* is ſufficient in itſelf *without ſhewing the ſpecial matter how*, as by ſetting up a gate, hedge or ditch &c. for it implies a nuſance continued, and not a perſonal diſturbance, and amounts to *obſtruxit*, as a foreſtaller, or ſaying to the plaintiff upon the land &c. that he ſhould not go there or uſe that way; for in ſuch caſes an action on the *caſe lies*: but as to any *local or real diſturbances*, obſtupavit amounts to obſtruxit. 3 Le. 13. pl. 31. [Mich.] 8 Eliz. C. B. Anon.

3. Tho' in the declaration is ſet down the *day and year of the obſtruction*, yet it ſhall *not* be *intended that it continued the ſame day only*, the words being further, by which he was diſturbed of his way and yet is; and ſo the continuance of the diſturbance is alleged. And of this opinion was the whole Court. 3 Le. 13. pl. 31. [Mich.] 8 Eliz. C. B. Anon.

4. Plaintiff declared of a *preſcription habere viam tam pedeſtrem quam equeſtrem pro omnibus & omnimodis carriagiis*; this preſcription is not good for a *cartway*; for every preſcription is *ſtricti juris*. This being ſaid to the Court by Leonard prothonotary, Dyer Ch. J. ſaid that it was well obſerved, and that he conceived the law to be ſo; and that therefore it is good to preſcribe *habere viam pro omnibus carriagiis* generally, *without ſpeaking of horſeway, or cartway, or other way* &c. 3 Le 13. pl. 31. [Mich.] 8 Eliz. C. B. Anon.

[36]

* Noy. 68. S. C. reports, that in a *quod permittat* in nuſance the pleading was quod levavit quandam molem (Anglice) a bay, by which &c. the *water-courſe of his mill is ſtopt*; and the Court ſaid that the writ ſhould abate; be-

5. The *count* in action on the caſe was, that 20 April 34 Eliz. the plaintiff *was ſeiſed of* 2 *acres of wood* in G. *adjoining to the river of H. and that the defendant the ſame day quandam molem nuper ante by the defendant erected and exalted ſuper & trans rivulum prædict. & ſemper poſtea* till the day of the writ purchaſed, *cuſtodivit & manutenuit & adhuc* cuſtodit & manutenet, *by which the river overflowed the lands of the plaintiff*: and exceptions were taken, among which one was, that *cuſtodire & manutenere* are not ſufficient words of tort; and that therefore the words ought to have been, that he *levied or repair'd de novo*, or *exaltavit* molem prædict. becauſe the original offence is before the plaintiff's title to the land for any thing which appears in the caſe; and judgment was that the plaintiff nil capiat per breve. Mo. 449. Paſch. 38 Eliz. C. B. Beſwick v. Comdon.

cauſe *molet is an equivocal term*, and is not proper for a brook or bay.——Cro. E. 520. S. C. in B. R. Mich. 38 and 39 Eliz. reports that it was reſolv'd upon a demurrer, that there is no offence laid to be committed by the defendant; for the plaintiff alleges that he kept and maintained a bank, which is that he *kept it as he found it*, and that is not any offence done by him; for he did *not do any thing*; and if it was a nuſance before his time, it is not any offence in him to keep it. But the plaintiff is to have his remedy by quod permittat, and therefore this caſe differs from 4 Aſſ. 3. for there the *uſing was a new nuſance*, but it is not ſo here: wherefore adjudged for the defendant.

6. In

6. In an *aſſiſe of nuſance* brought becauſe *levavit domum ad nocumentum of his mill, by which the wind is ſtopped to come at his mill, ſo that he cannot grind* &c. and the jury *find that the defendant has erected a houſe de novo, and that only* 2 *yards of the top of the houſe is to the nuſance:* this is found for the plaintiff; for here the declaration is not ſatisfy'd but only *abridg'd;* and the judgment ſhall be that the 2 yards ſhall be dejected. 2 Roll. 704. pl. 23. cites M. 11. Ja. B. between GOODMAN and GORE, and others adjudged.

(O) *Quare divertit* Curſum Aquæ.

[1. IF by a *trench* or other thing done, the water *holds its courſe in part where its courſe was not before (tho' not in all)* yet aſſiſe lies quare divertit curſum aquæ. * 48 E. 3. 27. b. Curia. 48 Aſſ. 4. Quære Dy. 8 El. 248. 80.] * Br. Nuſance. pl. 7. cites S. C.

[2. If by putting of *piles and ſtakes, and for default of cleanſing* the water is by *ſo much ſtraightned that it cannot run ſo readily as before, aſſiſe lies quare divertit curſum aquæ.* * 48 E. 3. 27. b. dubitatur. 48 Aſſ. 4. dubitatur.] * Br. Nuſance, pl. 7. cites S. C.

[3. If a man levies a *houſe a-croſs* a courſe of water which runs to my mill, the writ ought to be quare divertit curſum aquæ &c. and not quare levavit domum ad nocumentum liberi tenementi. 11 H. 4. 26. dubitatur.] F. N. B. (E) in the notes there (c) at the end cites S. C.

(P) *Obſtruxit.*

[37]

[1. ASSISE lies quare obſtruxit *quandam viam.* 48 E. 3. 28. 48 Aſſ. 4.] As to any local or real diſturbance *obſtupavit* amounts to obſtruxit. 3 Le. 13. pl. 31. [Mich.] 8 El. C. B. Anon.

[2. This writ *lies when he cannot have his way nor any part of it.* 11 H. 4. 26.]

[3. If a *way be ſtopt in part,* and part not, but the *better part* is ſtopt, *ſo that there is not any paſſage,* aſſiſe lies quare obſtruxit viam. 48 E. 3. 28.]

[4. If a *way to go with carts or carriages* be *ſtopt with a foſſe to the middle of the way, ſo that he cannot go with his cart,* aſſiſe quare obſtruxit lies. 48 E. 3. 28. adjudged. 48 Aſſ. 4. adjudged. For it is all ſtop'd as to the paſſing with carts.] Fol. 144.

[5. If a *houſe* be *levied acroſs a way, by which, where he was wont to have his way directly,* now he is made to go round about ſeveral feet out of his right way, aſſiſe quare obſtruxit lies, becauſe tho' he has a way, yet 'tis not ſo readily as he was wont. 11 H. 4. 26. dubitatur. Where the ancient way is ſtopt.]

[6. An aſſiſe quare obſtruxit *curſum aquæ* does not lie; for the courſe

See (N). Br. Nuſance, pl. 7. cites 48 E. 3. 7. that where the water is obſtructed in toto, a writ will lie quod obſtruxit aquam.——Pl. 13. S. P. cites 14 H. 8. 31.

courſe of the water cannot be totally ſtopt; for when a thing is made acroſs the courſe of the water, the water will reflow over the ſides, which is more properly a miſturning than an obſtruction. 48 E. 3. 28. 48 Aſſ. 4. per Cand.]

(Q) *Proſtravit.*

F. N. B. 183. (N) in the notes there cites 1 H. 4. 83. that if I have common appendant, lying beyond a bridge which a prior ought to repair ratione tenuræ, and the bridge *falls for want of reparation*, I ſhall not have aſſiſe of nuſance quare pontem proſtravit. 1. Becauſe there is no ſuch writ. 2. Becauſe *here is only a neglect*, and for that an action on the *caſe lies*.

[1. ASSISE quare proſtravit *pontem* does not ly. 11 H. 4, 83.]

(R) *Levavit.*

Br. Nuſance, pl. 9. cites 11 H. 4. 25. per Hals.

[1. IF a man makes a *trench acroſs my way, or other thing*, the writ ſhall be quare levavit *foſſatum, ſepem vel hujuſmodi*. 11 H. 4. 26.]

Br. Nuſance, pl. 9. cites S. C. per Hank.

[2. *So* if a *foſſe or hedge* be levied, *by which my land or meadow is ſurrounded*, I may have ſuch writ quare foſſatum vel ſepem levavit ad nocumentum &c. 11 H. 4. 26.]

and ſo where it hinders the *water to my mill*, per Weſtbury; but June contra.

S. P. And per June, the jury [38] ought to have the view; for the nuſance ſhall be ouſted; and it may be that part of the way is ſtopp'd only, and not the whole, and then part of the houſe ſhall be remov'd, and not all. Br. Nuſance, pl. 9. cites S. C.

[3. If a man levies a houſe *acroſs my way*, ſo that where I uſed to go directly, now I *muſt go round about* out of my right way, and not directly, I may bring aſſiſe quare domum levavit ad nocumentum &c. 11 H. 4. 25. b. dubitatur.]

A. brings an action on the caſe againſt B. and C. *quare exaltaverunt ſtagnum* &c. by which A.'s meadow is ſurrounded and overflowed with water; upon not guilty pleaded, a verdict is given for the plaintiff, quod erexit ſtagnum ut præfertur; the plaintiff has judgment affirm'd in error; for exaltavit is all one in ſubſtance with erexit. Jenk. 263. pl. 65. cites Mich. 28 Eliz. B. R.

4. *Quare exaltavit ſtagnum* per quod pratum &c. Vide 2 Le. 180. Mich. 28 and 29 Eliz. B. R. Gyles's Caſe.

(S) *Reformation. In what Caſes* a Man may reform it, *and how.*

So of water running to my houſe. Br. Nuſance, pl. 14. cites 9 E. 4. 35.

[1. IF a man makes a *ditch in his land, by which the water which runs to my mill is diminiſhed*, I may *fill the ditch up again*. 9 E. 4. 35. b.]

[2. If

[2. If a man in his own ſoil *erects ſuch a thing which is a nuſance to my mill, houſe or land* &c. I may *ſtand in my own land, and fling it down.* 9 E. 4. 35. b.]

Nuſance was that one had *fixt a pool and ſtakes in his own land* to the nuſance of the other, ſo that his mill could not grind, by which he *broke the nuſance, and a houſe, and could not otherwiſe avoid the nuſance*; and per tot. Cur. the breaking down the nuſance is lawful. Br. Nuſance, pl. 14. cites 9 E. 4. 35.

But per Choke, the *entering into the land of the other* is not lawful, tho' the breaking be lawful: contra Danby and Littleton; for the one cannot be in ſeveral caſes without the other. Ibid.

[3. *So I may enter upon his ſoil, and deject the nuſance*, and juſtify it in a writ of treſpaſs. 9 E. 4. 35. Curia. * 8 E. 4. 5. Co. 9. Baten 55. Co. 5. Penrud.]

* Er. Nuſance, pl. 33. cites S. C.—— 5 Rep. 101. b. Penruddock's Caſe.——A. may *enter on the owner's ſoil*, and pull down a houſe that is a nuſance. 2 Salk. 459. Hill. 10 W. 3. B. R. The King v. Roſewell.

4. Nuſance ought to be abated in as *convenient manner* as may be: if a *houſe* be levied to the nuſance, all the houſe may be abated. Jo. 222. cites 8 E. 4. 5. a.

If *part of a houſe* be a nuſance,* this part only ſhall be abated: but when the houſe (ſo far as the nuſance is) is abated, 'tis not lawful to *deſtroy the materials*, but they ſhall remain to the owners of them, and to him that made the nuſance. Jo. 222. Paſch. 6 Car. 1. B. R. in Caſe of James v. Hayward.——* Br. Nuſance, pl. 9. cites 11 H. 4. 25. per June.

When A. has a right to abate a public nuſance, he is *not bound to do it orderly*, and with as little damage in abating it as may be. Salk. 459. Mich. 9 W. 3. B. R. Lodie v. Arnold.——Hawk. Pl. C. 199. cap. 12. S. 75. ſays, that as the law is now holden, it ſeems that in a *plea juſtifying* the removal of a nuſance, you *need not ſhew that you did as little damage as might be.*

5. If a *houſe adjoining* to my houſe is *on fire*, I may *raſe* it, ſo that it ſhall not burn my houſe. Per Littleton, Br. Nuſance, pl. 14. cites 9 E. 4. 35.

(T) *Common.* Reformation. [39]

[1. IF a man erects a *gate*, and hangs it *upon iron-hooks croſs a highway*, which is a common nuſance to the people of the King, any of the King's people who paſs in the way may *fling down* the gate, *and cut the gate from the hooks, or uſe any other means* to reform the nuſance, * and to clear the way of this impediment, without any indictment of it. P. 6 Car. B. R. between *James* and *Hayward*, adjudged upon demurrer per Curiam, againſt the opinion of Crook.]

Cro. C. 184, 185. S. C.—— S. C. cited. 2 Salk. 459. * Fol. 145. Mich. 9 W. 3. B. R. in the Caſe of Lodie v. Arnold, and that tho' the defendant in that caſe might have opened the gate without cutting it down.

2. A *rope-dancer erected a ſtage in Lincoln's-inn-fields*, but upon a petition from the inhabitants, there was an *inhibition from Whitehall.* Afterwards, upon a *complaint to the Judges that he had erected one at Charing-croſs*, he was ſent for into Court; and Hale Ch. J. told him, he underſtood it was a nuſance to the pariſh, and ſaid, that in 8 Car. 1. Noy came into Court and

Jacob Hall proceeding in erecting a great booth at Charing-croſs for his feats of activity and

rope-dancing there, notwithſtanding his being forewarn'd by the Court of B. R. and being again brought into Court, he with great impudence affirmed, that he had the King's warrant for what he was doing, and promiſe to bear him harmleſs; whereupon the Court required him to enter into a recognizance of 300 l. to ceaſe further building, which he obſtinately refuſing was committed; and the *Court caus'd a record to be made of this nuſance as upon their own view* (it being in their way to Weſtminſter), *and awarded a writ thereupon to the ſheriff of Middleſex, commanding him to proſtrate the building.* And the Court ſaid, it was a nuſance to the King's royal palace; beſides that it ſtraitned the way, and was inſufferable in that reſpect, and that things of this nature ought not to be plac'd amongſt people's habitations. Vent. 169. Mich. 23 Car. 2. B. R. Jacob Hall's Caſe.———S. C. cited by Holt Ch. J. who ſaid, that a prohibitory writ iſſued, and made the party pull down his ſtage. 5 Mod. 142.

and pray'd a *writ to prohibit a bowling alley erected near St. Dunſtan's church*, and had it. Mod. 76. Mich. 22 Car. 2. B. R. Jacob Hall's Caſe.

3. *Any perſon* may abate a common nuſance. 2 Salk. 458. Hill. 1 W. & M. B. R. in Caſe of the King v. Wilcox.——Per Houghton J. 2 Roll. R. 31.

(U) *At what time* Dejection [may be].

Roll. R. 393. S. C. Throwing down *materials erected erga conſectionem* domus upon the King's highway,

[1. IF a man *intends to erect* a houſe (the which houſe, if it be erected, will be *a nuſance to me by ſtopping my ancient lights* of my houſe) *and for this purpoſe erects certain pieces of timber for the building*, I cannot deject this timber before he has done more, for this of itſelf is not any nuſance, and it is not known whether he will proceed in the building; for nemo tenetur divinare. My Reports, 14 Ja. Norris v. Baker.]

& per proſtrationem prædict. is roll'd and tumbled into the ſea, juſtifiable. Cumb. 417. Lovey v. Arnold.——2 Salk 458. S. C. Mich. 3 W. B. R. Lodie v. Arnold.

Roll. R. 394. S. C. —He may *prevent his being prejudiced*; per tot. Cur.

[2. *But* if a *man builds a houſe which overhangs my houſe*, there I may deject this houſe *before any water drops*, and ſo prevent the prejudice which may enſue before it be done in facto; becauſe it is *apparent* (and nearly poſſible) Co. 5. Penrud. 101. b. My Reports, 14 Ja. B.]

[40]

5 Rep. 101. b.——But Jenk. 260. pl. 57. adds, that *(after requeſt)* and before prejudice, he may abate it, and that it was ſo adjudged and affirmed in error; but I do not obſerve that in 5 Rep. 101.

3. If one ſees his neighbour erecting a thing which will be a nuſance, he *cannot* abate it *till* it become *an actual nuſance*; ſo the maxim of præſtat cautela quam medela holds not in this caſe. Per Holt Ch. J. 12 Mod. 510. Paſch. 13 W. 3. The King v. Wharton & al.

(W) *Who may deject it.*

S. P. Arg. Godb. 124. —I cannot enter into

[1. IF a nuſance be *done to my franktenement, I may enter into his land* and deject the nuſance. 9 Rep. Baten. 55. 9 E. 4. 35. b. 8 E. 4. 5. Co. 5. Penrud.]

the land of the other to beat it down. Het. 74. Holt v. Sandbach.—He may either have an aſſiſe of nuſance,

nuſance, or he may pull or beat down a houſe ſo built whereby his lights are ſtopp'd, if he can do it on his own land. Het. 74. Holt v. Sambach.

If a man builds a *houſe* ſo near mine that it *ſtops my lights*, or *ſhoots the water on my houſe*, or is any way a nuſance to me, I may * *enter on the owner's ſoil* and pull it down; and for this reaſon, only a ſmall fine was ſet upon the defendant in an indictment for a riot in pulling down ſome part of a houſe, it being a nuſance to his lights, and the right found for him in an action for ſtopping his lights. 2 Salk. 459. The King v. Roſewell.——* So in caſe of *water ſtopp'd* by which my land is drowned. Yelv. 142.

[2. If a man *ſtops my way to my common, and incloſes the common*, I may juſtify the dejection of the inclosure of the common and way. 29 E. 3. * b.] * It ſhould be (b)

[3. If a *nuſance* be done *to my land in which I have an eſtate for years*, yet I may caſt down this nuſance. 9 E. 4. 35. b.] It ſeems that *leſſee for years* may enter and abate the nuſance F. N. B. 184, 185. (G).

The makers of the ſtat. of W. 2. knew well, that *the party injured by the nuſance, though he had but an eſtate for years, might enter and abate* the nuſance, though made in the party's own ground, whether it were houſe, wall, or other nuſance, and that not only when it was in the hands of the wrong-doer, but in the hands of the alienee. 2 Inſt. 405.

4. *Every man* may abate a common nuſance. Br. Nuſance, pl. 3. cites 33 H. 6. 26.

5. If *water runs near a vill*, and is ſtopp'd, *any one of the vill* may break the ſtoppage, ſo that the vill ſhall not be ſurrounded. Br. Nuſance, pl. 14. cites 9 E. 4. 35. Br. Treſpaſs, pl. 186. cites S. C.

6. A particular *perſon* may *break the hedge which ſevers parcel of the highway*. Br. Nuſance, pl. 1. cites 26 H. 8. 26, 27.

7. *Feoffee* may abate a nuſance as well in the hands of a feoffee as in the hands of the tortfeaſor himſelf. 5 Rep. 101. b. Trin. 40 Eliz. C. B. Penruddock's Caſe. If nuſances are *increaſed after ſeveral feoffments*, theſe increaſes are *new nuſances*, and may be abated by the reſpective feoffees *without requeſt*. Jenk. 260. p. 57.

8. Every pariſhioner may abate nuſance *in cœmeterio*. Jo. 222. Paſch. 6 Car. 1. B. R. in Caſe of James v. Hayward. S. P. Tho' it has remained there 20 years. F. N. B. 183. (I) in the notes there (a) cites 6 E. 2. Aſſiſe 454.——And may pull down a wall hindering their way to the church, F. N. B. 185. (B) cites 6 E. 2.

9. A common nuſance may be abated or removed *by thoſe perſons who are prejudiced* by it. Paſch. 23 Car. B. R. And they are not compellable to bring actions to remove them. 2 L. P. R. 244.

(W. 2) *Proceedings.* [41]

1. WHEN nuſance is preſented before commiſſioners &c. of *not cleanſing of a river, ad nocumentum* &c. *diſtringas ſhall iſſue* againſt thoſe who are preſented to make the reparation &c. Br. Proces, pl. 101. cites 37 Aſſ. 10.

2. In *aſſiſe* of nuſance the party *had the view and after was eſſoigned* upon the view, and at the day *made default*, and the

other pray'd *diſtringas ad reſpondendum* as well to the default as to the party, and could not have it, but had reſpondendum *to the party only, and not to the default*; quod nota. And the like diſtreſs ſhall be in *quod permittat*, and not otherwiſe; quod nota. Br. Nuſance, pl. 4. cites 42 E. 3. 9.

Ibid. pl. 28. cites S. C.

3. It was preſented in B. R. *that W. obſtupavit curſum aquæ de S. per arbores creſcentes ſuper ripa aquæ malitioſe & voluntarie, unde naves ibidem tranſeuntes impediuntur ad nocumentum* &c. and by ſome his ſufferance is a tort. Per Knivet J. this is not his act, therefore he ſhall not be amerced, but writ ſhall iſſue to ouſt the nuſance at the coſts of the defendant, and in caſe he will do nothing upon the diſtringas, other remedy ſhall be provided; quere what remedy? Br. Preſentments in Courts, pl. 11. cites 42 Aſſ. 15.

4. In this action they ſhall not *fourch by diſtreſs infinite* any more than in treſpaſs; for there if the one appears, and the other not, they ſhall proceed againſt him who appears; and if he be convicted, and the plaintiff will waive his ſuit againſt the other, he ſhall have judgment and execution immediately, and ſo here; Per Belknap. Br. Nuſance, pl. 6. cites 50 E. 3. 11.

(X) *Pleadings* in Abatement or Bar.

Quod permittat by the Biſhop of Wincheſter, *againſt the Abbot of Hide of the turning of water*, the *defendant ſaid, that it was not turned in the time of the plaintiff, and therefore it is not to the nuſance of his franktenement*, by which the writ was abated by award; for falſe &c. quod nota. Br. Brief, pl. 529. cites 2 H. 4. 13.

1. IN aſſiſe of nuſance the *defendant ſaid, that the houſe which it ſuppoſed to be to the nuſance, was levied in the time of the predeceſſor of the plaintiff*; and if &c. *that the plaintiff has no way there* &c. *but at the ſufferance of the tertenant, and ſo levied without tort and nuſance*, and well. Br. Nuſance, pl. 36. cites M. 18 E. 2. and 20 E. 3.

2. Aſſiſe of nuſance *of levying a bank in K.* the *defendant ſaid, that K. is a hamlet of S.* Judgment of the writ, *and if found that it be not* &c. *that the bank was levy'd in the time of one J. N. who infeoff'd him of the land in which* &c. and it was adjudged a good plea. Br. Nuſance, pl. 39. cites 3 E. 3.

3. In aſſiſe of nuſance *of levying a lime-kiln to the nuſance of the plaintiff*; the *defendant ſaid, that there was a lime-kiln levied there before the plaintiff had any thing in the franktenement*, to which he ſuppoſes the nuſance, and uſed, *abſque hoc that there was a lime-kiln levy'd after to the nuſance* &c. Priſt &c. and this iſſue taken; for if the nuſance was made in the time of the plaintiff he ſhall not have thereof aſſiſe of nuſance; quod nota. Br. Traverſe per &c. pl. 167. cites 4 Aſſ. 3.

4. By *jointenancy or nontenure* the writ ſhall abate; but it is ſaid there, that in action real againſt two, the one ſhall not anſwer without the other, or till the proceſs be determined againſt the other. Br. Nuſance, pl. 6. cites 46 E. 3. 23.

5. Aſſiſe of nuſance of *miſ-turning a water, ſo that his mill could not grind;* and it was ſaid, that he ſhould have aſſiſe *de libero tenemento* when the mill cannot grind; but *where the mill is in one vill, and the miſ-turning the water is in another vill,* then aſſiſe of nuſance lies; for if he brings aſſiſe of novel diſſeiſin de libero tenemento, he ſhall recover nothing but in the vill where the diſſeiſin was; and therefore becauſe the mill is in another vill, nothing ſhall be redreſs'd in this vill but only where the miſ-turning was, viz. the diverted courſe of water; but if all had been in one vill, the writ had been abated as above. Br. Nuſance, pl. 18. cites 9 Aſſ. 19. [42]

6. Where he *aſſigned the nuſance in B.* and he *broke it in B. and C.* yet well, notwithſtanding that C. be not named; for the *firſt cauſe aroſe in B.* where the nuſance commenc'd, and therefore well; and the writ by this ſhall not abate. Br. Nuſance, pl. 19. cites 16 E. 3. lib. Aſſ. 3.

7. Aſſiſe of nuſance where he had a meadow in N. and he and thoſe whoſe eſtate &c. have had *a way from the ſaid meadow to the high-ſtreet* of N. thence to go to what part he will, there has the *defendant levied a houſe acroſs the way, by which he cannot go, but a long way about,* and ſo to the nuſance; and the plaint held good, as well as if he had claim'd it to his houſe; quod nota; by which the defendant ſaid that the plaintiff had it by ſufferance for a ſwarth of hay, and travers'd the preſcription &c. Br. Nuſance, pl. 21. cites 20 E. 3. 18.

8. In aſſiſe of nuſance it is a good plea, *that this land to which* the nuſance is done *extends into this vill and another.* Br. Brief, pl. 455. cites 46 Aſſ. 9.

But where one *ſaid, that the gorſe* in which the nuſance is ſuppoſed to be, *extends into A. B.* Judgment of the *writ brought in A. only,* he was ouſted of the plea, becauſe the *defendant had pleaded to the action before*; quod nota; for otherwiſe it ſeems that it had been a good plea. Br. Nuſance, pl. 6. cites 46 E. 3. 23.

9. *But* it is no plea that the plaintiff has *brought treſpaſs of this nuſance* with a continuando of the aforeſaid treſpaſs &c. within which time the aſſiſe of nuſance is; for treſpaſs or breaking cannot be continued. Br. Ibid.

10. In *aſſiſe* of nuſance before Juſtices the *party ſhall not have the view, but the jurors;* and if the party *pleads to the writ matter triable* by the aſſiſe, yet he *ſhall plead over* to the aſſiſe *no tort,* or *not levied* to the nuſance; ſo that a man ſhall *have but one iſſue* at his peril; and in caſe this be found againſt him, he has loſt without inquiring further of the principal point. Fitzh. Nuſans. pl. 10. cites H. 50. E. 3. 11. per Belk.

11. *Pardon for* a nuſance is void, as for the *continuance* thereof. Cro. J. 492. in Caſe of Dewell v. Sanders.——cites 22 H. 6.

12. If a man does a nuſance, and after he *reforms it before action thereof brought,* the action is determined, and no action of nuſance lies. Br. Nuſance, pl. 2. cites 28 H. 6. 12. per Moyle Arg.

And if the *party* who is *grieved abates a nuſance,* he ſhall not have action of treſpaſs of the damages meſne. Br. Treſpaſs, pl. 72. cites 2 H. 4. 11. ——Br. Action ſur Caſe, pl. 29. cites S. C. per Thirning.

For in aſſiſe of nuſance, it is a good plea *that the plaintiff has broke down the nuſance pending the writ* of aſſiſe of nuſance. Br. Brief, pl. 455. cites 46 Aſſ. 9.

13. Treſpaſs upon the caſe for ſtopping of water, and *counted how the water ought to have its courſe by the ſewer of Henly to Abbingdon*, there has the *defendant ſtopped the ſaid ſewer in A. by which the water has ſurrounded 20 acres of the plaintiff's land in A.* ad damnum &c. Choke *ſaid, before the treſpaſs R. C. was ſeiſed of a mill in A. acroſs the ſaid ſewer in fee, and of a bay, and of a gutter in the ſaid bay, which ſaid bay and gutter are of the contrary ſide of the ſaid ſewer on the weſt, and that R. C. and all thoſe whoſe eſtate he has* in the ſaid mill, bay and gutter *have uſed to repair*, or new make the ſaid bay and gutter, as they were before the rupture time out of mind, and have uſed to cleanſe the gutter aforeſaid, and ſo cleanſed to demiſe &c. and *that before the treſpaſs the ſaid R. leaſed the ſaid mill, bay and gutter to the defendant for 20 years*; which yet continues, by which he was poſ-
[43] ſeſſed; and * becauſe the ſaid bay and gutter were ruinous, the defendant repair'd them, which is the ſame ſtopping of which the action is brought, judgment &c. and to the ſtopping of the reſt not guilty, and the other e contra; and by the Reporter this is no iſſue, but *ſhall ſay that he did not ſtop*; but ſee elſewhere that † *not guilty* is a good iſſue *where the thing lies in feaſance; contra where it is of nonfeaſance*; as where a man ought to repair a bridge, make a houſe &c. and does not, there not guilty is no plea, as appears elſewhere; and the plaintiff aſſigned the treſpaſs in another place, viz. in the eaſt part, by which he made other plea for the eaſt part; and the plaintiff ſaid, that he ſtopped it de ſon tort demeſne, abſque hoc, that the ſaid R. and all thoſe whoſe eſtate &c. have uſed to ſtop the ſaid ſewer in the caſt part modo & forma; and the other e contra. Br. Action ſur le Caſe, pl. 77. cites 39 H. 6. 32.

* Orig. (purle ruine le dit bay &c.)

† S. P. Br. Action ſur le Caſe, pl. 111. cites 2 E. 6.

14. Nuſance, that he levied *a mill in D. to the nuſance of his franktenement there*; the *defendant ſaid, that he and all thoſe whoſe eſtate he has, have had a mill in D.* time out of mind, *which fell by tempeſt, and he re-built it*, abſque hoc, *that he is guilty of any nuſance in D. in the county aforeſaid* prout &c. and well, to traverſe the vill only, becauſe it is of a *thing local*; but in battery and goods carry'd away, he ought to traverſe all the county; for thoſe are tranſitory. Br. Nuſance, pl. 34. cites 18 E. 4. 1.

15. Treſpaſs upon the caſe where the *plaintiffs* &c. have been *ſeiſed of certain houſes and gardens in right of the church time out of mind* &c. and that they and their tenants time out of mind &c. *have had a water-courſe in a river running into a ditch from the river of T.* to the houſes and gardens to die cloths, water beaſts, and to bake and brew, there has the defendant *levied a lime-pit for ſkins of calves* and ſheep *ſo near the ſaid river, that the corruption of the ſaid lime-pit has corrupted the ſaid river, by which his tenants left him*; per Keble the writ is, that the defendant has levied &c. there, which *ſhall be intended in the ſoil of the plaintiff*,

and then treſpaſs vi & armis lies; and a good exception, per Cur. wherefore it was amended ex aſſenſu; by which Keble *ſaid, that the plaintiff has nothing in the water but in common with W. S.* and no plea; wherefore he *ſaid, that the plaintiff has nothing in the land cover'd with the water but jointly* &c. Br. Action ſur le Caſe, pl. 123. cites 13 H. 7. 26.

16. In an aſſiſe of nuſance he may in his plea *ſhew the nuſance to be to diverſe freeholds.* F. N. B. 185. (C).

17. When a man has lawful eaſement or profit by *preſcription* time whereof &c. Other *cuſtom* which is time whereof &c. cannot toll this; for one cuſtom is as ancient as the other; as if A. has a *way over B's land* to his franktenement by preſcription of time whereof &c. B. cannot allege by preſcription or *cuſtom to ſtop* the ſaid way. 9 Rep. 58. b. Mich. 8 Jac. Aldred's Caſe.

(Y) Pleadings. *Iſſue.*

1. A. And M. his wife brought nuſance againſt J. S. *for levying of a market in W. to the nuſance of their free-market in R.* for that the ſaid A. and M. in right of the ſaid M. had their market every Wedneſday in R. to which market the country people near uſed to come &c. of whom the plaintiffs had toll &c. and the defendant levied a market at W. *to hold the ſame day only two miles from R. and that the country people who uſed to come to S. do go to W.* The *defendant defended the tort and demanded the view,* but it was not allowed. 2d. He alſo took *exception, becauſe they did not ſay their market was elder,* but it was not allow'd; for it ſhall come by way of plea. 3d. He took exception, becauſe M. *had it only for life, and ſo ought to have another count,* ſed non [44] allocatur; wherefore he *pleaded, that he had not levied any market to the nuſance of their market,* and iſſue was taken, and the averment received by award. F. N. B. 184. (A) in the notes there (b) cites Paſch. 13 E. 3. W. de Clynton's Caſe.

2. In *aſſiſe of nuſance vicontiel,* they ſhall have *but one iſſue,* as in præcipe quod reddat, and *ſhall not ſay, and if found that it be not, non levavit ad nocumentum,* as in aſſiſe; per Belk, to which it was not anſwered. Br. View, pl. 82. cites 50 E. 3. 11.

(Z) *Indictments* &c. Pleadings *and Judgment.*

See Chimin —Indictment (Q) pl. 10. &c.

1. A. Was *ſeiſed of land in which B. had common, and incloſed the land,* whereupon A. was indicted for making ſuch incloſure, vi & armis. It was moved that indictment lay not upon this matter, but an action upon the caſe, and that had it been upon the lands of another, it were not material; for it is but a hindrance from the taking of common, which cannot be vi & armis; and for that and other reaſons the defendant

was diſcharged. 2 Le. 117. pl. 159. Mich. 29 & 30 Eliz. B. R. Willoughby's Caſe.

2. An exception was taken to an indictment for incroaching upon the highway, becauſe it was *not expreſſed of what place he was*. Sed non allocatur; for proceſs of outlawry lies not againſt him, but diſtreſs. Cro. E. 148. Mich. 31 & 32 Eliz. B. R. Ld. Dacre's Caſe.——Ibid. ſays it was ſo ruled in Ld. Paget's Caſe.

3. An indictment was *for ſtopping quandam viam valde neceſſariam for all the King's ſubjects there paſſing*. Exception was taken to it, becauſe it wanted the word *(regiam)*; and the word (neceſſariam) doth not imply any matter; for a foot-way is neceſſary, and for that and another cauſe the party was diſcharged. 4 Le. 121. pl. 243. Trin. 32 Eliz. B. R. Keen's Caſe.

4. One *pulled down part of a houſe which was a nuſance to his lights*, the right of which was found for him in an action for ſtopping his lights; and in an indictment for a riot in pulling it down, a ſmall fine only was ſet upon the defendant. 2 Salk. 459. Hill. 10 W. 3. B. R. The King v. Roſwell.

5. Exception was taken to an indictment, becauſe it was *quia erexit quandam januam apud Horneſey in com. Middleſex in via regia ducent. unto Highgate*, and doth *not ſhew in what county Highgate was;* but *Middleſex was wrote in the margin*. The whole Court was clear in opinion that this is well, and that (Middleſex) in the margin ſhall belong to Highgate alſo; but per tot. Cur. it would be otherwiſe in caſe of felony. Bulſ. 203. Paſch. 10 Jac. The King v. Springal.

He ought to have ſhewn that they flew about and devour'd the corn. Roll. R. 201. S. C.——

6. A preſentment was, that J. S. *erected a dovecoat, and ſtored it with pigeons*, but did *not ſay* in the preſentment that it was *ad nocumentum* * *ligeorum domini regis*, which ought to be in every preſentment; and altho' the party hath here *averred that it was ad commune nocumentum*, yet that is not ſufficient; for *it ought to be in the preſentment*, which is the charge, and this fault was held incurable. Cro. J. 382. Mich. 13 Jac. B. R. Prat. v. Stearn.

* An Indictment *for not repairing a bridge*, by reaſon whereof it was ruinous, *ita quod ligei domini regis per eam tranſire non poſſunt*, and concluding with *ad nocumentum eorundem &c.* was reſolved to be good *without* uſing thoſe words, ad nocumentum *omnium ligeorum* &c. for by the King's liege people ſhall be underſtood all his liege people. Hawk. Pl. C. 1. 98. cap. 75. ſ. 3.

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7. A *preſentment* was made *in a Leet for erecting a glaſs-houſe*, which was ſaid to be *ad magnum nocumentum per juratores jurat. pro dom. rege & dom. manerii & tenentibus*. This preſentment was clearly ill, becauſe it was not *ad commune nocumentum*. And it was ſaid further, that the Leet was the King's Court, and therefore it ought not to be jur. pro dom. rege & dom. manerii & *tenentibus*; but the Court held it *ſurpluſage* for the *word* (tenentibus), and good for the King and the lord of the manor; for leets are granted to the lords as derived out of the tourn for the eaſe of the reſiants within its juriſdiction. Vent. 26. Paſch. 21 Car. 2. B. R. Anon.

8. An indictment of nuſance was quaſhed, becauſe it was *in detrimentum*

detrimentum omnium inhabitantium &c. Mod. 107. Paſch. 26. Car. 2. B. R. Sir John Thorowgood's Caſe. S. C. cited Hawk. Pl. C. 197. cap. 75.

S. 3.——So where one was indicted for ſtopping of a highway *ad nocumentum diverſorum ligeorum* dominæ reginæ; and becauſe it was not of all the Queen's liege people, he was diſcharged. Cro. E. 148. Mich. 31 & 32 Eliz. B. R. Sir Rowland Hayward's Caſe.

Serjeant Hawkins ſays it may be probably argued, that an indictment *for laying logs in the ſtream of a navigable publick river, ad nocumentum J. S.* may be maintained; becauſe it cannot but be a common nuſance; and that if the law be ſo in this caſe, why ſhould not an indictment ſetting forth a *nuſance to a way, and expreſsly* and unexceptionably *ſhewing it to be a highway*, be good notwithſtanding it conclude *in nocumentum diverſorum ligeorum &c.* without ſaying omnium; and aſks, why ſuch concluſion ſhould be more neceſſary in an indictment for one kind of nuſance than for any other? and ſays, the authorities which ſeem to contradict this opinion, might go upon this reaſon, that in the body of the indictment it did not appear with ſufficient certainty, whether the way wherein the nuſance was alleged were a highway or only a private way; and therefore that it ſhall be intended from the concluſion of the indictment that it was a private way. Hawk. Pl. C. 198. cap. 75. ſ. 5.

9. If a man comes hither to *receive his fine* on a *conviction* of a nuſance, he ought not to be fined before he *remove it*, and hath ſu'd out a *conſtare facias* to the ſheriff, and obtains a conſtat return'd that it is removed. 2 Show. 60. Paſch. 31 Car. 2. B. R. The King v . . . . .

10. The owner of the *glaſs-houſe at Lambeth* was indicted, convicted and fined for maintaining that houſe being a common nuſance. Then comes a *general pardon*. The Court upon conſideration held, that the pardon *will diſcharge him only as to the fine, and not as to the abatement*; for that is not a puniſhment of the party, but a removal of that which is a grievance to other people, and any perſon may abate a common nuſance. 2 Salk. 458. Hill. 1 W. & M. B. R. The King and Queen v. Wilcox.

11. A *recognizance* was moved to be *diſcharged* on an affidavit that the nuſance was abated, but the Court refuſed unleſs the party would confeſs the title, and ſubmit to a fine in perſon, or try the right; and if it was found for him they would diſcharge the recognizance, otherwiſe not. Cumb. 133. Trin. 1 W. & M. B. R. Anon.

12. A perſon was convicted upon an indictment for being a *common ſcold*, but judgment was arreſted, becauſe the indictment was *communis calumniatrix*, where it ſhould be *rixatrix*. 6 Mod. 11. Mich. 2 Ann. B. R. The Queen v. Foxby. So becauſe it was *communis rixa* inſtead of rixatrix. 6 Mod. 230.

Mich. 3 Annæ B. R. S. C.—The words *communis rixatrix* ſeem to be preciſely neceſſary in every indictment of a common ſcold; and if ſuch indictment concludes *ad commune nocumentum diverſorum* inſtead of omnium &c. it has been ſaid to be good, perhaps for this reaſon, becauſe a common ſcold cannot but be a common nuſance. Hawk. Pl. C. 198. cap. 75. ſ. 5.

13. It ſeems agreed, that an indictment againſt one as a *common ſcold* is good without ſetting out the particulars. 2 Hawk. Pl. C. 227. cap. 25. ſ. 61.

14. L. was indicted for a publick nuſance to Billinſgate dock. The indictment ſet forth, *that Billinſgate dock was a common dock, to which all ſmall ſhips coming with proviſion to the markets of London might come, but that no great ſhip ought or uſed to come there; that notwithſtanding the defendant brought a great ſhip of 300 ton into it, ad commune nocumentum of all the Queen's ſubjects &c.* It

was mov'd to quaſh this indictment, that it was inconſiſtent to ſay, that a place is a common dock, and that * it would be a nuſance for a great ſhip to come there; for that a common dock in its nature is free for all ſhips. But the Court aſk'd, why there might not be a common dock only for ſmall ſhips as well as common pack and horſe way. 6 Mod. 145. Paſch. 3 Annæ B. R. The Queen v. Leich.

15. The Court ſaid, that they *never quaſh indictments for nuſances;* but if a nuſance be remov'd, and the party confeſſes it, the *removal will be a great mitigation of the fine*, and in that caſe it may be proper to *offer affidavits to leſſen the offence to the Court, but not otherwiſe.* And they put the defendant to demur, which he did. Quod nota. 6 Mod. 145. Paſch. 3 Annæ B. R. The Queen v. Leich.

16. An indictment was for *keeping hogs in ſome of the back ſtreets of London contra formam ſtatuti.* It was mov'd to quaſh it, becauſe the *ſwine are forfeited by the ſtatute* 2 *W.* & *M. ſeſſ.* 2. *cap.* 8. *ſ.* 20. and that therefore no indictment lies, at leaſt not contra formam ſtatuti. But it was adjudged for the King. Afterwards it was mov'd to ſet aſide the judgment, alleging ſurpriſe and want of notice. But it was to no purpoſe. 2 Salk. 460. Paſch. 4 Annæ B. R. The Queen v. Wigg ——But the book ſays that no counſel appeared for the defendant when judgment was given. Ibid.

17. Where an *offence of its own nature imports a thing to be a nuſance;* it is not neceſſary in an indictment for it at common law, to conclude *ad commune nocumentum* of the King's ſubjects. Beſides the word *common* ſupplies this defect if it was one. 10 Mod. 337. Trin. 2 Geo. 1. B. R. in Caſe of the King v. Dixon & Ux.

18. An indictment *for doing a thing which plainly appears immediately to tend to the prejudice of the Religion or the King is good, tho' it do not expreſsly complain of it as a common grievance.* And upon this ground it has been reſolved, that an indictment for *converting the King's money* to one's own uſe is good without more. And likewiſe that an indictment for breaking and *digging up the wall of a church* of ſuch a town *ad nocumentum Burgi ligeorum domini regis* is good. Hawk. Pl. C. 198. cap. 75. ſ. 4.

19. It ſeems that by the common law, if a fact *done in one county* prove a *nuſance to another* it may be *indicted in either.* 2 Hawk. Pl. C. 221. cap. 25. ſ. 35.

(A. a) *Puniſhable. How.* And Judgment in Actions.

1. IF the nuſance had been *levied in the time of the defendant*, it ſhall be *ouſted by the ſheriff* by judgment of the Court, *and the defendant who levy'd it* ſhall be *amerc'd;* but *if* it was levy'd *in other time* the nuſance ſhall be *ouſted* as above *without amercement;*

amercement; for he who is not party to the writ cannot be amerced. Br. Nuſance, pl. 39. cites 3 E. 3.

2. *And* it was *inquir'd of what quantity the nuſance was made*, who ſaid of the length of 3 foot; by which *this was ouſted, and the reſt* of the bank *not*, quod nota. Br. Ibid.

In nuſance *for inhaunſing of a* * *pool* if it be *found for the plaintiff*, the judgment ſhall be to *ouſt that which is inhaunced and no more*. Br. Nuſance, pl. 17. cites 8 Aſſ. 9.——*But in aſſiſe of nuſance, that he levied a pool to the nuſance*, which is found for the plaintiff, there the judgment ſhall be *that the whole ſhall be removed*, note the diverſity. Ibid.—* Orig. *Stank*.

3. Where a man *abates parcel* of a gorſe, *by which all the gorſe is broken down to the nuſance of another*; there he who broke but parcel of the gorſe ſhall repair all the whole gorſe; quod nota. Br. Nuſance, pl. 19. cites 16 Aſſ. 3.

4. Aſſiſe of nuſance, that he *turn'd aſide a courſe of water to B.* &c. and aſſigned the nuſance that he had made *a trench acroſs the river of B. by a water-mill of the plaintiff; ſo that it was turn'd aſide*; *and ſo that where the mill was wont to grind in one day and a night* 3 *quarters of* all manner of corn, *it cannot now grind but one buſhel; and* alſo *that the water ſurrounded* 15 *acres of meadow of the plaintiff adjoining* to the ſame mill, *ſo that where he was wont to have* 40 *load of hay, now he cannot have but* 7 *load*; *and where he was wont* in the ſame meadow *after the hay cut once, and carry'd away, to have paſture there for* 40 *graſs beaſts, he cannot now paſture but* 6. The *defendant challenged the plea, becauſe it is not to the nuſance of diverſe franktenements* & non allocatur, and after it was agreed that the *water ſhall be remov'd into its right place at the coſts of the defendant, and* the plaintiff ſhall recover his *damages*, and that the defendant capiatur; quod nota. Br. Nuſance, pl. 25. cites 32 E. 3. 8. [47]

5. 6 *R.* 2 *cap.* 3. enacts, That *writs of nuſances called vicontiels, ſhall be made at the election of the plaintiff in the nature of old times uſed, or elſe in the nature of aſſiſes determinable before the King's juſtices of the one bench or the other, or before the juſtices of aſſiſe, to be taken in the county.*

6. 12 *Ric.* 2. *cap.* 13. enacts, That *proclamation may be made as well in London as in other cities and towns, that none caſt any annoyance, dung, entrails, nor any other ordure into the ditches, rivers, waters, and other places; and if any do, he ſhall be called by writ before the Chancellor at his ſuit that will complain; and if he be found guilty, he ſhall be puniſhed after the diſcretion of the Chancellor.*

7. In *aſſiſe* of nuſance the nuſance ſhall be removed at the coſts of the defendant. Br. Action ſur le Caſe, pl. 29. cites 2 H. 4. 11. per Hank.

8. Of a *common nuſance* none ſhall have action, but *ſhall preſent it in the Leet* or Tourn, and impoſe a fine for the King, but *any one may break it down*. Br. Nuſance, pl. 3. cites 33 H. 6. 26. per Priſot. Br. Nuſance, pl. 8. S. C.

9. Of nuſance of a way not repair'd preſentment lies, but not

not action for him whoſe horſe is mir'd. Br. Nuſance, pl. 29. cites 5 E. 4. 3.

10. If nuſance be made *by levying a foſſe* in the highway, the *King ought to make the puniſhment*, and the *Lord of the ſoil ſhall have action for the digging* of the land; per Cateſby; quod Needham conceſſit. Br. Nuſance, pl. 30. cites 8 E. 4. 10.

11. An action upon the *caſe* ought to be brought *againſt one that makes a private nuſance*, and he ought *not to be indicted for it.* Paſch. 23 Car. B. R. For indictments ought to be in the King's name, and are preſumed to be preferred for offences done againſt the publick, and not for private injuries. 2 L. P. R. 244.

12. 'Tis ſaid that a *common ſcold* is puniſhable by being put into the *ducking-ſtool.* 1 Hawk. Pl. C. 200. cap. 75. ſ. 14.

(B. a.) *Power of Juſtices of Peace and Seſſions.*

1 Salk. 359. Trin. 4 Annæ S. P. and ſeems to be 8 C. by name of the Queen v. Sainthill.

1. JUſtices of peace have power of nuſances, and want of repairs of bridges and all ſorts of publick wayes common to all the Queen's ſubjects, by virtue of the ſtatute of 1 *E.* 3. 16. by which they are created *to inquire of all publick nuſances.* Per Holt Ch. J. 6 Mod. 255. Mich. 3 Annæ, in Caſe of the Queen v. Saintiff.

For more of Nuſance in general, ſee Actions, (N. b.) Bridges, Chimin, Common, Stopping Lights, and other proper titles.

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Oath.

(A) *Inforced* in what Caſes, and *who may adminiſter an Oath.*

The Mirror treating of this chapter ſays, The point which prohibits that no bailiff put a freeman to his oath without ſuit preſent, is interpretable in this manner, viz. That *no juſtice, miniſter of the King, or other ſteward* nor bailiff, have power to put a freeman to make oath without the King's commandment, nor can receive any witneſſes who teſtify the ſhewing to be true. 2 Inſt. 44. where Lord Coke ſays, that by this it appears, that under this word *balivus* in this act, is comprehended every juſtice, miniſter of the King, ſteward and bailiff. ——S. P. Co. Litt. 168. b.

1. Magna Charta 9 H. 3. c. 28. ENacts, That *no bailiff ſhall put any man to his open law, or to an oath upon his own bare ſaying, without faithful witneſſes brought in for the ſame.*

2. *Statute*

2. *Statute of Marlebridge*, 52 *H.* 3. *cap.* 22. *enacts*, *That none ſhall cauſe his free-tenants to ſwear againſt their wills; for none ſhall do this without the King's commandment.*

Before this ſtatute, lords of court barons, hundreds &c. where the ſuitors were judges, would conſtrain them to ſwear between party and party, which miſchief is taken away by this branch of the act; and this is to be *underſtood between party and party*; but to inquire for the lord of all the articles belonging to the court baron or hundred, they may be ſworn, and ſo are the books to be underſtood. 2 Inſt. 142. where Lord Coke cites a notable record in 14 E. 1. in Banco &c. as follows, viz. *Gilbertus de Pincebek & Richardus filius Guilielmi de Spalding implacitaver' priorem de Spalding pro eo quod cum ſint liberi homines, & terras & tennementa ſua tenent libere, ipſe prior diſtringit eos ad corporale ſacramentum præſtand' ſibi ſine præcepto regis contra legem & conſuet' regni regis, & contra prohibitionem &c. Prior dicit quod habet libertatem & regalitatem, quod ſi quis captus fuerit cum latrocinio, quod ipſe per baliivos ſuos in curia ſua inde habet cogn. Et quod ſuper captionem furis cum manuopere dictum fuit dictis Gilberto & Richardo, quod ad rei veritatem inde inquirend. præſtarent ſacramentum, qui illud facere recuſarunt, unde dic. quod per conſiderationem curiæ præd' fuerunt ipſi diſtricti propter contemptum prædict' judic. Et quia in caſu hujuſmodi liber homo in curia domini ſui corporale debet ſacramentum præſtare, ſi per conſuetudinem ejuſdem curiæ ad hoc electus fuerit, & idem Gilbertus & Richardus non poſſunt dedicere, quin per conſuetud' ejuſdem curiæ ad hujuſmodi corporale ſacramentum electi fuerunt. Conſiderat' eſt, quod prior eat ſine die, & hab. return. averiorum, & ipſi Guilielmi & Richardi in miſericordia. But in the leet or tourne, the ſuitors may be compelled to be ſworn* as well for the King as between party and party; *for they are not libere tenentes*, as this ſtatute ſpeaketh, *in reſpect of tenure; but* do their ſuit in reſpect *of reſiance*; alſo the leets and tournes are the courts of the king and of record; and the court baron and hundred court of other lords are not courts of record. The rule of law is, that whenſoever any man hath any thing of common right, and by courſe of law, the ſame may well be enlarged by cuſtom and preſcription; as the lord of a manor that hath a court baron of common right and by courſe of law, all pleas therein are determinable by wager of law; and yet by preſcription the lord may preſcribe to determine them by jury; and this branch doth bind the king in his court baron, hundred or county court. In a writ of right patent directed to the lord of the manor plea ſhall be holden of freehold; and the Court in that caſe may give an oath; for there is the King's writ of præcipe quod reddat, which is præceptum domini regis. 2 Inſt. 142, 143.

3. A new oath cannot be *impos'd upon any* judge, commiſſioner, or any other *ſubject without authority of parliament*; but the giving every oath muſt be warranted by act of parliament, or *by the common law time out of mind.* 2 Inſt. 479.

4. None can *examine witneſſes in a new manner*, or give an oath *in a new caſe* without act of parliament. 2 Inſt. 719. Marg. as a comment upon part of the ſtatute of 31 Eliz. cap. 12. of ſellers of horſes in fairs and markets &c.

5. Oaths are in two manners; by compulſion, as before judges who have authority to take an oath; or *voluntary, by conſent of the party*, which is alſo lawful; as 10 E. 4. 11. The condition of an obligation was to prove ſuch a thing before J. S. It is not to be doubted but that it may well be by oath before J. S. and the oath being taken voluntarily *and without compulſion*, it is lawful enough. Cro. E. 470. (bis) Hill. 38 Eliz. B. R. in Caſe of Knight v. Ruſhworth. [49]

6. Holt Ch. J. thought that the *cenſors of the college of phyſicians* might tender an oath *as a neceſſary conſequence of their judicial power*, but he ſaid he would give no poſitive opinion. 12 Mod. 393. Paſch. 12 W. 3. in Caſe of Greenvil als. Groenvelt v. College of Phyſicians.

(B) The

(B) The *Force* thereof, where there is *Oath againſt Oath.*

1. BY Glyn Ch. J. Trin. 1656. B. S. if oath be made againſt oath, in a cauſe depending in Court, this is a non liquet to the Court, which oath is true; and there the Court will *take that oath to be true, which is to affirm a verdict*, judgment, *or other act of the Court*, and not that which is made to deſtroy them; for this tends more to the honour of the Court, and to the expediting of juſtice. 2 L. P. R. 47.

2. The Court will *rather believe the oath of the plaintiff than the oath of the defendant*, if there be oath againſt oath; becauſe it is ſuppoſed, that the plaintiff hath wrong done him, and that the defendant is the wrong-doer, and may therefore be rather ſuppoſed to ſwear falſely to protect himſelf from the juſtice of the law, than the plaintiff that is forced to fly to the law to obtain his right. Paſch. 23 Car. B. R. 2 L. P. R. 247, 248.

3. Where there is a ſuit in Chancery, and there is *a ſingle witneſs againſt defendant's oath*, 'tis not ſufficient evidence to decree againſt him, nor will the Court after that ſend it to be tried at law, where one witneſs is ſufficient. Hill. 1692. 2 Vern. 283. Chriſt. Coll. v. Widdrington.

4. There being *oath againſt oath*, whether a plea came in in time, it was referr'd to a trial at law on a feign'd iſſue, to ſatisfy the conſcience of the Court, and in the mean time the judgment to ſtand. Comb. 399. Mich. 8 W. 3. B. R. Collins v. Lawley.

5. Where the *defendant in his anſwer deny'd notice* of the plaintiff's title, which the *plaintiff proved by one witneſs*; by the uſage of the Court of Chancery it is not ſufficient to ground a decree for the plaintiff, being oath againſt oath; but the *courſe has been to direct a trial at law.* It was now ſaid by the Lord Keeper, that he did not ſee the *difference* between doing it *per plura* and *per pauciora*; for to ſend it to law to be tried, where the jury will certainly find it on the teſtimony of one witneſs, and then decreeing it on that verdict, is the ſame thing as decreeing on one witneſs without any trial at all; and therefore directed it to be tried; but that the plaintiff ſhould admit the defendant's anſwer to be read at the trial, *not as evidence* (for that he ſaid it could not be), *nor ſhould they admit it to be true, but to be ſworn; ſo that defendant might have the benefit of his oath at law*, as in this Court, *if it would weigh any thing with the jury.* P. 1706. Abr. Equ. Caſes 229. pl. 13. Ibbotſon v. Rhodes.

(C) In

(C) In what Cases the *Plaintiff's Oath* is *neceſſary*.

1. WHEN a bill *alleges the want of a deed*, and * *ſeeks relief* on the *matter* of that deed by a decree, there oath is neceſſary that he hath not the deed. But where the bill ſeeks no decree, but barely to have the defendant diſcover *if he has ſuch deed or not*, or to have the deed produced at a trial, in that caſe the plaintiff ought not to be put to his oath. Tr. 14 Car. 2. 1 Chan. Caſes, 11. Anon.—Ib. 231. Tr. 26 Car. 2. Anon.—Vern. R. 59. Tr. 1682. contra. Anon.—Nelſ. Ch. R. 78. Tr. 14 Car. 2. Anon.—Vern. 247. Tr. 1684. Godfrey v. Turner.—Ibid. 310. Hill. 1684. Nicholſon v. Pattiſon.—3 Ch. R. 5. after Tr. 14 Car. 2. Anon.

But where no relief can be had at law on the deed, if not loſt, but the *remedy is only in equity* [50] (as in caſe of a covenant for farther aſſurance) there oath need not be made of the loſs. per North Ch. J. 2 Mod. 173. in the Caſe of Howard v. Att. General.—Where the bill is for a diſcovery *of deeds generally*, and not of a particular bond or deed, oath need not be made of the plaintiff's not having them. per Ld. Macclesfield. Ch. Prec. 536. Trin. 1720. Anon.—* Fin. R. 267. Mich. 28 Car. 2. Lathwell v. Foſter.—Fin. R. 444. Hill. 32 Car. 2. Lord Grey v. Warren & al.—Vern. 180. Tr. 1683. Anon.—If the bill *ſeeks relief generally* upon any deed or bond, *as to recover the money upon the bond, or the profits of the land under the deed*; in theſe and the like caſes there muſt be an affidavit; becauſe ſuch a bill does by conſequence ſeek to tranſfer the juriſdiction from the Common Law to the Court of Equity. Per King C. 2 Wms's Rep. 541. Trin. 1729. Whitchurch v. Golding.—And. 542. (the next day) Saunders v. Stephens.

(D) Where a Plea of the *Defendant* muſt be upon Oath.

See Plea and Demurrer in Chancery.

1. IN a *plea of outlawry*, or of *priviledge of the univerſity*, as a ſcholar, defendant ſhan't be put to aver the plea on oath. Per Finch. K. Mich. 26 Car. 2. 1 Chan. Caſes, 237. Prat. v. Taylor.

2. Plea of *outlawry* ſhall be put in without oath, becauſe of the identity of perſons. Per Lord Keeper. Hill. 26 and 27 Car. 2. Chan. Caſes, 258. Maſters v. Buſh.

3. The defendant never ſwears a plea *of a former ſuit* depending; but it is always put in without oath, and there needs no poſitive averment that the former ſuit is ſtill depending; for that is examinable by a maſter. Vern. 332. Trin. 1685. Wiling v. . . . .

For more of Oath in general, ſee Account, Affidavit, Own Oath, and other proper titles.

Obligation.

Fol. 146.

(A) Obligation. *What Perſons may make* an Obligation, *and to whom.*

See Baron and Feme. —Grants (H. 8).

[1. IF *feme covert* makes an obligation it is void. 14 H. 4. 30. b. 33.]

See Faits or Deeds (A). —Grants (H. 8).

[2. So if a *monk* makes an obligation it is void. 14 H. 4. 31. 33.]

See Infant. —Faits or Deeds (A). —Grants (H. 8). Feoffment (E).

[3. If an *infant* makes a deed it is not void. Contra 14 H. 4. 33. adjudged.]

[4. But the obligation is *voidable*. 17 E. 3. 1. b.]

[51]

See Grant (D).

(B) By what *Names.*

If it appears upon evidence that he was the ſame perſon who ſealed and delivered it, the ſame is ſufficient, and the bond ſhall bind him: but contra in caſe of a corporation. Arg. 1 Le. 163. Mich. 30 and 31 Eliz. in Caſe of Marriot v. Paſcall.

[1. IF a man obliges himſelf *by a falſe ſurname*, he ſhall be eſtopped to avoid it; becauſe he may have divers ſurnames. 3 H. 6. 25. b.]

See Eſtoppel (O).

[2. So if a man obliges himſelf *by a falſe proper name* he ſhall be eſtopped to avoid it. 3 H. 6. 25. b.]

(C) *To what Perſons* it may be made.

See Faits or Deeds (C)-- Grants (C).

[1. AN obligation may be made to a *feme covert*, and good. 3 H. 6. 23. b.]

See Faits or Deeds (C)-- Grants (C).

[2. But obligation made to a *chanon profeſſed* is void. 3 H. 6. 23.]

(D) *By*

(D) *By what Words Obligations may be made.* [*False Latin, improper or unknown Words.*]

See M.

[1. *MEmorandum that I B. have received* 20*l. of C. which* 20*l. I B. promiſe to pay to D. In witneſs whereof I have ſet my ſeal.* This is a good obligation. 22 E. 4. 22. Curiam.]

Br. Obligation, pl. 63. cites S. C. —Any *words by which the intention of the parties may appear* are ſufficient to make the condition of an obligation. 1 Saund. 66. in Caſe of Butler v. Wigg.

[2. [*So*] If it be [thus viz.] *I ſhall pay to you* 20*l. In witneſs &c. I put my ſeal*, [it is] a good obligation. 22 E. 4. 22.]

Br. Obligation, pl. 63. cites S. C. —Went. Off. of Executors 116.

[3. So theſe words *concedo vobis* &c. make a good obligation. 22 E. 4. 22.]

Br. Obligation, pl. 63. cites S. C.

[4. If a man binds himſelf *in viginti nobilis*, it is a good obligation; becauſe there is not any proper Latin word for nobie. Trin. 5 Ja. B. R. between Durchin and Vaghan.]

Upon ſhewing Thomaſius's Dictionary, wherein (nobilis) is ſet down for a nobleman, and alſo for the ſum of 6s. 8d. it was reſolved that the bond was good; and therefore adjudged for the plaintiff. Cro. J. 203. Hill. 5 Jac. S. C. by name of Matthew v. Purchins, alis. Burchin v. Vaughan.

[5. If a man binds himſelf *in triginti libris*, where it ſhould be triginta libris, yet it is good. Paſch. 17 Ja. B. between Taylor and Thorp, per Curiam adjudged.]

In triceſimo ſecundo libris was adjudged good. Cumb. 60. Trin. 3 Jac. 2. B. R. Dennis v. Snape.—So *triceſimo libris*. Ibid.

[6. [*But*] If a man obliges himſelf *in viginti liveris* (for libris), this is not good. Trin. 5 Ja. B. R. between *Durchin* and *Vaghan*, cited to be adjudged.]

Wiginti is all one with viginti. Cro. C. 517. Mich. 11 Car. B. R. admitted in the Caſe of Downs v. Hathwait.—So where the bond was in viginti *litteris*, inſtead of libris, it was judged a void bond; cited per Cur. Cro. J. 603. Mich. 18 Jac. B. R. in the Caſe of Hills v. Cooper, as the Caſe of Parterofs v. ....

Debt upon bond, conditioned for the payment of 20l. Upon oyer it appeared to be *firmiter obligari in quadraginta liberis*; yet plaintiff had judgment. 12 Mod. 475. Paſch. 13 W. 3. Homes v. Barneham. [52]

[7. *So*] If a man be obliged in *quinquegentis libris*, this is not a good obligation for 500*l.* for quinquegentis is not any Latin word nor of any ſignification. Mich. 4 Ja. B. R. between *Parry* and *Dale*, adjudged upon demurrer. Mich. 12 Ja. B. ſame caſe in writ of error. Hobart's Reports 165, where the opinion was, that it was a good obligation for 500*l.*]

Yelv. 95.—Cro. J. 146. —Hob. 119. —*Quinquageſſimis liberis* is good. Cro. J. 290. Ellis v. Clerk.—*Quimpe* pro *quinque* is not good. Het. 84. cites it as Parry's Caſe.—*Quinque* for quinque is not good. Yelv. 95. Hill. 4 Jac. B. R. Parry v. Dale.—And per Poph. Ch. J. *quinque* (with two i's) is incongruent Latin; but quimpe is no Latin at all. Ibid.

2. If

Fol. 147.

[8. If a man be obliged in *ſeptuagentis libris*, it is a good obligation for 700l. for it is a Latin word, tho' it be but barbarous Latin. Mich. 4 Ja. B. R. in the ſaid Caſe of *Parry*, ſaid to be adjudged and there agreed.]

Hob. 116. S. C. by the name of WALTER v. PIGGOT, adjudged. And a writ of error was brought, but ſays, it appears not what was done upon it.

[9. If a man obliges himſelf in *ſeptuagentis & quinquagentis libris*, it is a good obligation for 750l. without pleading, or finding by the jury that the intent was ſo. Hobart's Reports, 162, between *Waller* and *Bigot* adjudged. Intratur. Trin. 44 El. Rot. 1031. in the Common Pleas.]

Cro. J. 338. S. C. by name of Marſham v. Jolly ——

[10. If a man be obliged in *ſexigintis libris* for ſexagint. libris, yet it is a good obligation. Trin. 12 Ja. B. R. between *Jolley* and *Maſham* adjudged. Hobart's Reports 28.]

Hob. 20. pl. 36. S. C. by name of Maſdame v. Jolly.

Yelv. 105. GERRY v. DAVIS, that ſexgintis libris is a word of no ſignification, and adjudged that the plaintiff nil capiat per billam.—But where the word *ſexinginta* was put *for ſexaginta*, judgment was given for the plaintiff, and affirmed in error. Cro. J. 338. Paſch. 12 Jac. B. R. Marſham v. Jolles.

[11. If a man be obliged in *ſexgintis libris* for ſexcentis libris, it is not a good obligation; for ſexgintis is not Latin. Mich. 5 Ja. B. R. adjudged between Grey and Davies.]

In *ſexaginta* pro *ſexcentis* is not good. Cro. J. 190. Greg v. J. S.—This plea is mark'd (11) in the original of Roll as it is here.

[11. [*But*] If a man be bound in *ſexingentis libris*, for ſexcentis libris, this is a good obligation; for ſexingentis is good Latin. Mich. 5 Ja. B. R. per Curiam agreed.]

This bond was *in Italian*. Cro. J. 208. Trin. 6 Jac. B. R. S. C. by name of Parker v. Rennady.——* Hob. 19. Trin. 6 Jac. S. C.—S. C. cited 12 Mod. 194.—5 Mod. 281. Arg. S. C. cited accordingly, becauſe it was an Italian bond, and not intended to be put into Latin.

[12. If a man be obliged in *ſeſſanta libris* for ſexaginta libris, yet is good. Hobart's Reports 28. adjudged between * Parker and Kennedy.]

Hob. 18. S. C. accordingly that it was adjudged good for 30l. and affirmed in error.—Adjudged accordingly. Cro. J. 309. Mich. 10 Jac. B. R. S. C. by name of Biggins v. Titherton.—Judgment affirmed in Cam. Scacc. Cro. J. 355. Mich. 12 Jac. S. C. by name of Higgens v. Totherden.—Yelv. 225. Loggins v. Titherton. S. C. but reports it contra per Cur. that the plaintiff nil cap. per billam, inaſmuch as there is no ſuch word as trigintata, and by conſequence the party bound in no ſum. And if a man be bound in an obligation in (*libris*) and does not ſay how many, it is a void obligation; per tot. Cur. quod nota.

[13. If a man be obliged in *trigintata libris* it is good. For there is but one ſyllable (that is to ſay *ta*) of ſurplus in the end of the word. Mich. 12 Ja. in the Exchequer Chamber, between *Tetherton* and *Loggins* adjudged. Which ſee Mich. 12 Ja. B. Mich. 10 Ja. B. R. Hobart's Reports 26. ſame Caſe.]

Mo. 864. Anon. but ſeems S. C. accordingly. —5 Mod. 2[illegible]3. S. P. but contra of oſtigent.—So in *quinquageſimis* libris, ſhall be conſtrued to be of all one ſenſe

[14. If a man be obliged in *octogeſimo libris* for octoginta libris, it is good. Mich. 13 Ja. B. adjudged between Vernon and Onſlow.

ſenſe in a bond with quinquaginta, and the intent of the parties was ſo; and adjudged for the plaintiff. Cro. J. 290. Mich. 9 Jac. B. R. Ellis v. Clark.—One was bound *in nongint. & octogeſimis libris*; the condition was for payment of four hundred and ninety pounds with intereſt. Judgment upon a demurrer was given for the plaintiff. Lutw. 422. Mich. 3 Jac. 2. Roſſel v. Roſſel.

[15. If a man be obliged in *octigenta libris*, with *condition for payment of* 40*l.* tho' this word octigenta is not Latin, yet it is a good obligation for 80l. Mich. 3 & 4 El. B. Rot. 1350, cites Co. 10. *James's Oſborne's* Caſe to be adjudged. See the ſame caſe cited, Hobart's Reports 27, to be adjudged contra, and that it is entered Rot. 1988, and that it was * *Fitzhugh's* Caſe, where the record of it is ſet forth at large, and adjudged againſt the plaintiff. But the condition is not recited, nor any mention of it.]

Octoginta is not good. Dal. 37. pl. 1. anno 4 Eliz. Anon. —* Hob. 19. Mich. 3 & 4 Eliz. C. B.

[16. If a man be obliged in *ſeptunginta libris*, with *condition for payment of* 350*l.* it is a good obligation of 700l. Mich. 44 & 45 El. Rot. 1031. b. adjudged, cites Co. 10. James Oſborne's Caſe. 133.]

[17. If a man be obliged in *viginti libris*, it is a good obligation of 20l. Co. 10, 133. Oſborne.]

Br. Obligation, pl. 4. cites 3 H. 6.

22.—Het. 84. S. P. becauſe there is ſome colour of likeneſs; but if the word be no Latin word, ſo that nothing can be known what is intended it is otherwiſe.

[18. If a man be obliged by a bill in Engliſh, in *ſewteene pounds*, which is falſe Engliſh, yet it is a good bill of 17l. Mich. 11 Ja. B. adjudged, cites Co. 10. *James Oſborne* 133. for the intent of the parties appears.]

So where the words of a bill obligatory were *threty two ponds*, four

ſhillings and ſeven pence, where threty was for thirty, and ponds for pounds; upon a demurrer it was adjudged for the plaintiff. Cro. J. 607. Hill. 18 Jac. B. R. Hulbert v. Long.

[19. If a man obliges himſelf in *quingint. duabus libris*, it is a good obligation of 52l. the *condition* being *for payment of* 26l. For this ſhall be taken as an abbreviation of quinquagintis, Mich. 11 Car. B. R. between *Downes* and *Haithwaie* adjudged upon a ſpecial verdict, where the plaintiff declared upon an obligation of 52l. and the defendant pleaded non eſt factum, and this obligation and condition found in hæc verba. Intratur Hill. 9 Car. Rot. 195.]

Jo. 366.—Cro. C. 416, 417, S. C.—Debt upon bond for 50l. the obligation was *quantoginta libris*. Judgment for defendant, for

the inſenſibility of the word. 2 Lev. 166. Hill. 27 & 28 Car. 2. B. R. Strange v. Greenhill.—2 Jo 48. S. C.

[20. If A. be bound *to a ſheriff* of a county *in quadragent. libris* &c. with *condition to appear* &c. this being a bail-bond, it is not an obligation of 40l. in as much as the word *gent.* refers to *centum* *, and ſo it is rather 400l. than 40l. and the *condition being collateral, cannot ſhew the intent of the parties.* Paſch. 1651. between † *Feilder* and *Tovey*, adjudged per Curiam, where the declaration was for 40l. and upon oyer demanded a demurrer, and after argument at the bar adjudged for the plaintiff. Intratur. Paſch. 1650. Rot. 430.]

* Fol. 148.

A bond was in *quadraginta libris condition'd for payment of* 180*l.* the Court held this to be good for *quadringentis*, by reaſon of the greatneſs of the ſum expreſs'd in the condition, tho' no money was proved to be lent upon it; and per Lord Chancellor, if it had been *quadragenta* it had been good in law

law for 400 l. 2 Freem. Rep. 26 Hill. 1676. in Canc. Anon.——‡ Sid. 241, 242. S. C. adjornatur.——Ibid. 257, 258. S. C. adjudged accordingly.

[54] 21. Obligation was ſhewn in debt, which was *Noverint* &c. *nos* T. M. & J. G. *tenemur J. M. in* 20 *l. & uterq' noſtr' tenet'*, and in the percloſe *Obligamus nos & quilibet noſtrum* &c. *without* mentioning this clauſe, *Sigillum meum appoſui;* and becauſe it was tenemur for teneri, and quilibet for quemlibet, the Court would adviſe &c. Quære. Br. Obligation, pl. 30. cites 8 H. 6. 35.

A bond was thus, viz. Noverint *univerſæ per præſens* me T. K. de H. in *parochie* W. in com. Darbie *generoſæ teneric* & firmiter *obligarie* Ed. D. de M. in S. in com. Not. &c. ad quam quidem ſolutionem bene & fideliter faciend. *obligamus me* hæredes &c. ſigillo meo ſigillato dat. *tres viginti die* Octob. an. regni *reginæ domini noſtri Jacobie* Dei gratia Angliæ &c. *rexe defenſoris ſuis de Scotiæ ſexto, de Angliæ* quadrageſimo ſecundo 1608. In debt brought upon this bond the defendant demurr'd; and adjudged for the plaintiff: for there are *two principal things to be contained in an obligation.* 1. The *parties* to it. 2. The *ſum in which the party is bound;* and both theſe are ſufficiently expreſs'd: and tho' falſe Latin will abate a writ, becauſe the party may purchaſe a new one, yet it ſhall not deſtroy an obligation; for he cannot have a new obligation when he will. Per tot. Cur. Yelv. 193. Mich. 8 Jac. B. R. Dodſon v. Kayes.—Brownl. 110. S. C.

22. If an obligation *has incongruous Latin*, yet it is good: *contra of a writ*; for a man *may have a new writ*, but *not a new obligation*. Br. Obligation, pl. 71. cites 9 H. 7. 16.

23. A. *delivers* 20 *l.* to B. *to buy prunes*; B. makes a *deed* to A *teſtifying the ſaid delivery and receipt*; but the ſaid deed has not *a word of promiſe*, or *teneri or obligari*, for payment of the ſaid ſum; B. dies inteſtate: an action of debt may be maintained upon this deed by A. againſt the adminiſtrator of B. It was ſo adjudged and affirm'd in error. Jenk. 195. pl. 2.

24. In quadraginta *libis* &c. for libris was held an ill and inſufficient obligation; for liba ſignifies a cake, and the daſh does not help it; ſo *litris* for *libris* is ill; and the attorney was committed to the Fleet for his knavery. Noy. 109. Hill. 3 Jac. Sherret v. Mallet.

25. Tho' the *words* of an obligation are *not proper* and apt, yet if they are *ſubſtantial*, 'tis enough. Arg. Brownl. 121. 11 Jac. in Caſe of Hawkinſon v. Sandilands.

26. *In quatuor centum libris*, it was doubted whether it was to be intended 400 l. or 104 l. and it was adjudged naught. Het. 84. Paſch 4 Car. C. B. cites it as adjudged in one Randal's Caſe.

27. In debt the plaintiff declared on a bond in triginta & ſex libris ſolvend' &c. and upon over the words of the bond were, *ſex triginta libris*; and it was held good, and no variance; for it ſhall be *taken as one word*. 2 Salk. 462. Hill. 3 W. & M. B. R. Henderſon v. Foſter.

28. Theſe words in a bond, In premid. vigin. & anno regni Car. 2. millimo ſexcent ſeptua' quarto, adjudged to be void for inſenſibility; and being inſenſible, ſhall be *rejected*, the reſt being ſenſe without them. 2 Salk. 462. Paſch. 10 W. 3. B. R. Cromwell v. Grunſden.

29. In moſt caſes, where the *gent* or *gint*, or the *ſex* or *ſept* are

are right, the obligation has been held to be well. 2 Salk. 462. in Caſe of Cromwell v. Grunſden, cites Jo. 48. 1 Cro. 416, 418. 2 Cro. 338.

30. A man bound himſelf *in quadrans libris*, and the condition was for payment of 20l. 12s. The Court held that the word *(quadrans)* had been void and inſenſible, if it had ſtood by it ſelf, as in caſe there had been *no condition*, or if the condition had been *collateral*; but ſince it has relation to the condition, they would take it to be explain'd by the condition, and to ſignify 40l. there being ſomewhat like quatuor or quadragint in it; and there are caſes as ſtrong and of as odd words. 2 Salk. 462. Paſch. 10 W. 3. B. R. Cromwell v. Grunſden.

5 Mod. 281. S. C. and the pleadings.—— Comb. 477. S. C.—12 Mod. 193. S. C.—— Where the defendant wasbound *in a bail-bond* in ſuch ſum,

it was objected that the word *(quadrans)* was inſenſible; 'tis true if the *condition* had been *for payment of money*, ſo that it *might explain what was meant* in the bond, it might be good; but where the bond is ſingle, or the condition is for doing ſome collateral act (as in the preſent caſe) which doth not explain what ſum is intended in the bond, there it is void. The Court ſtaid proceedings till the roll was brought in, becauſe it might be well there, and ſaid that *tho' the condition of this bond was collateral, yet the bond being made according to the ſtatute*, by which it is enacted, that none arreſted by proceſs &c. in which the true cauſe of action is not expreſs'd, and for which the defendant is bailable by virtue of the ſtatute 23 H. 6. [cap. 10.] ſhall be forc'd to [55] enter into a bond with ſureties for appearing in any ſum exceeding 40l. Now the condition of this bond being for appearing &c. that may explain what is intended by the word (quadrants) in the bond, viz. 40l. according to the ſtatute. 8 Mod. 342, 343. Hill. 11 Geo. 1725. Anon.

(E) *How* it may be made. * *Single Obligation.*

* This belongs not to the plea in Roll; but as to this ſee Conditions (Y) and (E. a)—— See (O)—— So where the obligation was thus, viz. *Know all men that I P. G. do*

[1. IF *A. acknowledges* by a bill obligatory *that he owes to B.* 10*l.* to be paid at a day after, and *by the ſame bill binds himſelf and his heirs in* 20*l.* and doth *not ſay to whom* he binds himſelf; yet it is a good bill and ſhall be intended to be bound to B. to whom he acknowledged before the 10l. to be due. Mich. 10 Car. B. R. between *Franklin* and others plaintiffs, and *Turner* defendant, adjudged upon a demurrer. Intratur Trin. 10 Car. Rot. 949. Hill. 1649. between
adjudged upon demurrer. 2 E. 4. 22.]

ſtand bound (not ſaid to whom) *in the ſum of* 16*l. and is to be paid to J. S. the elder's executors; for which payment to be made I bind me, my heirs and executors* (but ſays not to whom), the defendant demanded over of the *condition*, which was (inter alia) *if therefore the defendant ſhall pay to J. S. the elder's executors within one year after his death, the bond ſhall be void*; and upon this the defendant demurred. And upon argument and deliberation all the Court reſolved and gave judgment for the plaintiff, who was executor of J. S. 3 Lev. 21, 22. Trin. 33 Car. 2. C. B. Langdon v. Goole.

2. A man bound himſelf to another *to pay* 6*l. the third day of May next, and if he did not pay the* 6*l. the ſame day, he granted by the ſame deed to pay to him the ſame day* 10*l.* and after he did not pay the 6l. the ſame day, by which the obligee brought action of 10l. and recover'd; and ſo the obligation good for the greater ſum for default of payment of the leſs ſum. Br. Obligation, pl. 79. cites 26 E. 3. 71. and Fitz. Det. 181.

(E. 2) How it may be made. *In the third Perſon.*

Debt upon an obligation, which was in the third perſon, and no mention was that the parties had put their ſeals to it; and therefore by award the plaintiff took nothing by his writ quod nota; for this ſtatute is that the obligation in the third perſon in a Court out of the realm ſhall be void: but Brooke makes a quære if it be material that theſe words ſigillum appoſuit were wanting. Br. Obligation, pl. 8. cites 40 E. 3. 1.——And concordat anno 7 H. 7. 14. as to the ſeal.

1. 38 *E.* 3. *Stat.* 1. *cap.* 4. *WHereas divers people are bound in another Court out of the realm, by inſtruments or otherwiſe, it is accorded that all* penal bonds in the third perſon *be void, and holden for none.*

Obligation made in the third perſon is good enough; for this ſtatute is that of bonds made in a Court out of the realm in the third perſon ſhall be *void*. Br. Obligation, pl. 51. cites 8 E. 4. 3. per tot Cur.—S. P. per Hank. Br. Obligation, pl. 65. cites 2 H. 4. 9. So a gift made by deed-poll in the third perſon quod præſens ſcriptum teſtatur quod A. dedit, tradidit &c. is good enough as it is in an indenture. Br. Obligation, pl. 51. cites 8 E. 4, 5.——Brooke ſays, that hence it ſeems that bonds in the third perſon not made in Courts out of the realm, are good. Br. Obligation, pl. 65.

This ſtatute is to be intended of bonds taken in other Courts out of the realm, and ſo it appears by the preamble of the act; and it was *principally intended of the Courts of Rome*; and ſo it appears by Juſtice Hankford, in 2 H. 4. in which Courts bonds were taken in the third perſon; wherefore ſuch bonds made out of the realm are void; but other bonds in the third perſon are reſolved to be good as indentures in the third perſon, by the opinion of the whole Court in 8 E. 4. Co. Litt. 230. a.

[56] See Indorſement (A).

(F) *With Condition.* [In reſpect of the Place where wrote.]

Obligation for 20*l.* and endors'd before ſealing and delivery, thus, *The intent of this bond is to pay* 10*l. for coſts*; it is no good condition. Per Huſton and Harvy what is *wrote after ſealing* and delivery is no part of the condition. Het. 137. Hill. 4 Car. C. B. Taylor's Caſe.

[1. IF the condition be *wrote on the back of the obligation*; yet it is good. 41 E. 3. 10. b. 7 H. 4. 11. b.]

(G) By what *Words* an Obligation may be; *Joint or Several.*

[1. IF *three bind* themſelves *& eorum* * *quemlibet*, either of them may be ſued alone. 34 E. 3. Execution 129.]

* Orig. is (quilibet).

D. 310. b. pl. 80.

[2. *But two of them only cannot be ſued*, but *either all* ought to be ſued *or one*. 34 E. 3. Execution 129. (Quære this).]

* Orig. is (alter).——*Nos vel alterum noſtrum*, they ought not to be ſued by ſeveral precipes, but both together, or one of them by one precipe only. D. 310. b. pl. 80. cites Mich. 7 H. 4. 2.

[3. If *two bind* themſelves in an obligation, *vel* * *alterum eorum*, this makes the obligation joint or ſeveral. 7 H. 4. 6. b.]

D. 310. b. pl. 80.

[4. If *two bind* themſelves in an obligation by theſe words *Obligamus nos & quemlibet noſtrum*, the obligation is joint and ſeveral. Dubitatur. 8 H. 6. 35. b.]

[5. If

[5. If *two bind* themſelves in an obligation by theſe words Obligamus nos & *utrumque noſtrum*, the obligation is joint and ſeveral. 16 E. 2. Annuity 47.]

D. 310. b. 5 Rep. 103. —Farr. 153. —If three are bound by *utrumque noſtrum*, it is joint and ſeveral. Quere.—D. 10. b. pl. 114.—Dal. 85 pl. 42. S. P.—*But* if three bind themſelves & *utrumque eorum*, this is joint, per Anger; becauſe it is uncertain who.—A. and B. *and either of them* do *acknowledge* to owe &c. for which payment they bind themſelves, is joint and ſeveral. Sid. 187. Paſch. 16 Car. 2. B. R. Burden v. Ferrers.

[6. If *two bind* themſelves in an obligation by theſe words, Obligamus nos *vel utrumque noſtrum* in the diſjunctive, yet the obligation is joint and ſeveral; for the word *vel* makes it ſeveral at election. Paſch. 11 Jac. B. R. adjudged upon demurrer between Haukinſon and Sir James Sandelon.]

Brownl. 121. S. C. —* *Utrumque noſtrum in ſolido* is joint and ſeveral. D. 310. b. pl. 80. ſaid to have been ſo adjudged.——So obligamus *nos & utrumque noſtrum* without the words *in ſolido*. Br. Obligation, pl. 84. cites Fitzh. Annuity 47.—S. P. 1 Salk. 393. Hill. 1 Annæ B. R. in Caſe of Robinſon v. Walker.

* S. P. And that it is as good as quemlibet in ſolido. Br. Obligation, pl. 86. cites 10 E. 3.—— S. P. Arg. cites it as ſo held, D. 19. pl. 114. and 39 H. 6. 9. that uterque is as good as quilibet. 2 Bulſ. 70. in Caſe of HAUKINSON v. SANDILANDS. And by Doderidge J. the *joint delivery* of the bond in this caſe ſhall not make it to be a joint bond, and not ſeveral, the ſame being joint and ſeveral by the law; and the whole Court agreed that the bond was joint and ſeveral, and judgment was given and entered for the plaintiff.——Cro. J. 322. S. C. adjudged.

[7. If in a *charter party* the merchants covenant with the owners in this manner, (that is to ſay) *that the merchants for themſelves, their executors and adminiſtrators, and for every of them do ſeverally covenant*, promiſe and grant *to and with the owners to pay for fraight of the ſhip* according to the rate of 120 l. for every month that the ſhip ſhall be in the ſaid voyage &c. In this caſe the covenant is joint and ſeveral in as much as the ſubject matter is joint (that is to ſay) the fraight to be paid by them all; [57] and the ſaid words (*and for every of them*) refer to the words (do ſeverally covenant) and the firſt words (that is to ſay) *for themſelves &c.*) make it joint. Trin. 8 Car. B. R. between *Linn* and *Harris* plaintiffs, and *Creſſing* and others defendants. Adjudged per Curiam upon demurrer. Intratur Mich. 7 Car. Rot. 108.]

8. *By two*, Obligamus nos & *unumquemque noſtrum* without more makes it joint and ſeveral. D. 310. b. pl. 80. cites H. 16 E. 2. Br. Obligation, pl. 92. cites 13 E. 3.

9. Three were bound in a bond by theſe words *Obligamus nos et quemlibet noſtrum conjunctim*, and it was holden by the Court to be joint-bond, and not ſeveral; for the word quemlibet is expounded by the word conjunctim. 3 Le. 206. Paſch. 30 Eliz. B. R. Wigmore v. Wells.

(H) *Covenant* [*or Obligation*] Joint or Several,

Fol. 140.

[1. IF the *merchants in a charter party* covenant *with the owners ſeverally, that the one merchant will pay* 3*l. another* 3*l. and ſo of the reſt*; but the words are *conveniunt ſeparatim*, and in the concluſion is ſuch clauſe, & *ad performationem omnium & ſingularum*

See (G) pl. 7.—— In covenant the plaintiff declared,

that the defendant and J. S. *convenerunt pro ſe & quolibet eorum, that they or either of them would lade ſuch a ſhip, and pay for the fraight* &c. The defendant pleaded in abatement, that the other covenantor was in full life not named, and prayed judgment of the writ. Holt Ch. J. took a *diverſity* between the words, viz. *A. and B. conveniunt & quilibet eorum convenit*, and *A. and B. conveniunt pro ſe & quolibet eorum*; for in this firſt caſe quilibet eorum convenit expreſsly ſevers the lien; but (pro quolibet eorum) ſeems to go to the thing to be done, that is, that they both or either of them would do it: but the other Juſtices e contra; and judgment was, that the defendant ſhould anſwer over. 1 Salk. 393. Hill. 1 Annæ B. R. Robinſon v. Walker.

larum conventionum ex parte prædictorum mercatorum perimplendarum quilibet mercatorum prædictorum ſeparatim obligat ſeipſum præfatis magiſtro & proprietariis in double the fraight; in this caſe the ſaid covenant is ſeveral by the words conveniunt ſeparatim, and the laſt part by which quilibet eorum obligat ſeipſum &c. refers to the precedent covenant, where they conveniunt ſeparatim, and ſo is alſo ſeveral. 5 Rep. *Matthewſon's* Caſe. 22. b. adjudged.]

[2. If in an indenture there are *three of the one part, and two of the other* part in which *the two covenant jointly and ſeverally to do* a certain thing, *and the three covenant* alſo *jointly and ſeverally with the ſaid two after the performance* of the ſaid thing *by the two to pay to the ſaid two a certain ſum for every particular* &c. and after follow theſe general words (that is to ſay) *pro vera & reali performatione omnium* articulorum & agreamentorum *prædictorum alternatim utraque partium prædictarum obligavit ſe* heredes, executores, adminiſtratores & aſſignatos ſuos *in & ſubter pœnalitatem ſexaginta librarum* ſterlingorum. The queſtion was, whether in an action of debt upon this laſt clauſe for the 60l. the action might be brought againſt one of the ſaid three only, that is to ſay, whether it be joint and ſeveral as well as the covenant is. Tr. 1652. Judgment was given againſt the plaintiff, ſcilicet, that this covenant was joint and not ſeveral (againſt my opinion) by the other three Judges. But diverſe of the Judges and Serjeants at the table at Serjeant's-Inn in Fleet-ſtreet upon the putting of the caſe to them were of my opinion. Trin. 1651. Rot. 522.]

Two are bound jointly and ſeverally in a bond, *one executes firſt of May, the other the firſt of July*; this is a joint bond. Lat. 61. Arg. Hill. 22 Jac. in Caſe of the Biſhop of Norwich v. Cornwallis.—See Croft v. Harris.

[3. If an obligation be *written in the name of two joint and ſeveral, and they ſeverally deliver the obligation at ſeveral times and places*, yet this is joint and ſeveral. 8 H. 6. 31.]

[58] 4. If a man *covenants with ten, and with each of them to make the ſea banks* in D. *and does not do it, by which the land of two of the ten is ſurrounded*, the two may have an action of covenant without the others; per Cur. Br. Jointenants, pl. 72. cites 6 E. 2.

5. Where *three* are bound by obligation *jointly and ſeverally, and each in toto*, the obligee *ſhall not have an action againſt two alone*, but againſt all three or againſt every one by himſelf. Br. Jointenants, pl. 1. cites 27 H. 8. 6.

6. *A. bound in a bond to B. and C.* ſolvendum the one *moiety* to B. and the other *moiety to C.* 'tis a ſeveral obligation, and the releaſe of one ſhall not prejudice the other, and yet by the premiſes

miſſes it was a joint contract; per Brown. J. Mo. 64. Trin. 6 Eliz. Anon.

7. Bond to 2 for 200l. to pay 100l. to one and the other 100l. to the other; one obligee dies; quære if the whole *ſurvives*. D. 350. pl. 20. Paſch. 18 Eliz. M. 21 & 22 Eliz. C. B. it was reſolv'd per Cur. that the 200l. ſurvives, and that thoſe words, viz. 100l. to one and 100l. to the other are void words. D. 350. Marg. pl. 20.

8. Debt was brought upon a bill for 20l. which was thus, viz. *Memorandum, that I Wm. S. have received of T. B. 40l. to the uſe of J. N. and M. his wife, equally to be divided between them; which ſaid ſum I acknowledge to have received to the uſes aforeſaid, and the ſame to re-deliver at ſuch time as ſhall be thought moſt for the profit and commodity of the ſaid J. N. and M. his wife.* J. N. died inteſtate, and R. N. took adminiſtration to J. N. and brought debt againſt W. S. for 20l. and agreed per Walmſley, Glanvill and Kingſmill J. that this is a debt due to J. N. and M. his wife. And per tot. Cur. if it be a debt, it is a divided debt and not joint; for there Glanvill ſaid, that there may be ſeveral bills to ſeveral men, of ſeveral ſums, viz. 20l. to one and 20l. to another in one deed. Ex libro, Mr. Andrews, D. 350. Marg. pl. 20. Mich. 41 & 42 Eliz. Rot. 2504. Shaw v. Sherwood. Ow. 127. S. C.—Cro. E. 729. S. C. Reſolved that they ſhould be divided debts, by reaſon of the words *equally to be divided &c.*

9. If *three are nam'd* in a bond, and but *one only ſeals*, the bond is ſingle. 1 Saund. 291. Trin. 21 Car. 2. B. R. Cabel v. Vaughan. Sid. 420. S. C. (but not S. P.) by name of Chappel v. Vaughan.

10. Action of *covenant* was brought *by the herald painters, & pro quolibet & ſingulis eorum*, that they *ſhould bring their work to ſuch a place*, and that there ſuch work ſhall be done &c. And becauſe one of the covenantors did not bring his work to the place aforeſaid, there to be worked, the others brought this action &c. and the action was adjudged to be well brought; for the action is founded upon the work not being brought to the place appointed for it; and in this part the covenant is joint, and the intereſt joint. Skin. 401. Mich. 5 W. & M. B. R. Saunders and Johnſon.

11. In *indentures of* apprenticeſhip, the *father covenants* to pay the apprenticeſhip money, the *ſon covenants to account for his maſter's goods*, and in the concluſion *father and ſon each bind themſelves for the true performance* of all covenants and agreements therein. Per Cur. The end of binding the father was to anſwer wrongs done by the ſon; and he muſt anſwer for any; and the covenant that each did bind himſelf &c. muſt be ſo where the ſon is bound to perform the thing for which the covenant was made, and *this clauſe is uſually inſerted, that* the covenants may be taken diſtributively, viz. that each of the covenantors ſhould perform his part, and this makes the covenant of the ſon bind the father, who covenanted for him as well as for himſelf. 8 Mod. 190. Mich. 10 Geo. 1. 1724. Whitley v. Loftus.

(I) [*What* ſhall be ſaid an] Obligation.

Cro. E. 461. S. C. adjournatur.—— Ibid. 544. adjudged that debt was well brought upon it as upon a bond. S. C.—— S. P. But afterwards the judgment was reverſed; and held, that it cannot be ſued as a bond, becauſe it wants delivery. Mo. 405. Trin. 37 Eliz. S. C. by name of Aſcue v. Hollingworth.

[1. IF [a man] obliges himſelf *in a ſtatute merchant* acknowledged before the Mayor of Lincoln, if the *ſtatute has not the ſeal of the King annexed* to it, by which it cannot be a ſtatute to be executed according to the ſtatute de mercatoribus, yet it ſhall be an obligation, upon which the obligor may be charged in an action of debt; for tho' it was intended to be a ſtatute and ſo a record, yet inaſmuch as it cannot take effect, it ſhall be an obligation in as much as he has ſeal'd it, and acknowledged it to be his deed. B. between *Aſcue* and *Haliworth* adjudged, upon which judgment, a writ of error was brought in B. R. H. 38. El. B. R. and there held accordingly.

See Executors.—Faits (C. a. 2) * Br. Obligation, pl. 15. cites S. C.—— † Br. Obligation, pl. 25. cites S. C.

(K) *Who* ſhall be *bound* by Obligation *without naming*.

[1. THE *executors of the obligor* ſhall be bound by the obligation, without naming * 45 E. 3. 17.

[2. So the *ordinary* ſhall be bound *if he adminiſters*. † 45 E. 3. 17.]

(L) *What amounts to* an Obligation or *Bill obligatory*.

1. *ALL words* which prove by ſpecialty, that the maker is debtor to another, amount to a ſufficient obligation. D. 23. pl. 143. Trin. 28 H. 8.

2. *Any words*, by which the *intention* of the party may *appear*, are ſufficient to make the condition of an obligation; becauſe if the words, tho' they are *improper*, ſhall be conſtrued void, and not a *condition*, then in ſeveral caſes the obligation ſhall be ſingle and of force againſt the defendant, tho' he has perform'd the condition of it according to the intent of the parties; and the condition being for the benefit of the defendant ſhall be conſtru'd favourably for his advantage. Saund. 66. Paſch. 19 Car. 2. Butler v. Wigg.

3. A man declar'd in debt upon *tally* of the defendant *ſeal'd*, & non allocatur, becauſe *it was not ſpecialty*. Br. Obligation, pl. 67. cites 44 E. 3.

4. Debt upon tally againſt executors, which *tally was ſeal'd and writ*, and the teſtator had granted to pay 20*l.* at 2 days, and *two ſcotches were upon the tally, each for* 10*l.* Per Skrene, the writing

writing may eaſily be waſh'd out by water or the like; and after it was agreed that the plaintiff ſhall be barr'd. Br. Obligation, pl. 80. cites 12 H. 4. 23.

5. *I owe to A. B. 20l. to be paid in watches.* Action muſt be brought for the money and not for the watches; for it is not certain how many watches. And. 117. Hill. 26 Eliz. Anon.

6 A bill ſealed was, viz. Memorandum, that *I have agreed to pay to R. S. 20l.* Exception was taken, becauſe the words of the contract are *in the præter tenſe*, but the plaintiff had judgment notwithſtanding. Le. 25, 26. pl. 32. Trin. 26 Eliz. B. R. Bedow's Caſe.

7. A bill was made in theſe words, Be it known &c. that *I owe to P. 14l. to be paid at the feaſts &c. together with 6l. which I owe him upon bills and reckonings, ſubſcribed with my hand.* P. brought debt for 20l. and adjudged againſt him, becauſe the bill does not make him debtor for more than 14l. and the words (together with 6l. which I owe by bills &c.) is only an explanation of the precedent debt, and an aſſent to pay it at a time certain. Whereupon P. brought debt afterwards for the 14l. Mo. 537, pl. 702. Trin. 36. Eliz. Parry v. Woodward. In debt brought by P. for the 14l. judgment was [60] given for him. And upon error brought, it was inſiſted that this was a debt of 20l. and not of 14l. and therefore he ought to have counted accordingly, and at leaſt he ought to have counted upon the bill as it is. But all the Judges and Barons reſolv'd that it was good enough; for there is 14l. due upon this bill, and that which comes after the ſolvendum is void in like manner as that which comes after an habendum. Cro. E. 537. Mich. 38 & 39 Eliz. in Cam. Scacc. Woodward v. Parry.

8. A. B. and C. were bound to J. S. in 400l. by ſuch words, viz. *Obligamus nos ad ſolutionem prædictam & ſi defecerimus de ſolutione prædicta tunc currat ſuper nos, & quemlibet noſtrum pœna ſtatuti ſtapul.* J. S. brought debt againſt A. only. The defendant pleaded that it was intended to be only a ſtatute, and becauſe it was not ſealed in ſuch a manuer as it ought to be, with a ſeal of two parts, it was void as a ſtatute, and therefore ought not to be ſued as an obligation. Adjudged and affirm'd in error by all the Juſtices, that debt was well brought upon it as upon an obligation, becauſe it never had any effect as a ſtatute. Cro. E. 494. Mich. 38 & 39 Eliz. 544. & Hill. 39 Eliz. B. R. Aſcue v. Hollingworth. Vide (I) pl. 1. and in margin. S. C.

9. *I A. B. do bind myſelf to C. to pay to him all ſuch monies as D. owes him*, in witneſs whereof &c. and in the end of the bill underneath was written, that D. owed C. 40 l. and C. averr'd in his declaration, that A. B. owed C. 40l. and judgment pro quer. Cro. E. 561. Paſch. 39 Eliz. B. R. Morgan v. Johnſon. Cro. E. 758. S. C. by name of Johnſon v. Morgan. But there the words are, *Be it known &c. that I A. B. do acknowledge my ſelf to be indebted to C. for all ſuch ſums of money as D. my brother in law did owe the ſaid C. A.* and avers *in facto*, that D. then owed unto him 45l. &c. Walmſly and Kingſmill held it to be a good bill, and the action well grounded thereupon, with this averment; for it is thereby reduced to a certainty; and although it be uncertain in the words of the bill, yet when it may be reduced to a certainty, it is well enough: but Anderſon and Glanvile contra, becauſe it ought to be certain what and to whom he owed it: and here to ſay that he owed that which his brother in law owed is void; for he cannot be indebted for his brother's debts; for the debts of D. are not thereby diſcharged notwithſtanding. But Walmſley ſaid, that the words tantamount, that he is indebted in ſuch a ſum as his brother in law owed, and yet thereby

thereby the debt of his brother is not determined. And the like Caſe was adjudged in this Court. Paſch. 29 Eliz. Wherefore, &c. adjurnatur.

10. Debt upon a bill, which was, *Memorandum*, that I *A. B. do acknowledge myſelf to owe, and do promiſe to pay to M. the ſum of* 10*l. at any time after the Feaſt of St. Bartholomew, whenſoever he ſhall require the ſame, if M. ſhall be then in life: for the payment whereof I bind my ſelf, my heirs, executors and adminiſtrators to C. by theſe preſents &c. In witneſs &c.* And it was thereupon demurred, and adjudged for the plaintiff; and that it was a good bill to M. by the words in the firſt part of the bill, and the words which oblige him to C. in the laſt part of the bill, are void. Cro. E. 886. Hill. 44 Eliz. Hardman v. John.

Br. Oblig. pl. 63. cites 22 E. 4. 22.

11. If the words of a bill be, *I ſhall pay to B.* 10*l.* it is a good ground for an action of debt. Went. Off. Executor. 116.

Th: Court inclined that it was a ſufficient obligation; but quære what judgment. Comb. 87. Paſch. 4 Jac. 2. B. R. S. C. by name of Throgmorton v. the Counteſs of Plimouth.

12. A. by *writing impowered B. to collect and receive his money and rents, and promiſed to allow him* 100*l. a year for his pains, and in default of payment, that B. ſhould detain the ſame;* and this was in the words following, viz. *I do direct and appoint B. to take and receive to his own uſe* 100*l. of lawful money of England, out of the firſt money which he ſhall receive of mine.* It was argued, that it cannot be an obligation; for that it was only a bare letter of attorney and an authority, and no more; for there were no words to oblige A. or which can make a warranty: and therefore if the money was not received, the party to whom the note was given could not reſort back to him who made it. But it was anſwer'd, that when one is indebted to another by ſimple contract, which is acknowledged by deed, an action of debt will lie againſt his executor; for any thing which is under hand and ſeal will amount to an obligation, eſpecially where the debt is

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confeſs'd; and that there are words in this deed to ſhew what money was due, and that makes it a bond: B. had judgment, but the judgment was revers'd on error brought, but for another reaſon, viz. becauſe it was brought for three quarters ſalary, whereas the agreement or contract was intire. 3 Mod. 153. Hill. 3 Jac. 2. B. R. Plymouth (Counteſs) v. Throgmorton.

11 Mod. 218. S. C. by the name of Sawyer v. Mawgridge, and Holt and Powell held that the word oblige is not neceſſary; Powis held, that the words, viz. I do hereby acknowledge to &c. were by way of parentheſis; which Holt oppoſed. Judgment for the plaintiff.

13. An action of debt on bond; upon oyer craved, it appeared to be thus, T. M. *this is to authoriſe you to ſeiſe and ſell ſo much as will ſatisfy a debt of* 9*l.* 16*s.* 6*d. which I do acknowledge to owe to you T. M. and to return the overplus*, and this ſhall be your diſcharge for ſo doing &c. After a verdict for the plaintiff, 'twas moved in arreſt of judgment, that tho' this ſeems to be an acknowledgment of a debt, yet 'tis but an authority. 42 E. 3. 9. Per Holt Ch. J. If a man by writing *under his hand and ſeal acknowledge himſelf to be indebted to* J. S. in 1000*l.* that is an obligation. By the whole Court judgment for the plaintiff. Holt's Rep. 207. Paſch. 8 Annæ. Mawgride v. Sauil.

(M) *Void.* In Regard of the *Words being Inſenſible*, &c.

Vide (D).

1. OBligation was by A. to B. that the obligee *ſhould receive* 5 *l. by the hands of J. S.* This as to the receiving it by the hands of J. S. or its being to be paid by the hands of J. S. is void, and A. the obligor ſhall pay it preſently. Vide Br. Obligation, pl. 56. cites 20 E. 4. 17.

2. *Know &c. that I A. B. am bound to C. D. in the ſum of &c. for the payment of which ſum I give full power and authority to the ſaid D. to keep the ſaid ſum on the profits of the bailiwick of E. from year to year, until the ſame be paid.* Per Cur. the plaintiff may bring his action, or levy the debt, according to the clauſe aforeſaid. 4 Le. 208. Trin. 30 Eliz. B. R. Goote v. Winkfield.

3. In debt for 10 l. the plaintiff declared, that the defendant conceſſit ſe teneri per ſcriptum ſuum obligatorium &c. The words of the deed were, *I do acknowledge to Edward Watſon by me twenty pounds upon demand for doing the work in my garden.* Upon a demurrer to the declaration, this was adjudged a good bond. Vent. 238. Hill. 24 & 25 Car. 2. B. R. Watſon v. Snaed.

4. Debt on *bond conditioned, that if the obligee ſhall pay* 20*l. in manner* and form *following, viz.* 5*l. upon four ſeveral days therein named, but if default ſhall be made in any of the payments, then the ſaid obligation ſhall be void,* or otherwiſe to ſtand in full force and virtue. The defendant pleaded that tali die, &c. non ſolvit 5 l. &c. and upon this the plaintiff demurr'd. It was argued that the firſt part of the condition is good, which is to pay the money, and the other is ſurpluſage void and inſenſible; but if it be not void, it may be good by tranſpoſing thus, viz. *If he do pay, then* the obligation ſhall be *void*; *if default* ſhall be *made* in payment, *then* it ſhall be *good*. The Court were all of opinion, that judgment ſhould be given for the plaintiff; and the Ch. J. ſaid he doubted whether the Caſe of 39 H. 6. 10. [which ſee at (N). pl. 1.] was law. 2 Mod. 285. 29 & 30 Car. 2. C. B. Wells v. Wright.

5. An obligation to John Garnes the elder was thus, viz. *Know all men that I P. G. do ſtand bound* (but ſays not to whom) *in the ſum of* 16*l. and is to be paid to J. G.* (the obligee) *the elder's executors*; *for which payment to be made I bind me, my heirs and executors,* (but ſays not to whom). The *condition* likewiſe was long and *ſenſeleſs* in divers recitals, *and inter alia recited a deviſe of* 8*l. by a ſtranger, to be paid to John Garnes the elder, within one year after his death, If therefore the ſaid P. G.* (the defendant) *ſhall pay to J. G. the elder's executors within one year after his death, the bond ſhall be void.* Upon demurrer, it was held by ſome that the words [John Garnes the elder's executors] ſhould be disjoined, and read thus, viz. *(J. G. the elder his executors)* and ſhould be taken

Vide (E) pl. 1. Marg. S. C.

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taken [as if the words were] *J. G. the elder and his executors.* Others held that the words *(the elder's executors)* ſhould be wholly *rejected as void*, and then the words ſhall be read *(to be paid to John Garnes* only); for he cannot have executors in his life, according to Cro. J. 358. GOODMAN v. KNIGHT where the inſenſible words in an obligation are rejected as void, and the covenant read in the ſenſible words only; and judgment was given for the plaintiff. Per tot. Cur. 3 Lev. 21, 22. Trin. 33 Car. 2. C. B. Langdon v. Goole.

6. The *ſum* in the obligation was expreſs'd by inſenſible words, viz. *in premid. vigint.* which being inſenſible were rejected, the reſt being ſenſible without them, or at leaſt made ſo, by being explained by the condition. 2 Salk. 462. Paſch. 10 W. 3. B. R. Cromwell v. Grunſden.

(N) Void. By reaſon of *Miſtake in the Words.*

S. C. cited 1 Saund. 66. Paſch. 19 Car. 2. in Caſe of Butler v. Wigg. S. C. cited Carth. 159. per Bridgman Arg. who ſaid it ſhould have been *if he did*, but we ought to judge according to the purport of the words parolx font plea; and puts Lord Hobart's diſtinction, that 'tis a legal intent we muſt go by, and not a mental.——S. C. cited 1 Sid. 106. Hill. 14 & 15 Car. 2. B. R. * in Caſe of VERNON v. ALSOP. But there, 165. it was adjudged contra; the obligation being, *that if the defendant pay the plaintiff 2 s. per week till the full ſum of 7 l. 10 s. be paid, viz. on every Saturday; and if he fail of payment at any one day, that then the bond to be void* &c. The defendant pleaded that he did not pay at ſuch day; upon which the plaintiff demurr'd, and after adviſement ſeveral terms, it was adjudged that the obligation was ſingle, and the condition repugnant and void. + 1 Lev. 77. S. C. accordingly.—Raym. 68. S. C. accordingly.—Vide (M) Wells v. Wright.——S. P. For when the condition recites a debt (as in this caſe it did) and after lays an obligation not to pay it, 'tis in that repugnant. 2 Salk. 463. Mich. 7 Annæ. B. R. Wells v. Treguſan.

1. DEBT. The obligee was bound in 100 l. upon *condition that if he did not pay to the obligee 60 l. that the obligation ſhould be void* &c. And in debt he *ſaid that he did not pay the 60 l. Judgment ſi actio*; and a good plea per Littleton. And Priſot ſaid that this caſe was adjudged in his time, quod nota, becauſe the words were as above, and yet the *intent was contrary*, viz. that if the obligor pays 60 l. that the obligation ſhall be void, and otherwiſe ſhall be in full force. Br. Obligation, pl. 42. cites 39 H. 6. 10.

Br. Nugation, pl. 19. cites S. C.—The ſolvendum is void, and it ſhall be intended to the obligee. Arg. Roll. R. 58. cites 4 E. 4.

2. Debt. The obligation was Noverint univerſi &c. *J. S. teneri & obligari W. in 10 l. ſolvendum eidem J.* where it ſhould be eidem W. and the plaintiff counted ſolvendum &c. and did not ſay to whom; and per Cur. he *ſhall ſay ſolvendum to W.* notwithſtanding the default in the obligation; for the *obligation is good without any ſolvendum*, or day of payment, and the ſolvendum to J. is *ſurpluſage*, and does not make the obligation void. Br. Obligation, pl. 47. cites 4 E. 4. 29.

Br. Obligation, pl. 58. cites S. C.—S. P. and this ſhall take effect by the premiſſes, and the ſolvendum ſhall be void. Per Glin. Ch. J. 2 Sid. 70. Paſch.

3. If *I am bound* to J. N. in 10 l. *ſolvendum to me*, this ſolvendum is void, and the obligation good and payable immediately. Br. Conditions, pl. 172. cites 21 E. 4. 36. per Vaviſor.

Paſch. 1658. B. R. in Caſe of Anſty v. Brian.——For the plaintiff may declare on a ſolvendum to himſelf. Finch. Max. 13, b.—Pl. C. 141. b. cites 4 E. 4. 29.—4 Le. 248. Arg. cites 4 E. 4. 29. b.

4. *And* if obligation be ſolvendum *in craſtino de domeſday*, it is the like, per Brian. Br. Obligation, pl. 58. cites 21 E. 4. 36.

5. The condition was, *whereas* the above bounden &c. ſhall and will &c. inſtead of *if*——This is a void condition, the ſame being altogether inſenſible and not compulſory as it ought to be, and ſo the obligation ſingle and without condition. 2 Bulſ. 133. Mich. 11 Jac. Marker v. Croſs. [63]

6. Obligation concludes, that the *condition* of the obligation ſhall be void, where it ſhould be the *(obligation)* omitting (condition) yet good. Sid. 456. Paſch. 22 Car. 2. B. R. Maleverer v. Hawkſby. 2 Saund. 78. S. C.—— Mod. 55. S. C.—— Vent. 39. S. S.—— 2 Keb. 625. S. C.

(O) Void. In reſpect of *Omiſſions* of Words. See (E).

1. A Man was bound in writing *to deliver* 20 *quarters of corn* to the plaintiff *ſuch a day*, *to the performance of which he bound himſelf in* 100*s.* and *did not ſay to whom*, and yet well, per Cur. for it ſhall be *intended* to the plaintiff; but, per Littleton, the *count ought to be that he bound himſelf to the plaintiff by theſe words* &c. *rehearſing the words of the deed.* Br. Obligation, pl. 46. cites 2 E. 4. 20. In articles between A. and B. 'tis ſaid, *We bind our-ſelves* (without ſaying to whom) in 2 col. to be forfeited *upon due proof of any part of theſe articles on either ſide*, but did not ſay upon due proof of *the breach* of the articles, yet made good by conſtruction. Lutw. 441. Mich. 1 Jac. 2. Watts v. Pitt.

2. Debt upon indenture of covenants, made by H. abbatem beate Marie de W. and in the end it was, ad quas conventiones perimplendas *H. abbas de W. obligat ſe* &c. in 10l. and *did not ſay predictus H. abbas*, and yet well; for it ſhall be *intended the ſame abbot* who was named before; quod nota. Br. Obligation, pl. 52. cites 11 E. 4. 2.

3. *Ad quam &c. obligo me* per preſentes dat. &c. and ſays not *ſigillo meo ſigillat.* nor *in cujus*; yet if a ſeal be put, the obligation is good; per 2 Juſtices. D. 19. pl. 113. Trin. 28 H. 8. Anon. See Faits (H) pl. 9. and the notes there.—— S. P. Dal. 1. pl. 4. cites S. C.—Cited per Portman J. to have been lately ruled, and ſays that the words *teneri & firmiter obligari* may be ſupplied by words purporting the ſame. D. 22. b. pl. 140.

4. The obligor's ſubſcribing his name to the bond is ſufficient, notwithſtanding that his *chriſtian name is blotted or left blank* in the bond. Cro. J. 261. Mich. 8 Jac. B. R. Dobſon v. Keys. 2 Rep. 5. ac.

5. If a man *binds his heirs* to pay a ſum of money (and does *not bind himſelf*), this is void. Arg. Show. 379. Paſch. 4 W. & M. cites Hob. 130. Oats v. Frith. For no man can charge his heir but as part of himſelf, and therefore beginning with himſelf. Hob. 130. Trin. 12 Jac. Oats v. Frith.

6. If

6. If J. S. be bound *in .... libris* (with a blank or ſpace), and not ſhewing in how much, it is not good. Per tot. Cur. quod nota. Yelv. 225. in Caſe of Logging v. Titherton.

7. Where the *heires* were *mentioned only in the condition*, and not in the obligation, the Court would not intend a real lien againſt the heir, tho' he be bound by the obligation of his anceſtor unleſs he be expreſsly named; tho' otherwiſe of an executor who has effects; and therefore judgment was arreſted. 2 Saund. 136. Trin. 22 Car. 2. Barber v. Fox.

[64] (P) Where the Obligations are *joint or ſeveral, or both. Rules, Pleadings &c.*

1. WHERE two are bound *each in the whole*, and are impleaded upon it upon *joint præcipe*, and the *one appears*, he ſhall not be compelled to anſwer without his companion; contra if he had impleaded them by *ſeveral præcipes*. Br. Dette, pl. 197. cites 48 E 3. 1.

2. Debt upon an obligation againſt *N.* who ſaid that he *and a feme were bound* et *uterque in ſolid'*; the *defendant ſaid, that the feme took to baron E. to whom E. the plaintiff has releaſed all actions by the deed which he ſhewed*, judgment &c. and the *plaintiff ſaid, that at the time of the making the obligation, the feme was covert of W.* ſo he can never have action againſt her judgment &c. and the opinion of the Court was, that it is no bar. So of an obligation made by J. and a monk, and the plaintiff releaſes to the monk. Br. Dette, pl. 73. cites 14 H. 4. 29.

3. In debt upon an obligation the defendant pleaded to the writ, *that J. S. was bound with him not nam'd* &c. and the plaintiff *ſaid that J. S. was within age* &c. the defendant was compelled to anſwer alone. Br. Dette, pl. 75. cites 14 H. 4. 32.

4. In debt upon a bond *againſt A.* it is a good *plea to the writ, that he and N. were joint obligors*, without any *traverſe* that he was obliged alone. Br. Brief, pl. 179. cites 22 H. 6. 4.

5. *So* in debt *againſt a prior*, to ſay *that he and the covent made the bond* without any traverſe. *But* Brook ſays, it ſeems that *if it was in bar*, as it is to the writ, *he ought to traverſe it*. Br. Ibid.

6. In aſſiſe. Where a man *is bound to two*, the *one dies*, the *other brings action*, and he *declares that the other is dead*; this is ſufficient, tho' he *does not ſay before the writ purchaſed*; for if it be otherwiſe the defendant may allege it; per Newton. Br. Count, pl. 38. cites 22 H. 6. 11.

7. In *debt* againſt J. N. *upon a bond*, and he *demanded oyer* of it, and had it, in which *were two other obligors*; by which he *demanded judgment of the count*, becauſe it was a joint bond, and the others were not named, & non allocatur; by which he ſaid that it appeared by the bond, that the other two are bound who are not named, *judgment of the writ*, & non allocatur; for this

is no form of pleading, but *ſhall ſay in fact, that he and the other two made the bond, who are alive not named, judgment of the writ*; quod nota. Br. Brief, pl. 26. cites 28 H. 6. 3.

8. Where there are two joint obligors, and the *obligee gives a longer day of payment to one* of them, and in the mean time *ſues the other*, a ſubpœna may be brought by that other; for it is for the ſame debt, and if the one had paid all, or if the obligee had agreed to accept the money from one who is indebted to one of the obligors, the other joint debtor ſhall have advantage thereof; per the Ld. Chancellor. Br. Conſcience, pl. 3. cites 9 E. 4. 41.

9. If *three are bound & quilibet in toto*, and *one is impleaded* for the debt, and the *plaintiff recovers*, and after *impleads another* of them, the firſt recovery is no bar; for it is no ſatisfaction; contrary if the plaintiff *takes execution* by the recovery; note the diverſity. Br. Jointenants, pl. 31. cites 4 H. 7. 8.

10. If *four are bound* by obligation *jointly, & uterque eorum per ſe*, the obligee *may charge any of them by themſelves ſeverally*; *but if he impleads two* of them they may abate the writ; for if he will charge any of them jointly, he ought to charge all the four. Br. Obligation, pl. 94. cites 10 H. 7. 16.

S. P. And this was pleaded in abatement of the writ after they were outlawed, and had ſued charter of pardon and ſcire facias upon it, and there pleaded this upon the firſt original. Br. Dette, pl. 69. cites 12 H. 4. 21.

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11. J. S. *maſter of the fraternity of D. and his confreres grant* 10*l. annuity to A. ſolvendum &c.* In cujus rei teſtimonium, *J. S. the maſter, and confreres put their common ſeal, and the ſaid J. S. ſigillum ſuum appoſuit &c.* A. ſhall have action againſt the corporation only; for tho' the maſter might charge himſelf alone, by reaſon of his 2 capacities, yet this does not charge him alone, becauſe all are the *words of the corporation, and no ſeveral words* by him only; and where the words are joint, the ſeveral ſealing will not make an obligation ſeveral. Br. Faits, pl. 106. cites 10 H. 7. 16. pl. 15.

12. *Sigillo ſuo ſigillat.* may be referr'd to both their ſeals, and both may uſe one ſeal. Cro. E. 247. Mich. 33 & 34 Eliz. C. B. Bretton v. Bolton.

13. An *obligation* was *entered into by three* to J. S. which tho' it was in the nature of a ſtatute-ſtaple, yet for want of being ſealed with a ſeal of two parts, *was ſued* as an obligation *againſt one only*. It was objected, that tho' it be an obligation, yet it being jointly entered into by three, therefore one cannot be ſued without the other. But it was reſolved and affirmed in error that debt lay upon it, and that the declaration againſt one of the obligors only was good enough, altho' the words of the obligation are joint; becauſe it *does not appear that the other two did ever ſeal it, or that they are alive, which ought to be ſhewn by the defendant*, if he will have the advantage; for otherwiſe the Court will not intend

Sid. 420. S. P. and that it ſeems judgment ſhall be for the plaintiff, and that the declaration is good, and it ſhall come of the other part to ſwear that there is another named in

intend it. Cro. E. 494. Mich. 38 & 39 Eliz. and Hill. 39 Eliz. B. R. Aſcue v. Hollingworth.

the bond, who is not named in the writ. Trin. 21 Car. 2. B. R. Chappel v. Vaughan—At another day it was adjudged for the plaintiff; but defendant might have pleaded his ſpecial matter in abatement. Ibid.

14. If two are bound ſeverally and jointly to me, and I ſue them jointly, I may have a capias againſt them both, and the *death or eſcape* of one ſhall not *diſcharge* the other; but I cannot have a *capias againſt one and another ſort of execution againſt the other;* becauſe tho' they are two ſeveral perſons, yet they make but one debtor when I ſue them jointly. But if I *ſue them ſeverally*, I may ſever them in their kinds of execution; for tho' the obligation be but one, yet the originals, the ſuits, pleadings, judgments, and executions are ſo divers as if they were upon ſeveral obligations; but yet ſo as if a very ſatisfaction be had of one, or againſt the ſheriff on an eſcape of one, the reſt may be relieved on an audita querela. Hob. 59. in Caſe of Foſter v. Jackſon.

15. Debt for 91*l.* 12*s.* 8*d.* upon a bill obligatory, dated 1ſt May 8 Jac. ſolvend 1ſt November following: the defendant demands over of the bill, which is entered in hæc verba; Be it known that *J. W. C. do acknowledge my ſelf to owe, and to be indebted to J. F. and W. S. in the ſum of* 91*l.* 12*s.* 8*d.* *to be paid the firſt of November following; for which payment to be made, I bind myſelf to J. F. in* 100*l.* dated &c. And it was thereupon demurred; and whether F. ought to bring the action for the 100*l.* or both of them for the 91*l.* 12*s.* 8*d.* was the queſtion; et adjournatur. Cro. J. 291. Trin. 9 Jac. Foxhall and Sands v. Corderoy.

16. If *three are bound*, and the *action is brought againſt two*, the plaintiff ought to *ſhew that the third is dead.* 2d. If two or three are bound, and *one dies*, the action cannot be *brought jointly againſt the ſurvivor, and the executor* of him that is dead. But if three are bound jointly, and action is *brought againſt two without ſpeaking of the third*, it was doubted if it be not good; for it may be that the third never ſealed. 3d. If *obligation* be *made to three*, and *two bring action*, they ought to * ſhew that the third is dead. 4th. If two or *three are bound jointly, and one dies*, the *executor of the deceaſed is utterly diſcharged.* Sid. 238. Hill. 16 & 17 Car. 2. B. R. Oſborne v. Croſbern, & al.

* Sid. 420. Trin. 21 Car. 2. B. R. S. P. in Caſe of Chappel v. Vaughan.

17. In debt on a bond againſt one, it appeared that another was bound with him, and for that reaſon the defendant demurred, but adjudged for the plaintiff; for the defendant *cannot demur* in ſuch caſe, *unleſs the other obligor be averr'd to be living, and alſo that he ſealed and delivered the bond.* Vent. 34. Trin. 21 Car. 2. B. R. Cabel v. Vaughan.

S. P. But defendant might have pleaded his [66] ſpecial matter in abatement. Sid. 421. S. C. by name of Chappel v. Vaughan—1 Saund. 291. S. C. acc.—Where plaintiff declares againſt one upon a deed, by which it appears that another was bound with him, it ſhall not be intended that the other ſealed unleſs averred on the defendant's ſide; otherwiſe where the declaration is upon matter

matter of record. Vent. 126. Trin. 23 Car. 2. B. R. in Case of PUTT v. NOSWORTHY, cites it as held per Cur. in CARTWRIGHT's Case, als. Bond v. Cartwright.

18. *And* if *one be bound to two*, one obligee cannot sue unless he *avers that the other is dead*. Vent. 34. in Case of CABEL v. VAUGHAN, cites 1651. B. R. Levit v. Staniforth. Hard. 198. S. P. by Hale Ch B. cites 28 H. 6. 3. 36 H. 16. 6 E. 4. 5.

19. One obligor is su'd to *judgment*, and thereupon a *fi. fa.* and the money levy'd by the sheriff, and this is pleaded by defendant the co-obligor, and held ill. Where a scire facias or debt is brought on the judgment against the party himself; such plea may be good; for he shall not pay twice. But a co-obligor can *plead* nothing but satisfaction actually made of the debt. 2 Show. 394. Mich. 36 Car. 2. Dyke v. Mercer.——Ibid. 498. Arg. cites the Case of BLOMFIELD v. USEWICK, 5 Rep. 86. Mo. 459. 3 Cro. 478. Whitacre's Case, 1 Cro. 75.

20. Where two are jointly bound and *one dies*, you must *sue the survivor*, and cannot bring an action against the executor or administrator of him that is dead; but if bound jointly and severally 'tis otherwise. 2 Vern 99. Pasch. 1689. Anon.—In the first Case plaintiff must set forth in his declaration that the other is dead. Sti. 50. Mich. 33 Car. Blackwell v. Ashton.

21. If *one be dead*, there the declaration against the other alone is good; and upon *non est factum*, he shall not have the advantage; because this *is* his deed, and *a several deed*; but because the lien is joint, there if it be pleaded in abatement, that another sealed the deed who is not named, and is yet living, judgment shall be given against the plaintiff; but if it was upon a contract & nil debet pleaded, there without question, the defendant might give in evidence that the contract was between him and A. B. &c. not named; and upon this it would be against the plaintiff; per Holt Ch. J. Skin. 280. Hill. 2 W. & M. B. R. in Case of Boulton v. Sandiford.

22. A. *executrix and residuary legatee* of her former husband, lends 100l. to B. and C. for which she *took a note in her own name, and a bond in J. S.'s name* in trust for herself. Afterwards A. *marries B.* this is no *extinguishment* of the bond, as it would have been had it been in her own name. 2 Vern. 290. Pasch. 1693. Cotton v. Cotton.

23. There is a *difference* between a *bond* jointly and severally, and a *recognizance* joint and several; for upon the bond you can't sue both jointly and severally, but upon the recognizance you may; per Holt Ch. J. 6 Mod. 197. Trin. 3 Annæ. B. R. in Case of Fanshaw v. Morrison.

(Q) *Good* or not, where the *Solvendum* is *to a Stranger.*

1. IF A. be *bound unto J. S.* in an obligation of 20l. and in the obligation itself it is thus, *to be paid unto J. D.* this obligation is not good. Trin. 24 Car. B. R. For to J. S. it cannot

If A. bind *himself to* 20l. *to B.*

ſolvend' to C. who is a *ſtranger*, a payment to C. is a payment to B. And in an action upon [67] it, the count muſt be upon a bond ſolvend' to B. Arg. 6. Mod. 228. Mich. 3 Ann. B. R. in Caſe of Roberts v. Harnage.——cites 4 E. 4. 19. 2 Keb. 81.—And per Cur. if A. makes a bond to *B. ſolvend' to ſuch perſon as B. ſhall appoint.* If B. does appoint one, payment to him is a payment to B. and if B. appoints none, it ſhall be paid to B. himſelf. Ibid.

cannot be good, the obligor not being bound to pay him the 20 l. in which he is bound; for the ſolvendum is to J. D. And to J. D. it cannot be good; becauſe if A. pay not the 20 l. J. D. cannot ſue for it; for A. is not bound unto him by the obligation, and ſo the obligation is void to all intents; and where a deed can have no operation in law, it is utterly void, and it is as if no ſuch deed had been made. Sed. qu. for I ſee no reaſon why it ſhould not be a good bond; it is a common thing in covenant; or if it had been *in the condition* of the bond *to pay money to a ſtranger*, there had been no doubt in the caſe. 2 L. P. R. 251.

2 Keb. 81. S. C. and that the Court inclin'd that there are ſufficient words of obligation, and that the Queen might declare on an obligation generally to herſelf, notwithſtanding the payment be to another for her uſe.

2. A. was *bound to the Queen ſolvend' to J. K. to the uſe of the Queen.* In debt brought upon this bond the defendant demurred; and it was ſaid, that the ſolvend' to the ſtranger is void, as well as if it had been to the obligor himſelf; and the Court inclin'd that judgment ſhould be for the plaintiff for this reaſon; but adjornatur. Sid. 295. Trin. 18 Car. 2. B. R. The Queen Mother v. Challoner.

6 Mod. 228. S. C.

3. A. is bound to *B.* in 40 *l. ſolvend. to his attorney* or his aſſigns. This bond was declared upon as payable to A. himſelf, and held good; for teneri made it a debt to A. and conſequently it may be paid to him; a ſolvend' to any body elſe would be repugnant. 2 Salk. 659. Mich. 3 Ann. B. R. Roberts v. Harnage.

(R) *Forfeited or diſcharg'd by* what *Entry, Eviction, &c.*

For an obligation cannot be apportion'd; for where he is bound in 10 l. to pay 4 l. and he pays 3 l. and not 4 l. the obligation is forfeited. Ibid. ——Brook ſays it ſeems there that *if the entry had defeated the eſtate of the plaintiff in the whole*, that then *the obligation had been diſcharged in all.* Ibid.

1. DEBT upon *an obligation for payment of rent reſerved upon a leaſe for years made by the plaintiff to the defendant*; the *defendant ſaid, that before that the plaintiff any thing had, J. N. was ſeiſed and had iſſue the plaintiff and two other daughters and died; and the plaintiff entered into all and leaſed to the defendant rendering the rent*, and he was bound to pay it, *and before any day of payment the two other daughters enter'd*, judgment ſi actio. And the beſt opinion was, becauſe by the entry into two parts, the rent ſhall be apportioned, and the defendant has not paid the third part of the rent according to it, therefore the *obligation is forfeited* Br. Obligation, pl. 6. cites 20 H. 6. 23.

2. *Oblations* were *leaſed* which *were after reſum'd*, and admitted that this is a good plea in bar in debt upon an obligation for performance

performance of the covenants in the indenture of leaſe on the part of the leſſee. Br. Obligation, pl. 39. cites 21 H. 7. 6.

3. If a man be *bound to pay the rent reſerved upon ſuch a leaſe for years* made of the land by the obligee to the obligor; if the *obligee enters into parcel of the land*, the obligation is diſcharged for the non-payment during this time. Br. Obligation, pl. 76. cites 4 H. 7. 6. per Brian and Keeble.

4. If a man be bound in a *bond depending upon covenants*, or upon a leaſe, *if he can avoid the* leaſe or *covenants*, then this is an avoidance of the bond. Br. Obligation, pl. 88.

5. Bond to *perform covenants in a leaſe*, one whereof was to *pay the rent* at the day.——Debt was brought for non-payment of the rent.——By the recovery the obligation is *determined*. Cro. E. 332. Trin. 36 Eliz. B. R. Andrews v. Wood.

6. *Judgment* is a good plea *in ſatisfaction* of a bond; per Cur. 12 Mod. 248. Mich. 10 W. 3. Roe v. Nedham.

(S) *Aſſignment* of Obligations. [68]

1. AFTER aſſignment of a bond, the money in equity is the aſſignee's, and *payment* to the obligee after notice of the aſſignment is not good. 2 Vern. 540. Hill. 1705. Baldwin v. Billingſley.

2. J. gave bond to the defendant C. of 250 l. for payment of 120 l. The defendant aſſigns that bond to the plaintiff in ſatisfaction of a debt of 56 l. and to indemnify him againſt a bond he was bound in as ſurety for the defendant C. and at the ſame time the plaintiff C. gave a note to the defendant to indemnify him againſt a debt of 50 l. to Jewel, in which the defendant C. was bound as ſurety for the plaintiff. Lord Chancellor decreed the plaintiff to have the benefit of the bond, and thereout to diſcount the debt to Jewel, the note being (as he ſaid) in the nature of a defeaſance to the bond; and although the aſſignee comes in upon a full and valuable conſideration, yet he *muſt take the bond ſubject to the ſame equity*, as it was in the obligee's hands. 2 Vern. 692. Trin. 1715. Coles v. Jones and Coles.

A bond is aſſignable only in equity, and when aſſigned *is liable to and attended with the ſame equity as if remaining with the obligee.* 2 Vern. 765. Mich. 1718. Turton v. Benſon.

(T) *Agreement.* In what Caſes the *Condition* of a Bond being to do ſome Act, it ſhall be *decreed* to be executed *in Specie, or only as a Condition.*

1. AFTER the ſtatute of 32 H. 8. a *tenant in tail binds himſelf* by obligation or recognizance *not to make a leaſe for* 21 *years or three lives*; if he makes ſuch leaſe it ſhall be good, but the bond or recognizance is forfeited. Jenk. 120. pl. 41.

2. An agreement *contained in the condition of a bond*, ſhan't be turn'd

A bond of the *penalty*

of 5000 l. was enter'd into by A. to J. S. in conſideration of J. S marrying A.'s daughter *to ſettle one third of whatever eſtate ſhould come to him upon the death of A.'s father* upon the ſaid J. S. and his daughter, within three months after his the ſaid A.'s father's death. The father of A. died, and the third part of the eſtate which came to A. was 1600 l. per ann. Parker C. decreed, that the condition of the bond ſhould * be *ſpecifically performed; for* the deſign of this agreement, of which this bond was an evidence, was to *make a laſting proviſion*, which could never be ſatisfied by the forfeiture of the penalty, which in ſuch caſe would be all the huſband's, and ſo no proviſion for the wife or children. 10 Mod. 511. Hobſon v. Trevor——2 Wm's Rep. 191. Mich. 1723. S. C.——* S. P. 10 Mod. 462. Mich. 6 Geo. 1. Blundel v. Barker.

turn'd into a collateral execution, by *decreeing the land.* Ch. Caſes 188. Mich. 22 Car. 2. Bagg v. Foſter.

9 Mod. 62. S. C. Aliſon's Caſe. —2 Vern. 394. Gardiner v. Pullen. Mich. 1700.

3. The authorities are many in this Court, that bonds have been conſidered as *evidences of agreement*, and obligors held to a ſpeciſick performance, and not allowed to forfeit the penalty; per Parker C. 10 Mod. 518. Mich. 10 Geo. Parks and Wilſon.

[For more of **Obligation**, ſee **Aſſignment**, **Conditions**, **Grants** (G), and other proper titles.]

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[69]

Fol. 150.

Occupant.

(A) Occupant. *Of what Eſtate.*

2 Roll. R. 123. contra Arg. and no objection to it.

[1. IF *tenant by the curteſy*, *or* tenant *in dower grant over* their eſtate, and grantee dies during the life of ceſty que vie, there ſhall be an occupant, though the eſtate be created by the law. Co. Litt. 41. b.]

[2. If *leſſee for life leaſes to the leſſor in reverſion in fee, and to the heirs of his body for life of the leſſee*, and after *leſſor dies* living the leſſee, the heir of the body ſhall be a ſpecial occupant; for this was not any ſurrender. 18 E. 3. 44. b.]

[3. If *tenant for life ſurrenders to the remainder in tail, who dies during the life of the leſſee*, there ſhall not be any occupancy; for by the ſurrender the eſtates were conjoin'd. Contra. 42 E. 3. 10.]

[4. If *remainder in fee enters, and be an occupant*, he ſhall be ſaid an occupant during the life of ceſty que vie. 42 E. 3. 10. may be collected.]

S. C. cited 4 Rep. 73. b. in Borroughe's Caſe.

[5. If a man *leaſes to two for their lives, & diutius eorum viventi*, and after the *leſſees make partition*, and then one dies, yet there ſhall not be any occupancy of his eſtate; but the leſſor may enter; for the words (et diutius eorum viventi) are void, not

not being more than the law ſays, and by the partition the jointure is ſever'd. 30 Aſſ. 8. adjudged.]

6. A leaſe is made to J. S. *to hold to him and his aſſigns for his own life, and for the life of A. and B.*——The queſtion was, If his eſtate was determined; becauſe one cannot have a greater eſtate of freehold than his own life. But Anderſon and the whole Court held clearly, that it is a good limitation, and he has an eſtate for all their three lives; for though he himſelf cannot have an eſtate but for his own life, yet he may have it to grant to another, and the habendum for their three lives is a good limitation, and by his death the eſtate is not determined, but occupanti conceditur. Cro. E. 182. Paſch. 32 Eliz. B. R. Utty Dale's Caſe—alias Uvedale's Caſe.

S. C. cited Cro. E. 491. Mich. 38 & 39 Eliz. in Caſe of Roe v. Ardwick.

7. Father had eſtate for his *own and his two ſons lives*; he *aſſigns it to truſtees* to the uſe of himſelf for life, remainder to his wife for life, (if his two ſons live ſo long) remainder to the uſe of one of the ſons and his heirs. The queſtion was, Whether after the wife's death it ſhall *reſult* to the father, or the *ſurviving truſtee* ſhall have it, or the *heir* ſhall be ſpecial occupant. Cart. 46. Trin. 17 Car. 2. C. B. Tinker v. Lidcott.

Bridgman Ch. J. ſaid, when the father had an eſtate for three lives, and he conveyed the land after to the uſe of himſelf for life, and to his wife for life, during the lives of his ſons &c. why ſhould not all go out of the father, as in CHUDLEIGH's Caſe? Ibid.

8. No occupancy ſhall be of *copyhold, without ſpecial cuſtom.* 6 Mod. Mich. 2 Ann. B. R. Smartle v. Penhallow.——1 Salk. 188. S. C.

If copyhold tenant *pur auter vie dies*, there ſhall be no occupant, but the *lord ſhall enter.* 1 Salk. 188. S. C.———Noy. 47. S. P. in Caſe of Salter v. Butler.

(B) *Againſt whom* there ſhall be an Occupant upon the Eſtate. [70]

[1. AGainſt *the King* there ſhall not be any occupant; becauſe *nullum tempus occurrit Regi*, and therefore no man ſhall gain of the King by priority of entry. Co. Lit. 41. b.]

Of an eſtate which a man has by letters patents of the King, there ſhall not be any occupancy. Arg. 2 Roll. R. 123. Mich. 17 Jac. in Caſe of Skellekorne v. Hay.

[2. If *leſſee for life enters into religion*, there ſhall not be any occupancy; *but leſſor may enter*, becauſe he is dead in law. 18 E. 3. 48. b.]

[3. *But* if leſſee for life *grants over his eſtate and then enters into religion*, it ſeems that there ſhall be an occupancy; for otherwiſe he may by his own act defeat his own grant, as Litt. 96. If diſſeiſor enters into religion, the deſcent to his heir ſhall not take away an entry.

(C) General. *Of what Thing* it may be.

Vaugh. 190. in Caſe of Holden v. Smallbrook. —The ſole means that

[1. THERE cannot be any occupant of any *thing which lies in grant, and which cannot paſs without deed;* becauſe every *occupant ought to claim by a que eſtate, and aver the life of ceſty que vie.* Co. Lit. 41. b.]

the law gives to one to gain an eſtate by occupancy, is by entry; but no *entry* can be in an *advowſon, rent,* or any other *thing that lies in grant.* Bridgm. 94. Arg. cites 26 Aſſ. 38. 12 H. 7. 16. ——See Vaugh. 187 to 200. Holden v. Smallbrook.

Mo. 664.— Yelv. 9. 2 Roll. R. 123. S. P. Arg.

[2. There cannot be a general occupant of a *rent.* Contra 33 Aſſ. 4.]

——For none can make a title to a rent to have it againſt the tertenant, unleſs he be party to the deed or conveys a ſufficient title under it Cro. E. 901. Mich. 44 and 45 Eliz. B. R. Salter v. Butler.——*Rent* was granted *to A. for* 3 *lives,* who *dies without diſpoſition living ceſty que vie;* grantor ſhall hold the land diſcharged, becauſe occupancy can't be of a rent; for it can only be of lands which paſs by livery, whereby the freehold paſſed, and ſhall not revert again till the limitation be determined, and it is for the ſake of a præcipe of a ſtranger. 6 Mod. 68. Mich. 2 Annæ B. R. Agreed, in the Caſe of Smartle v. Penhallow.

[3. A *feme tenant for life of a copyhold,* the *reverſion* being granted over *to B. for life, remainder to C. for life cum acciderit poſt mortem ſurſum-redditionem vel forisfacturam of the feme,* and after *baron ſurrenders to* the uſe of *B. for his life,* to whom the lord grants it for his life, and ſo he *is admitted tenant, and after dies.* In this caſe C. ſhall not have it; becauſe his eſtate is not to commence till after the death, ſurrender, or * forfeiture of the feme, and the feme here is alive, and has not made any ſurrender or forfeiture, and the feme has right to it by plaint in nature of *cui in vita;* but *the lord* in this caſe *may retain it* in his proper hands, or diſpoſition, *during the life of the baron, as an occupant.* D. 9 E. 264. f. 38.]

* Fol. 151.

4. No occupancy ſhall be of a rent, nor *of an eſtate created by law.* Arg. Bulſ. 136. cites 15 E. 3. F. tit. Sci. Fa. pl. 17.

5. Rent was granted to 2 for life of J. *If they die living J.* the rent is extinct; for there is no general occupant of rent; but if they had granted their eſtate to M. there M. ſhall have this living J. D. 186. pl. 1. Marg. cites Mich. 41 & 42 Eliz. per Walmſley and Anderſon in Crawley's Caſe.

[71]

1 Salk. 188. S. C.

6. No occupant can be of *copyhold* without ſpecial cuſtom. Agreed. 6 Mod. 68. Mich. 2 Annæ B. R. Smartle v. Penhallow.

* (D) *Special, of what Thing it may be.*

* This in Roll is (O).

[1. A Special occupant may be of a *rent.* 18 E. 3. 44. b. 33. Aſſ. 4.]

Mo. 664. pl. 807. Trin.

[2. *As* if a rent be granted *to another and his heirs for the life of J. S.* his *heir* after his death ſhall have this rent as ſpecial occupant.

occupant. P. 7 Jac. B. per Curiam, between Whiſkings and Davie.] 44 Eliz. B. R. S. P. in Caſe of

Salter v. Butler——Per Fleming Ch. J. In ſuch caſe the heir *takes not by deſcent, but as heir nomination, and by limitation only.* Bulſ. 135. Bowles v. Poor.——Ibid. 137.——Cro. J. 232. Trin. 9 Jac. B. R. S. C.

[3. If an *annuity* be granted to another and his heirs for the life of J. S. if the grantee dies during the life of J. S. his heir ſhall have the annuity. 19 E. 3. 56. Agreed.]

* (E) Who ſhall be ſaid to be the Occupant.

* This in Roll is (P).

[1. IF *tenant pur auter vie makes leaſe for years and dies*, the leſſee for years being in poſſeſſion ſhall be the occupant, and his leaſe is extinct. M. 10 Ja. B. R. per Curiam, between Chamberlaine and Ewer.] If tenant pur auter vie makes a leaſe for years, the remainder

for years, and tenant for years enters, and then the tenant pur auter vie dies, here the tenant for years ſhall be an occupant, and yet his term for years is not drown'd by reaſon of the meſne remainder for years; for in ſome caſes a term for years and a freehold may well ſtand together in one and the ſame perſon. Per Williams J. 2 Bulſ. 12. in Caſe of Chamberlain v. Ewer.——Watſ. Comp. Inc. cap. 42. pag. 815.——Leſſee pur auter vie *leaſes at will to feme covert*; leſſee pur auter vie dies; her baron ſhall be occupant. Per Twiſden. Sid. 317. Mich. 19 Car 2. Geary v. Bearcroft——Leſſee at will ſhall be occupant. 2 Roll. R. 123. Skellikorne v. Hay.——Cro. J. 554. Skelliton v. Hay.

[2. If a man *leaſes for years, and after by covin, to the intent to extinguiſh the leaſe, makes leaſe to an* ancient *man pur auter vie who dies*, it ſeems the leſſee for years ſhall be occupant. But it ſeems by reaſon of the covin, that his leaſe for years ſhall be ſaid to be in eſſe againſt the leſſee. M. 10 Ja. B. R.] 2 Brownl. 202. S. P. cites it as 18 Eliz. Adams's Caſe.

[3. If *leſſee pur auter vie leaſes for years, and leſſee for years makes leaſe at will*, and after *leſſee pur auter vie dies, the* * *leſſee at will* being in poſſeſſion ſhall be the occupant, and not the leſſee for years; but he ſhall have it in nature of a reverſion, and ſo the leaſe for years is not extinct. Mich 10 Ja. B. R. adjudged between Chamberlayne and Ewer.] D. 328. b. pl. 10. Mich. 15 and 16 Eliz. —Palm. 42. Bowyer v. Ewer —— Vern. 234.

Ragget v. Clerk——* S. P. and he need not make claim; for he has the occupation of the land; and this differs from the caſe where a man comes caſually to the land, or hawks there; for they are not any occupancies; per Crooke, Doderidge, * and Haughton. J. 2 Roll. R. 123. Mich. 17 Jac. Skellekorne v. Hay.——S. P. Cart. 59. 61.——S. P. The freehold by operation of law is caſt upon him; but this he ſhall hold and enjoy ſubject unto the leaſe for years; becauſe he cannot have and enjoy this eſtate of freehold but in the ſame manner as the tenant pur auter vie held and enjoy'd the ſame, and he held the ſame ſubject to the leaſe for years; but if there had been no leaſe at will made, then by the eſtate of occupancy falling upon the termor for years the freehold is preſently in him by operation of law, and ſo by this the term for years is drown'd, extinct and gone. 2 Bulſ. 12. Chamberlain v. Ewer.

[4. If *tenant pur auter vie dies, and J. S. firſt enters and claims it in the right of J. D.* yet he himſelf ſhall be the occupant; for the law veſts the occupancy upon him who firſt enters, which cannot be deveſted by the act of the party en Pais. M. 10 Ja. B. R. per Curiam, between Chamberlain and Ewer.] [72] S. P. per Vaughan Ch. J. and cites S. C. Vaugh. 195. in caſe of Holden v. Smallbrook.

5. *Adminiſtrator* can't be an occupant of a *rent-charge pur auter vie*,

Cro. E. 901. Mich. 44 & 45 Eliz. B. R. S. C. —Yelv. 9. S. C. and

vie, but after the death of the grantee it paſſes to the benefit of the tertenant. But if grantee had *aſſign'd* the rent &c. the aſſignee ſhould have had it during the life of ceſty que vie. Noy. 47. in caſe of Salter v. Butler.

that it cannot come to the executor or adminiſtrator; for it was not a thing teſtamentary, but franktenement.

6. A *tenant for life granted by fine* his eſtate to B. and by indenture limited the uſe *to B. for the life of A. and B. and if he died living A.* then to remain *to C.*——B. died living A.——C. entered and let to D. for years, and died, living A.—— C. ſhall have this as an occupant, and his leſſee ſhall hold as an occupant, and A. has no reſidue of the uſe in him. Cro. J. 200. Mich. 5 Jac. B. R. Caſtle v. Dod.

7. Tenant pur auter vie of a *prebend*, conſiſting of houſe, barn, glebe and tithes, *leaſes it for a year* and dies leaving a wife; J. S. entered and claim'd.—The wife enter'd and claim'd; *leſſee for a year attorned to the wife*, and afterwards continuing poſſeſſion, aſſigns all his eſtate in the premiſſes to the plaintiff J. S. Adjudged for the wife againſt J. S. per 3 J. v. Vaughan Ch. J. Vaugh. 187 to 205.

Per Tirrel J. if A. diſſeiſe B. tenant pur auter vie, he ſhall not be occupant. Cart. 61.——per Croke J. contra, and Doderidge J. ſeem'd to agree that diſſeiſor ſhould be occupant. 2 Roll R. 123. cites 19 H. 6.

8. If tenant pur auter vie be diſſeiſed and die, *diſſeiſor* ſhall be an occupant; per Brown J. Arg. Cart. 61.

Per Bridgman Ch. J. according to Brown J. Cart. 64.——If tenant for three lives makes a leaſe for years, and the leſſee for years is outed, and after the tenant for three lives dies; here the diſſeiſor ſhall be occupant, and the law will now turn his wrongful eſtate, which he had by the diſſeiſin into a rightful eſtate as an occupant. 2 Buls. 12. Chamberlain v. Ewer.

If tenant pur auter vie be diſſeiſed and dies, the fee ſimple here which he had gain'd by diſſeiſin is converted and changed into a rightful freehold, and that by operation of law, ſettling now the freehold in him as occupant, and this is warranted by the book of 38 H. 6. 28. per William J. 2 Buls. 12. in Caſe of Chamberlain v. Ewer.

* (F) *Of what Eſtate* it may be. [*Special.*]

* This in Roll is (Q).

There ſhall be no occupant of an eſtate of tenant by the *curteſy or dower* which are eſtates *created by Law*.

[1. IF *tenant by the curteſy grants his eſtate to another and his heirs*, and grantee dies, his heir ſhall be a ſpecial occupant of this eſtate, 27 Aſſ. 31. admitted as I take it, that the grant over was ſo; for it is admitted that the heir of the grantee ſhall have the land.]

Cro. E. 58. cites it as Delapet's Caſe.

S. P. by Anderſon & Periam. Cro. E. 182. Paſch. 32 Eliz. B. R. in Utty Dale's Caſe.

2. *Tenant pur auter vie makes leaſe for years to commence from his death*; a ſtranger enters; tho' the ſtranger is occupant of the freehold, yet leſſee for years ſhall enter upon him, and the leaſe ſhall bind the occupant: agreed. Lev. 201. in Caſe of Geary v. Barecroft.

——D. 328. b. Marg. pl. 10. cites ſame year, and ſeems to mean the S. C.

3. *So* if tenant pur auter vie leaſes for years, *in truſt for himſelf for life*, and after in truſt *for his wife* for her life; and the *leſſee for*

for years actually enters, but permits the baron to enjoy it, who dies, and * then the feme enters. The *feme ſhall be* occupant and not the leſſee for years. And ſo a judgment given in C. B. contrary to the opinion of Bridgman Ch. J. was affirmed per 3 J. abſente Keyling Ch. J. Lev. 202. Geary v. Bearcroft.

Sid. 346. S. C. in B. R.— Cart. 57. S. C. argued by the Court in C. B.

4. The cuſtom of a manor was, that *every cuſtomary copyhold of that manor might be granted to three* perſons, habendum to them, *ſucceſſive ſicut nominantur & non aliter*. A ſurrender was made *to J. S. and his aſſigns for his own life, and the lives of two others*. Powel J. ſeemed to incline that if J. S. had become bankrupt, and the eſtate aſſigned, and the aſſignee had died, living the copyholder; the lord ſhould immediately have the land; and Powis J. thought that upon the death of the copyholder the eſtate of aſſignee would determine, tho' the ceſty que vie were living. But it was agreed, that if the grant had been *to J. S. for the lives of B. C. and D. and J. S. had died;* the lord ſhould have the land again, tho' againſt his own limitation, becauſe there can be no occupant of a copyhold eſtate without a ſpecial cuſtom, and this would be no miſchief, the failer being on the ſide of the grantee only. 6 Mod. 63. 68. Mich. 2 Ann. B. R. Smartle v. Penhallow.

* (G) *Who may be* a ſpecial Occupant.

* This in Roll is (R).

[1. IF *leſſee for life leaſes to another, and to the heirs of his body for life of the firſt leſſee;* in this caſe the heir of his body ſhall be occupant after his death. 18 E. 3. 44. b.]

[2. If a man *leaſes to another and his executors land for life of J. S.* and ceſty que vie dies, the executors ſhall be a ſpecial occupant (tho' it be a franktenement). D. 16 El. 328. 10.]

See this Caſe D. 328. b. pl. 10. Mich. 15 & 16 Eliz. where this point ſeems not to appear clearly; but it ſays, that livery of ſeiſin was made according to the habendum.

[3. If a man grants a *rent to another, his executors and aſſigns for the * life of J. S.* and after *the grantee dies, making an executor but no aſſignee*, the executor ſhall not be a ſpecial occupant; becauſe it is a franktenement, which cannot deſcend to the executor. Tr. 3 Car. in Chancery, between Sir *Richard Buller* and *Emelin Cheverton* plaintiffs, and *Iſabel Cheverton* defendant, agreed and admitted by Juſtice Jones and the Court, and by the counſel of both ſides, and that the rent was extinct.]

* Fol. 152.

S. P. Mo. 664. pl. 807. Trin. 44 Eliz. B. R. Salter v. Boteler.

4. Rent is granted *to A. and B. during the life of C. to the uſe of C.—A. and B. die.* Per Cur. the rent continues to C. for the uſe is veſted by 27 H. 8. D. 186. a pl. 1. Marg. cites Mich. 41 & 42 Eliz. Crawley's Caſe.

But in D. 186. pl. 1. Mich. 2 & 3 Eliz. the Court inclined that the eſtate was determined by the deaths of A. and B. inaſmuch as the eſtate, on which the uſe was raiſed and created was gone, by which &c. But adds a quære if the eſtate was made before the 27 H. 8.

5. If

5. If *grantee pur auter vie* of a rent-charge had *devis'd the rent-charge;* the deviſee ſhould have had the rent during the auter vie; per Gaudy and Fenner, but Popham contra. Noy 47. in Caſe of Salter v. Butler.

[74] (H) The *Reaſon and Original* of Occupancy.

Occupancy is only to ſupply a freehold, per Holt Ch. J. 1 Salk. 189. Smartle v. Penhallow.——For ſhould the freehold continue in *abeyance*, no action could be brought during all that time, be it ever ſo long; nor trial had by him that had right to recover the freehold and inheritance; per Tirrel J. Cart. 61.

1. IT is only for *neceſſity* and to avoid a greater miſchief; per Brown J. Cart. 60.

2. The law of occupancy is *founded upon the law of nature*, viz. quod terra manens vacua occupanti conceditur. So as upon the firſt coming of the inhabitants to a new country, he that firſt enters upon ſuch part of it, and manures it gains the property (as is now uſed in *Cornwall* &c. by the laws of the Stannaries) ſo that it *is the actual poſſeſſion and manurance* of the land, which was the firſt cauſe of occupancy, and conſequently is only to be gain'd by actual entry. Sid. 347. Geary v. Bearcroft.

3. The true ground of occupancy is, that *anciently all trials of titles were by real actions*, and therefore he that had the freehold was one to whom the law had a ſpecial regard. The *ancient law* for many reſpects *did not allow leaſes for above* 40 *years*, till 21 *H.* 8. 15. per Bridgman Ch. J. Cart. 65. Paſch. 18 Car. 2. C. B. in Caſe of Geary v. Bearcroft.

4. *And* another thing was, there was reaſon too, that not only he that had right paramount might know how to try his action, but that the *lord might know how to avow for his ſervices* (which were conſiderable things formerly), he ought to know who was his tenant; and therefore the law provided there ſhould be a perſon on whom he ſhould avow; per Bridgman Ch. J. Cart. 65. in Caſe of Geary v. Bearcroft.

5. The ſubject and object of the occupant are only ſuch things as are capable of occupancy, and not the freehold at all; into which he neither doth nor can enter; but *the law caſts the freehold immediately upon him that hath made himſelf occupant* of the land or other real thing whereof he is occupant, *that there may be a tenant to the præcipe*; per Vaughan Ch. J. Vaugh. 195. Hill. 19 & 20 Car. 2. in Caſe of Holden v. Smallbrooke.

(I) *Actions.* What Actions lie againſt him.

S. P. Co. Lit. 44. b.

1. IT was reſolved that an occupant ſhall be puniſhed for *waſt*, becauſe he has the eſtate of the leſſee for life; for the ſtatute of Glouceſter cap. 5. gave action of waſt againſt him who holds in any manner for term of life, or for years; and *occupant holds*

holds for term of life. 6 Rep. 37. b. Trin. 3 Jac. B. R The Dean and Chapter of Worceſter's Caſe.

(K) *Pleadings.*

1. IF *he in reverſion* enters after the occupant, and brings an action againſt him, the occupant ought to *plead* the leaſe to *ceſty que vie* whoſe eſtate he hath; but for a rent or an eſtate that lies in grant, *none can plead a que eſtate*, but ought to intitle himſelf by the grant. Arg. Bridgm. 94. Hill. 13 Jac. in Caſe of Mande v. French.

(L) Acts of Parliament. [75]

1. BY 29 *Car.* 2. *cap.* 3. *ſ.* 12. *any eſtate pur auter vie, if not deviſed ſhall be chargeable in the hands of the heir if it come to him by a ſpecial occupancy as aſſets by deſcent, elſe it ſhall go to the executors, and be aſſets in their hands.*

See Eſtate (Q. a. 3.)— A title under an occupant of a life for the lives of B. and C. is good; for the ſtatute did not take away all occupancy, but *transferred* it to executors; and the occupant by his entry on the land is *executor de ſon tort*; becauſe the ſtatute made it aſſets; per Holt Ch. J. Carth. 166. Mich. 2 W. & M. B. R. in Caſe of Bradburn v. Kennerdale.

(M) *Equity.* Relief.

1. *A. Conveyed lands to W. R. and W. S. and their aſſigns to the uſe of them, their heirs and aſſigns during the lives of the ſaid A. and M. his wife, and the longer liver of them; proviſo if A. pay to B.* (who after died inteſtate) 120*l.* in February 1628. then the eſtate to be void, and A. to re-enter. The 120*l.* was not paid; ſo as the eſtate became forfeited. C. having paid divers debts for B. the ſaid W. R. and W. S. were ordered to convey their intereſt to C. which they did. C. died, leaving D. her executor, who was ſettled in the eſtate by order of the Court; but there being no decree in the cauſe, D. exhibited his bill to have the eſtate confirmed to him by decree. The Court with advice of Judges, and view of precedents, whereby *in ſome ſpecial caſes, the Court hath ordered the poſſeſſion againſt an occupant*, did declare that tho' in caſe of an occupant upon a general truſt, this Court was doubtful how to decree any thing upon a matter of equity in oppoſition to a ground or rule of law; yet this caſe differing from a general truſt upon an eſtate granted pur auter vie, as the ſame is a *conditional eſtate pur auter vie granted as a ſecurity or pledge for a debt*, which not being paid, the eſtate by forfeiture becometh aſſets in the plaintiff's hands to pay the debts of B. the Court decreed the lands abſolutely to D. and his aſſigns, during the continuance of the ſaid eſtate, for ſatisfaction of

B.'s debts, and the tenants to attorn, niſi cauſa; and none was ſhewed. Chan. Rep. 39, 40. 5 Car. 1. Tuphorne v. Gilbie.

In the Caſe of the Duke of DEVON v. KINTON, the Lord Chancellor took it, that before the ſtatute of frauds and perjuries, if an eſtate pur auter vie *came to an executor or adminiſtrator* it would be aſſets, and decreed accordingly. 2 Vern. 719, 720. Mich. 1716. Caſe 638.

2. A. being indebted, B. became *ſurety* for him. A. died, B. brought a bill againſt A.'s widow, ſuggeſting that ſhe had ſufficient of her huſband's eſtate to diſcharge the debts, and *prayed to have leaſes pur auter vie, whereof A. the teſtator was ſeiſed at the time of his death*, and on which the widow entered as an occupant, *to be aſſets in equity*. But the Court in reſpect the plaintiff did not get a caſe made of this point by ſuch a time diſcharged the defendant of any further demands from the plaintiff. Chan. Rep. 59. 8 Car. 1. Throgmorton v. Wagſtaff.

Freem. Rep. 212. pl. 384. Mich. 1675. ſeems to be S. C. which was a bill by occupant *for the conveyances belonging to the eſtate.*

3. A title under an occupant ſet forth by the plaintiff was *demurred to*, and allowed; becauſe this Court will not countenance nor give any relief thereto. 2 Chan. Rep. 112. 27 Car. 2. Price v. Evans.

It was ſaid for the defendant, that it was not proved in the cauſe, that there was any deficiency of aſſets; but if it had, yet this occupancy happening before the ſtatute of frauds and perjuries, the eſtate was nowiſe ſubjected to the payment of debts, and of that opinion was the Lord Keeper, and therefore diſmiſſed the bill. 1 Vern. 234. S. C.

[76]

4. *A.* ſeis'd of a parcel of land for his own life, and the lives of B. and C. *prevailed with R. to be bound with him for a ſum of money;* and that R. might raiſe money for the diſcharge of the ſaid debt, he *permitted R. to enter into* the ſaid lands, *and take the profits for two years*, the ſaid lands being about 12*l.* yearly value, and the ſaid land being ſo in A.'s poſſeſſion *A. died*, and made E. his wife his executrix. E. brought a bill to have an account of the profits, and that the poſſeſſion of the land ſhould be delivered up to her; R. by plea ſet ſet forth his title as occupant, and it was allowed, and the bill diſmiſſed. Paſch. 36 Car. 2. 2 Vent. 364. Ragget v. Clark.

[For more of Occupant in general ſee Eſtate and other proper titles. And ſee Vaugh. 187. to 205. Holden v. Smallbrooke.]

Occupier.

(A) *Who*; and capable of what.

1. *Preſcription* was laid in all the occupiers of ſuch a cloſe, that they time out mind had *repaired a fence*. This is too general and ill; for every tenant † at will, or at ſufferance, or a diſſeiſor are occupiers, and they * cannot charge the land; but ſuch a preſcription to pay ſo much *in diſcharge of tythes* by the occupiers has been allowed good; for it is for the benefit of the land; and tythes ariſe on the occupying of the land. Cro. E. 445. Mich. 37 & 38 Eliz. C. B. Auſty als. Auſby v. Fawkner.

10 Mod. 301. Arg. ſays, that this Caſe was denied to be law. Mich. 9 Ann. in Caſe of Thorn v. Rookby.—S. P. 5 Rep. 99. b. Hill. 40 Eliz. C. B. Rooke's Caſe.—S. P. 2 Roll. R. 289. Hill. 20 Jac. in Caſe of Holbetta v. Warner.——* 2 Lev. 164. Welby v. Herbert.——6 Rep. 60. Gateward's Caſe.

2. He who *takes* any thing *as a profit apprender* is not tenant, nor occupier, and cannot preſcribe to be diſcharged of tythes under thoſe denominations. 2 Bulſ. 249. Trin. 12 Jac. B. R. Suckerman and Coates v. Warner.

3. *Where there is no tenant*, the *owner may be* underſtood to be the occupier. As if he grants a houſe in his occupation, tho' he does not inhabit it himſelf, yet if it be not inhabited by another, it is well enough. Vent. 312. in a Caſe of Chimney Money. Trin. 29 Car. 2. B. R. The Company of Ironmongers v. Nailer.

[For more of Occupier in general ſee Chimin, Robbery, and other proper titles.]

Offer.

(A) Offer. In what Caſes a Man ſhall be bound by his Offer.

1. A Defendant was held to the offer *in his anſwer in Chancery*, tho' the circumſtances of the caſe were varied from what they were at the time when the anſwer was put in. Vern. 448. Paſch. 1687. Holford v. Burnell.

2. Where

2. Where the defendant pleaded himſelf a *purchaſor for a valuable conſideration without notice, as by the deed &c. ready to be produced may appear*; and upon arguing the plea, it was ordered to ſtand for an anſwer; and it being moved that the defendant might leave the deed with his clerk in Court, that the plaintiff might have the ſight and peruſal of it purſuant to the offer in his anſwer; and tho' the Bar (being aſked by the Court how the courſe was) agreed, that by his offer the defendant had *made the deed part of his anſwer*, and therefore it had been the courſe to order it to be produc'd; yet my Ld. Chancellor ſaid, he would not bind the defendant, being a purchaſor, by the *improvident offer* in his anſwer. Abr. Equity Caſes 36. pl. 3. Mich. 1698. Watkins v. Hatchet.

3. *Plaintiff tenant in tail* endeavouring by his bill to ſet aſide a jointure made by his father by virtue of a *power ill executed*, but offering to ſettle 100 *l.* on the jointreſs, was held to his offer in his bill, and decreed accordingly. G. Equ. R. 9. Trin. 7 Annæ. Mapletoft v. Mapletoft and Clerk.

The Maſter of the Rolls. Mich. 1718. cited Lord Cowper, as having often ſaid that a man ſhould not be bound by an offer made during a treaty, which afterwards broke off, or upon terms that were not accepted. Wms's Rep. 497. in Caſe of Turton v. Benſon.

4. An offer *to deliver up a bond on terms not comply'd with* is not binding, and if made without conſideration is *nudum pactum*. 2 Vern. 717. Mich. 1716. Harman v. Vanhatton.

(B) Where after an Offer refuſed, no Relief will be given in Equity.

1. A. Recovers judgment againſt B. and has a leaſe ſold to him by the ſheriff. C. the ground-landlord enters, and having judgment in ejectment for non-payment of the ground rent, offers A. on payment of arrears and coſts at law, to make him a new leaſe for the remainder of the term. A. refuſing this, C. lets it to another. A. brings his bill to be relieved againſt the *recovery and forfeiture at law*, having firſt tendered the arrears and coſts. The bill diſmiſſed with coſts. Vern. 449. Paſch. 1687. Dorrington v. Jackſon and Watſon.

[For more of Offer ſee Marriage, Tender, and other proper titles.]

(A) Offerings.

1. OBlations and offerings ſeem to be but one and the ſame thing, and are in a ſenſe ſomething of the nature of tithes being offered to God and his church, of things real or perſonal. Offerings are *reckoned amongſt perſonal tithes*, and as ſuch come by labour and induſtry, are paid by ſervants and others once a year to the parſon or vicar, according to the cuſtom of the place; or they are to be paid in the place where the party dwells, at ſuch four offering-days, as before the ſtatute 2 & 3 Ed. 6. c. 13. within the ſpace of four years then laſt paſt had been uſed for the payment thereof, and in default thereof. * Cro. 3. Abridg. Caſes 159. in London offerings are a groat a houſe. They are by the law now in force, to be paid as formerly they have been. See Stat. 32 H. 8. 7. 27 H. 8. 20. 2 & 3 Ed. 6. 13. and Co. 11. 16. They properly *belong to the parſon or vicar of that church where they are made*; of theſe *ſome were* † *free and voluntary, others by cuſtom* certain and obligatory. They *were anciently due to the parſon of the pariſh that officiated at the mother church, or chapels that had parochial rights*, but if they were paid to other chapels that had not any parochial rights, the chaplains thereof were accountable for the ſame to the parſon of the mother-church. Lindw. c. de Oblation. & cap. quia quidam. Such offerings as at this day are due to the parſon or vicar at ſacraments, marriages, burials, or churching of women, are only ſuch as were confirmed by the ſtatute of 2 Ed. 6. 13. and payable by the laws and cuſtoms of this realm, before the making of the ſaid ſtatute, and are recoverable only in the Eccleſiaſtical Court. Godolph. Rep. 426, 427.

Under this duty of offerings are comprehended not only thoſe ſmall accuſtomary ſums commonly paid by every perſon when he receives [78] the Sacrament of the Lord's Supper at Eaſter, which in many places is by cuſtom 2d. from every communicant, and in London a groat an houſe, but alſo the accuſtomary payments for marriages, chriſtenings, churchings, and burials; theſe properly belong to the parſon or vicar of the church where they are made, and are recoverable by law in ſuch places and caſes only where there is a cuſtom for payment of certain ſums upon the performance of theſe ſeveral duties. Wats. Comp. Inc. 1033. cap. 52.——* Cro. C. 596. Mich. 16 Car. 2. B. R. Anon,——† 2 Inſt. 659.

2. *Treſpaſs of monies taken*, the *plaintiff cannot count of offerings*; for it may be, that if offerings had been in the writ, the defendant as parſon there might have *pleaded to the juriſdiction*. Br. Count, pl. 90. cites 34 E. 3. 23.

3. *Account* lies not for offerings againſt the pariſh prieſt, if there be no agreement about them; for the clerk holds the veſſel in which they are put. F. N. B. 119. (E).

4. *Coat, armor, penons, and ſword*, put up in a chapel where a perſon is buried, nor the carpet, livery, and cuſhion which

are

are in a place in the chancel where the deceaſed uſed to ſit, cannot be claimed by the parſon as oblations. Godolph. Rep. 155. cap. 12. ſ. 38. cites 9 H. 4. 14. Dame Wick's Caſe.

11 Rep. 16. a. Arg. cites 30 E. 3. 1. 5. Offerings and obventions are *in London* the profits of the church, and not in corn or other manner. 2 Inſt. 659.

a. and 38 E. 3. 13. a. per Finchden. S. P. and Ibid. 16. b. it was ſaid, as to the ſaid opinions in 30 E. 3. & 38 E. 3. that obventio dicitur ab obveniendo, and includes oblations, rents, and other revenues, which may well agree with the reſolution there, viz. in Dr. Grant's Caſe.——Watſ. Comp. Inc. 890. cap. 146. cites S. C.

6. A writ of *right of advowſon* was brought of the 4th part of the tithes and offerings of the church of St. Dunſtan in the Weſt in Fleet-ſtreet London, and adjudged good. 2 Inſt. 659.

7. 32 *H.* 8. *cap.* 7. *ſ.* 2. *Inforces the payment of offerings according to the cuſtom of places where they grow due.*

8. 2 & 3 *E.* 6. *cap.* 13. *ſ.* 10. *All perſons which by the laws of this realm ought to pay their offerings, ſhall yearly pay to the parſon, vicar, proprietary, or their deputies, or farmers of the pariſhes where they dwell at ſuch* 4 *offering-days, as heretofore within the ſpace of* 4 *years laſt paſt hath been accuſtomed, and in default thereof ſhall pay for their ſaid offerings at Eaſter following.*

9. By a leaſe de rectoria, the *leſſee ſhall have* the tithes and offerings of the ſame church; for they are *incident* to it. Fin. Law. 8°. 88.

10. Oblations were paid for *houſes* in all places, and now by the ſtatute are brought to a certainty, that is, *a groat for a houſe.* Hob. 11. in Caſe of Leyfield v. Tiſdale.

11. The ſuggeſtion for a prohibition was a *modus for a farm*, and the *libel was for tithes and offerings*, by which it was mov'd, that the *ſuggeſtion does not extend to the offerings*; wherefore it was
[79] ruled per Cur. that a prohibition ſhall be only *quoad.* Sid. 251. Paſch. 17 Car. B. R. Luſh v. Webb.——And ſays it was ſo rul'd upon a motion the other Term, in the Caſe of Coleman and Gilbert.

[For more of Offerings in general, ſee Diſmes, or Tithes, and other proper titles.]

Office

Office or Inquiſition.

(A) The *Original* of it.

1. THE office was *deviſed by law for* an authentical means to bring the King to the land by ſolemn matter of record ſuitable to his regality, and for the ſafety of the ſubject, that he ſhould not enter or ſeiſe the lands of the ſubject upon ſurmiſes without matter of record. Hob. 347. 13 Jac. in Scacc. in Caſe of Sheffield v. Ratcliffe.

(B) The *ſeveral Sorts* of Offices.

1. THERE are two ſorts of offices, the one which veſts the eſtate and poſſeſſion of land &c. in the King where he had only right or title before, and this is called office of *intituling*; as in caſe of a purchaſe by alien or villein of the King, or by any body corporate or politick in mortmain, or by a perſon attainted of felony &c. and ſuch office which concerns fee or franktenement, ought to be by force of a commiſſion under the great ſeal of England. There is another office, and this is called the office of * *inſtruction*, and this is when the eſtate of the land &c. is lawfully in the King before, but the particularity of the land &c. does not appear of record, ſo that it may be put in charge, as if one be attainted of high treaſon, all his lands &c. are immediately by the ſtatute of 33 H. 8. cap. 20. in the King, or if tenant of the King commits felony, is attainted and dies, in theſe and other ſuch caſes the eſtate of the land is in the King without any office. But if it does not appear to the Court of Exchequer, of what lands the perſon attainted was ſeiſed at the time of his attainder or after, and if it be found by office by force of a commiſſion under the Exchequer ſeal, this is a ſufficient record to inſtruct the King of the certainty of the land, by which it may be put in charge. 5 Rep. 52. a. b. Mich. 29 & 30 Eliz. in the Exchequer, in Page's Caſe.

10 Rep. 115. a—— S. P. Godb. 312. Paſch. 21 Jac. cite S. C. in Caſe of Sheffield v. Ratcliff.— * S. P. and the office of inſtruction ſhall *relate* to the time of the attainder not to make the King in by deſcent, but *to avoid all meſne incumbrances*. Arg. Godb. 312. Paſch. 21 Jac. in Caſe of Sheffield v. Ratcliff.

The office of *intituling* was *always by inquiſition found by commiſſion under the broad ſeal*; for the King could not take but by matter of record, no more than he could give without matter of record; and this was a part of the liberty of England, that the King's officers might not enter upon any other man's poſſeſſion till the jury had found the King's title; therefore where the King's title appeared of record, his officers might enter without any office found: as where the lands are held of the Crown, and the tenant dies without heir, the officers of the King may enter, becauſe the tenure is upon record whereby the King's title appears; ſo by the common law, where the land belonged to nobody, the King's officers might enter, becauſe by the law the land is in the Crown; for the law intitles the King where the property is in no man; but if any body elſe is in poſſeſſion, the lands

cannot be deveſted without matter of record; and where the King is intitled by matter of record, there is no need of any office to intitle him. The offices of *inſtruction ſettled the annual value of the lands*, and by that value the eſcheator accounted, unleſs the Court, by putting it up to auction, found any perſon that would give more for the land, and then they let it by leaſe under the Exchequer ſeal. Gilb. Hiſt. View of the Exchequer, 132, 133, 134.

[80]

See (D)—See Prerog. (H b) S. P. and therefore need not be traverſed.

(C) *How* the Finding muſt be.

1. IF office be found *before the ſteward which ought to be before the eſcheator*, this is void, & coram non judice. Br. Office devant &c. pl. 54. (bis) cites 24 E. 3. 35.

Br. Traverſe de Office, pl. 44. cites S. C.

2. It was *found before the eſcheator ex officio, that J. S. had done treaſon*, and was ſeiſed of certain lands &c. and the *King ſeiſed and granted them to one A.* by which *B. tertenant brought ſcire facias againſt A.* to repeal thoſe patents; and becauſe the *party was not indicted of treaſon*, the office was not regarded, but procedendo granted to B. Br. Office devant &c. pl. 51. cites 8 H. 4. 21, 22.

3. If 2 *contrary offices are* found, and the one finds the heir within age, and the other finds him of full age; that which makes beſt for the King ſhall be *received*. Arg. Hard. 14. cites 14 E. 4, 5. b. 5 E. 4. 4. a.

4 Where the laſt office is contrary to the firſt, it ſeems to be void; and contra, where the laſt office ſtands with the firſt office, as one [parcel of] land in the one office, and other land in the other office. Br. Livery, pl. 35. cites 9 H. 7. 9.

5. In aſſiſe, *pluries ought to iſſue out of Chancery, and not out of the Exchequer:* and per Cur. *office* found *virtute officii is as well* to intitle the King, *as* office *virtute brevis*; but the heir ſhall not have livery upon office virtute officii. Br. Office devant &c. pl. 61. cites 16 H. 7. 11.

6. If office *finds the death of the* King's *tenant, and that his heir is of full age*, and *does not ſay when*, there it ſhall be *intended* that he was of full age *at the time of the caption of the inquiſition*, but that he was within age at the time of the death of the tenant; and therefore ought to be *expreſs'd certainly*, that he was of full age. Br. Office devant &c. pl. 58. cites 29 H. 8.

7. A *double ignoramus* (on inqueſt firſt, and after on a melius inquirendum) *of de quo vel de quibus tenentur* &c. ignorant &c. was reſolved to be ſufficient to intitle the King. Cro. J. 40. Mich. 2 Jac. in the Court of Wards. Houſe's Caſe.

Inquiſition finding ſome parts well, and nothing as to others, may be ſupplied by *melius inquirendum*; otherwiſe if defective in the points found. 2 Salk. 469. Mich. 2 W. & M. B. R. Layton v. Manlove.

(D) *Neceſſary.*

(D) *Neceſſary. In what Caſes.*

1. IN quare impedit the King made title to preſent, becauſe the *advowſon* was *held* of him *in chief*, and was alien'd without licence, by which he preſented &c. and admitted for good title; and yet it is *not alledged that the alienation was found by office*; quod nota. And therefore it ſeems that the King may have *chattle* without office. Br. Prerogative, pl. 33. cites 2 E. 3. 71.

It was in a manner agreed, that where a man *aliens a manor and advowſon to a prior in fee to hold to his proper uſe without licence*, that the ſeiſin of this is not in the King without office thereof found. Br. Office devant &c. pl. 3. cites 9 H. 6. 22.

2. The *eſcheator may* * *ſeiſe the ward* for the King without office; per Thorp: quod non negatur; and therefore it ſeems that *chattel may veſt in the King without office*, but he *cannot grant the land before* office, by the ſtatute of 18 *H.* 6. Br. Prerogative, pl. 30. cites 24 E. 3. 54.

Br. Office devant &c. pl. 30. cites [81] S. C.——* And *information* that ſuch a one has ſeiſed the ward of the King, is *ſufficient* for the King to ſeiſe the ward without office. Br. Prerogative, pl. 121. cites 1 E. 3. 7. per Cateſby J.——*And* if it be found by office, he *may enter into the land*; per Mordaunt, which Frowike affirmed. Br. Office devant &c. pl. 36. cites 12 H. 7. 20.——*But* he is *not* intitled *to the land of his ward without office*, tho' he has nothing in it but a chattle. Br. Office devant &c. pl. 55. cites it as agreed by the Juſtices, 5 E. 6. in the Caſe of Charles Brandon Duke of Suffolk.

3. If a *villein of the King purchaſes goods*, the King ſhall be adjudged in poſſeſſion of them without office found; *but if* he purchaſes *land*, the King ought to ſeiſe before that he ſhall be poſſeſſed: quære, if this ought not to be found by office. Br. Office devant &c. pl. 53. cites 35 E. 3. and Fitzh. Villeinage 22.

Br. Property, pl. 43. cites S. C. Brooke ſays the reaſon ſeems to be inaſmuch as goods are moveable and tranſitory; and it is ſaid elſewhere, that the King may grant the ward of the body without office.—Br. Prerogative, pl. 113. cites S. C. And Brooke ſays it ſeems to him that the ſeiſing of the land ſhall be by office; for *land abides*, but oxen or *cows may be eaten or waſted.*

4. The King is not in poſſeſſion *by alienation of his tenant*, who holds of him in capite *without licenſe*, till the tenure and the alienation are found by office. Br. Office devant &c. pl. 24. cites 50 Aſſ. 2.

Br. Traverſe de Off. pl. 22. cites S. C.

5. It ſeems that if the King has not office, which proves him to have a title, then he ſhall not be *ſeiſed of the land of any*; nor can he by this entry or by any other act without matter of record be ſeiſed of the land of any other, *unleſs where the writ iſſues to the eſcheator to ſeiſe*; for there may be ſeiſin without office, as it ſeems there. Br. Patents, pl. 3. cites 9 H. 6. 20.

6. Where a man is *attainted*, the King cannot enter without office. Br. Traverſe de Office, pl. 32. cites 4 E. 4. 21.

Br. Office devant. pl. 38. cites 4 E. 22, 23. S. C.——S. P. upon attainder *of felony*, 1 Rep. 50. Trin. 42 Eliz. in Alton Wood's Caſe.——5 Rep. 52. b.

7. In quare impedit the King counted by title of *attainder of*

* Queen Elizabeth having lands by forfeiture for treaſon, whereof A. had been ſeiſed in fee, M. his wife, by petition of right, which comprehended the title of M. and of the Queen, claimed her *dower*, which in effect was this, that A. her huſband was ſeiſed thereof in fee, and took her to wife, and before his treaſon committed levied a fine with proclamation to another, whoſe eſtate the Queen had by lawful conveyance therein expreſs'd; and that afterwards *A.* was attainted of high treaſon *by outlawry*, and died, which outlawry was afterwards *reverſed in a writ of error*. And it was reſolved by the Lord Chancellor, with the advice of all the Judges, that the petitioner need not have any office to find her title, becauſe her title ſtands with the title of the Queen, and *the Queen is not intitled by office* (which ſhe might traverſe, confeſs or avoid), *but by conveyance*, which ſhe affirmeth. 3 Init. 215, 216. cites Hill. 27 Eliz.

* *treaſon* to have preſentation without office found: and it was held by the Juſtices that the King may be intitled *to the preſentation fallen without office*; for that is only a chattle, *but the inheritance of advowſon is real*. And *ſo of things tranſitory*, the King ſhall have them without office, *as the ward of a body*, and may grant it without office. And *ſo* where a man *outlaw'd has an advowſon, and after the church voids*, the King ſhall have it without office. Br. Office devant &c. pl. 45. cites 20 Ed. 4. 11.

8. *And* therefore the ſame law ſeems to be of *goods movcable*. Ibid.

The lands, whereof a perſon attainted of high treaſon dies ſeiſed of an eſtate in fee, are actually veſted in the King without any office, becauſe they cannot deſcend, the blood being corrupted, and the freehold ſhall not be in abeyance; *but* it ſeems agreed, that by the common law ſuch lands were not veſted in the actual poſſeſſion of the King *during the life of the offender* without an office. 2 Hawk. Pl. C. 248. cap. 49. ſ. 1. 2.

A *right of entry* into lands, to which a perſon attainted of high treaſon is intitled, is as much forfeited as lands in poſſeſſion; but the King ſhall not be adjudged in poſſeſſion of ſuch lands without an office, and ſcire facias or ſeiſure on ſuch office; for the words *that the King ſhall be deemed in poſſeſſion without office* &c in the *ſtatute* 33 *H.* 8. ſhall have this conſtruction, that he ſhall be in poſſeſſion without office in the ſame manner as he ſhould have been upon an office found at common law. But at the common law, if a diſſeiſee had been attainted of high treaſon, and the ſeiſin found by office, the King ſhould not have been in poſſeſſion without a ſcire facias, or a ſeiſure at leaſt. 2 Hawk. Pl. C. 452. cap. 49. ſ. 23.

[82] S. P. Br. Office devant &c. pl. 57. cites 2 H. 7. 8.

9. If the *King leaſes for years, rendring rent with clauſe of re-entry*, the King cannot enter for non-payment till the matter be found by office. Br. Office devant &c. pl. 30. cites 2 H. 7. 8.

And per Brian, the King *need not demand the rent* as a common perſon ſhall do: but per Huſſey, the King is not in poſſeſſion thereof till the condition broken be found by office.

The King grants a leaſe, proviſo that the *leaſe ſhall be void on non-payment*. The rent is arrear. The leaſe is void *without* any *office*; and yet office is neceſſary to intitle the King to the *meſne profits* and the *poſſeſſion*, by reaſon that the non-payment of the rent is matter of fact in Pais, and is not triable by record; but if the condition had been triable by record, there by the breach of the condition the King ſhould be in poſſeſſion without office; as, upon condition to grant other land by deed inrolled in Chancery, or to ſurrender parcel in the Exchequer by ſuch a day, if the tenant fails, office is not neceſſary to intitle the King to the poſſeſſion, becauſe the records of the Chancery and Exchequer themſelves prove title ſufficient. Per Manwood Ch. B. and judgment accordingly, which was affirmed in error. Mo. 291, 295, 296. Paſch. 32 Eliz. Sir Moile Finch. v. Throckmorton.

If the King grants a *leaſe for life, on condition* to be void on non-payment of the rent in forty days, he can't be *intitled* thereto on breach, unleſs by office found *in its proper county* to avoid it. But ſuch condition reſerv'd on *leaſe for years*, may be found by office in another county, and 'tis but an office to inform the King, which in whatſoever county found is ſufficient. Cro. E. 855. Trin. 43 & 44 Eliz. Br. Parſlew v. Corne.——The leſſee continuing poſſeſſion ſhan't be accounted an *intruder* before office thereof found, but he ſhall be *accountant for the profits* to the King as bailiff of his own tort. 2 Le. 134. Sir Moil Finch's Caſe.——2 Le. 206. S. C. cited.

Br. Office devant &c. pl. 34. cites S. C.

10. The King may be *ſeiſed without office*. Br. Prerogative, pl. 91. cites 9 H. 7. 2. per Oxenbridge.

11. *As* where the *King's* * *tenant dies without heir.* Ibid. S. P. and Brooke fays,

it ſeems that entry by a ſtranger ſhall not alter the caſe; for if the King be ſeiſed by law without office, *a ſtranger by his entry cannot deveſt the franktenement out of the King.* Br. Office devant &c. pl. 34. cites S. C.

* S. P. That the franktenement is in the King without office *or entry where no ſtranger enters*; for franktenement cannot merge; quod nota. Br. Eſcheat, pl. 33. cites S. C.——Br. Eſcheat, pl. 25. cites S. C.

12. *So* if he be *attainted of treaſon and dies*; for he cannot have heir. Ibid. Br. Office devant &c. pl. 34. cites

S. C.—Br. Office devant &c. pl. 38. cites 4 E. 4. 22. 23. Contra, that where a man is attainted of treaſon, yet the King *cannot enter without office.*——But ſee pl. 7. and the notes there.

13. *So* if *tenant in tail*, the *reverſion to the King dies without iſſue.* Ibid. Br. Office devant &c. pl. 4 cites

S. C.——If *tenant in tail, or for term of life* [of the grant] *of the King dies without iſſue*, franktenement is in the King; and *where the father dies and none enter, the franktenement is in the ſon, and ſo in the King, if the King be heir to ſuch perſon who dies ſeiſed.* Br. Eſcheat, pl. 33. cites S. C.

14. *So* of *tenant for life*, the *reverſion to the King*, and the *tenant dies*, the King is ſeiſed in fact without office; per Oxenbridge. And per Huſſey this may be law; but per Fiſher it is good law; for *franktenement cannot be in ſuſpence*; *contra* upon *alienation* * *in mortmain.* Br. Prerogative, pl. 91. cites 9 H. 7. 2. Br. Office devant, pl. 34 cites S. C.——* S. P. and ſo of alienation *by tenant* of the King *without licence.* Ibid.——*And* if *tenant* for life, the reverſion to the King, *ſurrenders by deed inroll'd*, the franktenement is in the King without other record; for this is matter of record by the inrollment; per Huſſey, and of the others he would be adviſed. Br. Prerogative, pl. 91. cites 9 H. 7. 2.

15. It is *not neceſſary* that an office be found to intitle the King *where the law caſts the poſſeſſion upon him*; as in caſe of eſcheat and limitation of a remainder to the King, which afterwards veſts in poſſeſſion &c. but otherwiſe where the law caſts the poſſeſſion and franktenement on the heir, as in caſe of ward. Pl. C. 229. b. 230. Willion v. Barkley.——cites T. 9 H. 7. 2. Br. Eſcheat. 25. 33. Office devant 34. Prærogative 91.

16. The King in ſome caſes may be *in poſſeſſion without office*, and none can diſpoſſeſs him; as where war is between England and France, the poſſeſſion of *priors aliens* may be ſeiſed by command without office: and ſo of *temporalties of a biſhop upon contempt*; for thoſe poſſeſſions are *apparent and known in certain.* Br. Office devant &c. pl. 14. cites 21 H. 7. 7. per Frowick Ch. J. for clear law. Br. Prerogative, pl. 38. cites S. C. *And if termor for years be outlawed*, there the King ſhall ſeiſe without office. And ſo ſee that in caſes of *chattles* the King may ſeiſe and have poſſeſſion without office. Ibid.——And by Mordant and Frowike *where a common perſon cannot enter*, but is put to an action, *as for waſt*, ceſs' by *aſſault*, or the like, if ſuch matter be found for the King by office, he cannot enter, but *ſhall have ſcire facias.* Br. Office devant &c. pl. 36. cites 12 H. 7. 20. [21.]

[83]

17. The *King never ſhall be entitled by matter in fact*, nor by allegation of matter in fact, *but by matter of record*; per Rede clearly. Br. Office devant &c. pl. 15. cites 21 H. 7. 19. *And* Brooke ſays, that by this it ſeems that *information in the Exchequer* does not intitle the King till it be found between the parties by iſſue tried, or by confeſſion

confession of record. Ibid.——*Quære* if *tail is discontinued by the ancestor of the King who was a subject*, or the possession of a feme be discontinued, *and after it is found that the King is heir to the tail*, or to the feme by office, whether the King be not put to a *scire facias* in this case? It seems that he is. Ibid.

* See the *Stat.* 18 *H.* 6. 6. at Prerogative (H. b).

18. If the *King grants land for life* and after *the patentee dies*, yet the King cannot grant it over till the death be found by office, and this by the statute of * 18 H. 6. Br. Office devant &c. pl. 56. cites 29 H. 8.

* S. P. 2 Le. 206. Arg.—— S. P. Lane 27 Arg. cites 21 H. 7. 8.—S. P. Ibid. 62. per Tanfield Ch. B.

19. The Queen cannot be intituled to *things real* without office. But for things *personal* she may in several cases. So for *chattels real*; as in *outlawry*, the Queen shall have obligations—statutes—recognizances—* leases for years—next avoidances without office—because the Queen is intitled by the record of the outlawry; per Clark J. Mo. 292. Pasch. 32 Eliz. in the Case of Sir M. Finch v. Throgmorton.

Trin. 7 Jac. in the Exchequer, in Sir Edward Dimock's Case.

A. the father of B. the plaintiff being possessed of a lease for years, was outlawed for high treason; an inquisition found B.'s title, and the tenements were seised into the King's hands, who granted away the term; the outlawry was afterwards reversed for error; and thereupon the lease was restored to B. 2 Vern. 312. Hill. 1693. Peyton v. Aylisse.——[Quære if the inquisition was necessary].

20. There is a difference between an *act of assurance* and an act *of forfeiture*. If the words are, that *the King shall have and enjoy*, 'tis then an act of assurance, and the lands are given to the King without office; but by an act of forfeiture, the lands are not in the King without office found. Arg. Godb. 304. Pasch 21 Jac. in Case of Sheffield v. Radcliffe.

2 Vent. 270. S. C. adjudged, and Pollexfen Ch. J. conceived it in nature of a chose en action.

21. An archdeacon made *sale of the office of register of his archdeaconry*, by means of which it became forfeited by the statute of 5 & 6 *E.* 6. *cap.* 16. And the question was, whether the King having granted the same without any office found thereof it be good? And resolv'd that it is good; because no estate or interest in the office is forfeited, either of the archdeacon or register, nor is any franktenement to be divested out of him, and vested in the King; but the office is become void, and by the disability of the archdeacon, the power to supply the office of register is in the King, and cited 20 E. 4. 11. a. and therefore gave judgment unanimously for the plaintiff. 3 Lev. 289. Hill. 2 W. & M. C. B. Woodward v. Fox.

Agreed, that as to such vacancy the right to supply that was a chattle separate from the inheritance, and the King might supply such present avoidance before any office found, tho' it be admitted that the right of nomination in point of estate, should not vest in the King before office found. 2 Vent. 270. Woodward v. Fox.

22. Where a freehold is forfeited to the King *by any statute*, it is requisite that an office should be found of the forfeiture. But where it is *only a power to appoint* an officer 'tis otherwise. 2 Vent. 267. Hill. 2 & 3 W. & M. C. B. Woodward v. Fox.

But where a sci. fa. is *brought for the forfeiture of* a pa-

23. In a *scire facias* out of Chancery *to repeal a patent for a market*, it was objected that an office ought to have been found before the scire facias. For that a sci. fa. is a judicial writ, and ought to be founded upon a record. But it was resolved, that it

it is true that a *ſci. facias ought to be founded upon a record*, and that ſo it is in this caſe; for the *patent is a* * *record in Chancery*, out of which Court the ſci. fa. iſſued, and it is a ſufficient record whereon to found it. 3 Lev. 223. Trin. 1 Jac. 2. in the Houſe of Lords on appeal from the Chancery. The King v. Butler.

tent or other thing *in another Court.* in ſuch caſe an office ought to be found in the other Court before the

ſci. fa. unleſs the forfeiture appear on record in the ſame Court, upon which to found the ſci. fa. And where the office is found, the King ſeiſes immediately upon the office; but where the ſci. fa. is founded upon the patent, as in the principal caſe, the King cannot *ſeiſe* till the forfeiture or other defect of the patent be try'd upon the ſci. fa. 3 Lev. 223. Trin. 1 Jac. 2. in the Houſe of Lords on appeal out of Chancery. The King v. Butler.

24. The King granted the wardſhip of body and lands, *rendring rent to the receiver or his deputy within* 40 *days after the feaſts appointed for payment*, with a clauſe *to be void on nonpayment*. It was agreed, that the leaſe is not abſolutely void by nonpayment of the rent reſerved, unleſs office be found; becauſe it was payable to the receiver or his deputy, which is *matter of fact in Pais*. For there is a *difference* between a leaſe for years, reſerving rent *payable at the receipt of the Exchequer*, with ſuch proviſo, and when it is *payable to the receiver or his deputy*; for in the *firſt caſe* the payment or nonpayment *appears of record*; and therefore there needs no office to prove the nonpayment; but in the laſt caſe it does not appear of record, and therefore in that caſe the leaſe is not void by nonpayment without office. Cro. C. 99, 100. Mich. 3 Car. Stephens v. Potter.

And it is there ſaid that the like reſolution was made in the caſe of Sir Moyle Finch v. Throgmorton.—Cro. E. 220, 221. Hill. 33 Eliz. B. R. S. C. —Mo. 291. pl. 440. S. C.—— And. 303. S. C.——

2 Le. 134 to 146. pl. 178. in the Exchequer, S. C.——S. P. Poph. 53. Trin. 36 Eliz. cites S. C. and judgment there given accordingly, FINCH v. RISELEY. And that *where in the caſe of a common perſon, an entry is neceſſary to defeat an eſtate, there in the King's Caſe an office is neceſſary* to determine the eſtate; for an office in the King's Caſe countervails an entry; becauſe the King in perſon cannot make an entry.

(E) Neceſſary. *What the King may do before Office* found.

1. WHERE it is *awarded that the temporalties of a biſhop ſhall be ſeiſed* into the hands of the King, the King ſhall take conuſance of them, and *ſhall preſent to the advowſon; for* the temporalties of a biſhop *are always of record in the Exchequer*, as appears 21 H. 7. 7. Br. Office devant &c. pl. 17. cites 21 E. 3. 30. and Fitzh. Scire Fa. 113.

S. P. 9 Rep. 95. b. in Sir George Reynold's Caſe.

2. Where the *King's tenant dies ſeiſed of an advowſon*, or in caſe of an *outlawry*, tho' the eſtate is not in the King before office, yet if the church becomes void, the King ſhall preſent before office. 2 Vent. 270. in Caſe of Woodward v. Fox.—— cites 20 E. 4. 11.

Kelw. 42. b. 43.—— 9 Rep. 95. b. 96. in Sir G. Reynold's Caſe.

3. Where the *King* leaſes for years with clauſe of re-entry for nonpayment of the rent, the King need not demand the rent before he re-enters; but it is ſaid there, that if the King *grants the rent and re-entry to another*, he cannot enter without demanding the rent, and the King may grant his action, and a choſe en

S. P. Mo. 296. Paſch. 32 Eliz. Sir Moile Finch v. Throckmorton.

action, contrary of a common perſon; quod nota; per Huſſey and Brian, and the *King cannot enter till the nonpayment be found by office.* Br. Entre Cong. pl. 88. cites 2 H. 7. 8.

4. Brooke makes a quære, if grant of the King be good without office, in *caſe of alienation in mortmain, or by tenant of the King without licence*, by reaſon of the ſtatute 18 H. 6. 6. that grants before office ſhall be void. Br. Office devant &c. pl. 34. cites 9 H. 7. 2.

5. Note, by thoſe of the Exchequer, where a man is *attainted by parliament, and all his lands to be forfeited, and does not ſay that thoſe ſhall be in the King without office*, there they are not in ſeiſin of the King to *grant over* without office; for it does not appear of record what lands they are. Br. Office devant &c. pl. 17. cites 27 H. 8.

[85] 6. In ſome caſes the King ſhall be in poſſeſſion *by office without ſeiſure*, as of lands, tenements, offices &c. which are local, or whereof continual profit may be taken; as where 'tis found by office that condition is broken, or that perſon attaint of felony is ſeiſed of land &c. or in caſe of ward of land &c.—In ſome caſe the King ſhall be in poſſeſſion *by office and ſeiſure*, as in caſe of advowſon &c. the right patron ſhall not be outted by ſuch falſe office found of it, till the King preſents, and his clerk admitted and inſtituted. 9 Rep. 95. b. Hill. 9 Jac. in Canc. in Sir George Reynolds's Caſe.

7. In caſe of a *tranſitory chattel* coming to the King an office is not *neceſſary*; but where an *intereſt* comes to the King an office ought to be found. Arg. Lane. 43. Paſch. 7 Jac. in Caſe of the King v. the Earl of Nottingham & al.

8. In caſe of *Simony* the King ſhall preſent without office. 2 Vent. 270. Hill. 2 & 3 W & M. C. B. in Caſe of Woodward v. Fox.

9. A promiſe and *order was made for paſſing a patent for the office of warden of the Fleet to L. on a ſuppoſed forfeiture for permitting eſcapes*, and this was inſiſted to be before inquiſition taken, or forfeiture found, and therefore illegal; to which it was anſwered, that in truth the inquiſition bears date, and was taken before the warrant for paſſing the patent, though not filed till afterwards, and that that is not material; for this is none of the caſes where the ſtatute requires the filing of an inquiſition, and only in caſes of grants of lands and tenements; but the Court held it to be a matter of great conſequence to the King, and to the ſubject if the ſeal ſhould be put to this patent, and that it might occaſion a general eſcape of all the priſoners in the Fleet, and therefore would know the King's pleaſure before they would paſs the grant. 2 Vern. 173. Trin. 1690. Colonel Leighton's Caſe.

(F) In what Caſes the *Office* ſhall be *ſufficient without Seiſure.*

1. IF office be found for the King *of an advowſon in groſs*, yet by this the owner is not out of poſſeſſion. Br. Office devant &c. pl. 52. cites 17 E. 3. 10.

Upon office found that the tenant in his life granted the next preſentation to B. who preſented C. who was inſufficient, and did not preſent another within ſix months, by which the defendant the ordinary made collation by lapſe, and that the King was intitled by the heir within age and in his ward; there the King is not in poſſeſſion, but ſhall have quare impedit; for he is not in poſſeſſion of the advowſon. Br. Office devant, pl. 11. cites 14 H. 7. 22. and 15 H. 7. 6.——Br. Traverſe de Office, pl. 15. cites S. C.

2. The King may be in poſſeſſion of an *advowſon appendant or in groſs*, by office thereof found; contra of *common or rent*; for præcipe lies of advowſon, and livery may be made of it; contra of rent and common. Br. Office devant &c. pl. 46. cites 20 E. 4. 13, 14. and 21 E. 4. 1.

And of office found of *lands and tenements which are manual or lie in occupation*, the *contra of rent and common*, as appears there; and a man may be out of poſſeſſion of advowſon by preſentment; King by this is in poſſeſſion without entry, and others by this are out of poſſeſſion; contra of rent and common. Ibid.——Br. Traverſe de Office, pl. 40. cites S. C.

3. There are *ſome offices* which *do not put the King in poſſeſſion*, as where *waſt* is found by tenant of the King, he ſhall have *ſcire facias* upon the office; per Coninge. Br. Office devant, pl. 11. cites 14 H. 7. 22. and 15 H. 7. 6.

Br. Traverſe de Office, pl. 15. cites S. C. —S. P. per Rede J. which Tremaile J. agreed. Br. Office devant &c. pl. 15. cites 21 H. 7. 19.——*But* where office *finds matter for the King, by which a common perſon may enter*, in ſuch caſe the King ſhall be adjudged in poſſeſſion; per Rede J. Br. Office devant &c. pl. 15. cites 21 H. 7. 19.

4. *So* upon *ceſſavit found* by office, he ſhall have writ of ſcire facias. Ibid.

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Br. Traverſe de Office, pl. 15. cites S. C.——S. P. per Rede J. which Tremaile J. agreed. Br. Office devant, pl. 15. cites 21 H. 7. 19.

(F. 2) In what Caſes the Office ſhall be ſufficient *to put the Party out of Poſſeſſion.*

1. *QUARE impedit by the King*, and *counted that it was found by office, that S. B. held the manor of W. to which the advowſon is appendant of him by knights ſervice, as of the earldom of B. which came to him by attainder, and that S. B. preſented* &c. *and after died his heir within age, and now in ward of the King, and the Church voided, and the King preſented, and the defendant diſturbed him*; the *defendant ſaid, that A. was ſeiſed of the advowſon in fee, and preſented him, abſque hoc, that the ſaid S. B. preſented modo & forma*; per Jenny, office which intitles the King to lands or tenements puts him in poſſeſſion, and all others are by this put out of poſſeſſion, and therefore ſuch office ſhall be traverſed

But if it be *found that the tenant of the King has common in my land appendant*, this ſhall not be traverſed in Chancery, *but by plea*; for by this the party is not out of

poſſeſſion. Ibid.—So where it is traverſed in the Chancery, and not by way of plea. Br. Traverſe de Office, pl. 40. cites 20 E. 4. 14. and 21 E. 4. 1.

found that the tenant of the King died ſeiſed of a manor to which a villein is regardant, the villein may traverſe it by plea, and not in Chancery. Ibid.——*So of a rent-charge*, as where it is found that the tenant of the King has a rent-charge out of my manor, I ſhall avoid it by way of anſwer; and Choke and Nottingham Ch. Baron agreed with Jenney. Ibid.—— *But* per Brian Ch. J. there is a *diverſity* where a thing is *found expreſsly by office*, and where *imply'd* as here by theſe words, *cum pertinentiis*, which is imply'd, there this need not be traverſed in Chancery, but by way of anſwer. Ibid.——*And* by him *if it had been expreſsly found of the advowſon in the office*; yet becauſe *it does not lie in manual occupation*, it need not be traverſed in Chancery, but by way of plea; but Billing Ch. J. of England agreed, that the office ought to be traverſed. Ibid.—— *And* per Collow, *the appendancy is the title of the King*; for he is intitled ſo by office, *and therefore this ought to be traverſed, and not the preſentment*, which Littleton and Brian J. agreed. Ibid. ——Br. Traverſe per ſauns &c. pl. 257. cites 20 E. 4. 13, 14. and 21 E. 4. 1. 3. S. C.——Br. Office devant, pl. 46. cites S. C.

(G) *Subject bound by it.* In what Caſes.

Br. Entre Cong pl. 27. cites S. C.

1. *OFFICE* is *found for the King*, and after *upon falſe ſurmiſe other office is found for a party*, this ſhall not diſcharge the office found for the King; but if he enters it is intruſion; for it is only inqueſt of office, which ſhall not diſcharge the title of the King; and alſo *inqueſt of office found for a ſubject ſhall not bind any party*; quod nota; for *it is only evidence*; but inqueſt of office found for the King ſhall bind till it be traverſed; note a diverſity. Br. Enqueſt, pl. 22. cites 21 E. 3. 1, 2.

* S. P. Br. Office devant &c. pl. 40. cites 5 E. 4. 3. 4. But Brook ſays, ſee now the ſtatute of 2 E. 6. 8. thereof.

2. Office found that J. S. tenant of the King died ſeiſed, and *that W. S. is his ſon and heir, and of the * age of one year, where he is* of the age of 40 *years*, he has no remedy at the common law, and ſhall not have livery till 20 years after; and per Brian, if it be found *that J. S. holds of the King in capite, his heir within age, where in fact he has no land*, his heir ſhall be in ward, and has no remedy; but per Towns. he has; for he may *traverſe*, quod Cateſby, Neal, and Huſſey, conceſſerunt. Br. Office devant &c. pl. 28. cites 1 H. 7. 3.

Br. Traverſe de Office, pl. 47. cites S. C.

3. *And* if it be found that the King's tenant died ſeiſed, and that I am his heir, and of the age of five years, and it is *found by another office that another is heir and of full age*, I ſhall have no remedy before that I am of full age, and then to interplead; and *none ſhall interplead but he who has office found for him.* Br. Office devant &c. pl. 40. cites 5 E. 4. 3, 4.

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4. In annuity, if the King be intitled by office *to land to which N. has title* and right, he *cannot enter upon the King*: for by the office the King is in poſſeſſion, and N. is out of poſſeſſion, and if the King grants it over, he *cannot enter upon the patentee, the office being in force; but* he who has a *rent-charge or common* out of that land is not out of poſſeſſion, but may diſtrain the patentee, or uſe his common. Br. Entre Cong. pl. 42. cites 21 H. 7. 1.

This being a beneficial law the eſtates of tenant by ſtatute ſtaple, merchant

5. 2 & 3 *Ed. 6. cap. 8. ſ. 3.* enacts, That *where any office or inquiſition is found omitting any title for term of years, by copy of court-roll or other intereſt, every leſſee or copyholder, and every perſon that ſhall have any intereſt to any rent, common, or profit apprender, out of any lands contained in ſuch office or inquiſition, ſhall enjoy their*

their leaſes and intereſts, rents &c. as they might have done, in caſe there had been none ſuch office or inquiſition found, and as they ought to have done in caſe ſuch leaſe, intereſt by copy of court-roll, rent &c. had been found in ſuch office or inquiſition.

and elegit, and executors, that hold lands for payment of debts are

taken to be within the benefit of this clauſe. Co. Litt. 77. b.——S. P. becauſe their intereſt is but a chattle real. 2 Inſt. 689.

Termors before this ſtatute had not any traverſe, and the ſtatute does not give any traverſe to them; then what means ſhall the defendant have to ſave his term? Only by the ſupplying the defect of the inquiſition, and ſhewing his title to it; which is all that he has to do in relation to the inquiſition, and it is not material to him whether the inheritance be in the King or in any other; and as it ſeems the ſtatute is ſtrictly penn'd to prevent the termor to diſpute the title of the King to the inheritance; and inaſmuch as it can't be any prejudice or advantage to the termor if the inheritance ſhall continue in the King, and it may be prejudicial to the King, if it ſhould be traverſed and found againſt the King, therefore 'tis reaſon that the defendant ſhall not be admitted to traverſe it. 2 Lutw. 1008. Paſch. 10 W. 3. The King v. Hungerford.

6. A *forfeiture of* the office of *Marſhal* of the King's Bench, (which is an office of inheritance) was found by inquiſition out of the petty-bag office; and it was ſtrongly moved by the King's counſel for a writ of ſeiſure. But the Lord Keeper, upon great conſideration, did refuſe to grant it, and gave the defendant a reaſonable time to *traverſe the inquiſition peremptorily*. Hill. 5 W. & M. in Canc. For although the inquiſition finds a title in the King, yet the inquiſition is traverſable; and 'tis very hard to turn a man out of poſſeſſion upon a bare inqueſt of office, without hearing what the defendant hath to ſay for himſelf. L. P. R. 630.

7. Inquiſition upon a *melius inquirendum* is traverſable; becauſe it is not taken ſuper viſum corporis; for an inquiſition *ſuper viſum corporis* is not *traverſable*. Carth. 72. Mich. 1 W. & M. B. R. The King v. Bonny.

8. A. tenant for life remainder to B. in fee. A. is attainted. The King ſeiſes. In this caſe B. may *enter on the King*. Otherwiſe, if an office had found A. ſeiſed in fee. 2 Salk. 469. Hill. 8 W. 3. B. R. Linch v. Coote.

(G. 2) *Traverſed. In what Caſes, and how.*

1. BY 34 *E.* 3. *ſtat.* 1. 14. *Traverſes of offices found before the eſcheators ſhall be tried in the Bench.*

2. It was *found* by office return'd in Chancery *that W. of H. was ſeiſed of certain land in B. and was aiding to M. P. enemy of the King*, by which the land was ſeiſed into the hands of the King; whereupon came the ſaid W. of H. and *travers'd that he was not aiding* &c. Br. Traverſe de Office, pl. 46. cites 43 Aſſ. 28.— [88
And ſuch an office appears the ſame year, p. 29. and ſuch a traverſe to it. Ibid.

3. A man cannot traverſe the title of the King without title by office. Br. Traverſe de Office, pl. 22. cites 50 Aſſ. 2.

As where it was *found* by office

that W. was ſeiſed in fee, and held of the King in capite, and died ſeiſed; and R. who is an *ideot, is his heir, and that M. enter'd,* and *ſcire facias iſſued againſt M. to ſay why the land ſhould not be ſeiſed for the King for ideocy?* who came and *ſaid, that R. releaſed all his right to P. S. who infeoffed*

inſeoffed him, at which time R. was of good memory, abſque hoc, that he was a fool natural a non-compos from his birth; Prift; and admitted for a good traverſe; and he *ſaid further, that the land is held of D. C. abſque hoc, that it is held of the King, prout* &c. Skipwith ſaid, You cannot have this iſſue unleſs the King was in poſſeſſion; for by the office found, of this tenure and alienation, the King ſhall be in poſſeſſion, and then you may traverſe it, but not now; for then you will toll the King of the ſeiſin which the King might have after the office is found. Br. Traverſe de Office, pl. 22. cites 50 Aſſ. 2. Br. Office devant, pl. 24. cites S. C.

4. By 23 *H.* 6. *cap.* 17. *ſ.* 2. *If any will traverſe an office, no protection ſhall lie for the patentee; and concerning the demiſe of the land to him that tenders a traverſe, the ſtat. of* 36 *E.* 3. 13. 8 *H.* 6. 16. *and* 18 *H.* 6. 6. *ſhall be duly obſerved.*

Br. Non-ſuit, pl. 34. cites S. C. 5. In traverſe of office the *plaintiff in the traverſe was non-ſuited*, and per Cheney J. clearly the plaintiff may have a new traverſe; for *traverſe is given by ſtatute*; for at common law, he whoſe land is ſeiſed into the hands of the King, had no other remedy but by petition, and if he was nonſuited in the petition, he might have a new petition, and the traverſe is given in lieu of petition; and therefore if he be nonſuited he *may have a new traverſe*. But, per Hals, the ſtatute gives only one traverſe, and therefore if he be nonſuited he ſhall not have another traverſe. *Quære* inde; for where ſtatute gives action, as maintenance, decies tantum &c. which were not at common law before, it ſeems that the party may be nonſuited and have a new action, and traverſe is in lieu of action. Br. Traverſe de Office, pl. 16. cites 4 H. 6. 12.

Br. Office devant, pl. 37. cites S. C. 6. Where the *King* is *intitled by double matter of record*, a man ſhall not have traverſe, *as* where *tenant of the King is attainted of felony*, and after it is *found* by office *that he was ſeiſed of certain land at the time* &c. Br. Traverſe de Office, pl. 31. cites 3 E. 4. 24.

7. If the *King enters into my land by office, and there is no ſuch office*, I may traverſe and ſay that nul tiel record. Br. Traverſe de Office, pl. 32. cites 4 E. 4. 21.

8. *A. was bound to two* in an obligation *in* 40 *l.* and the *one was felo de ſe*, which was found by office; and per Choke J. it *is all forfeited* to the King; but Young contra; for the ſurvivor takes place before the office, and it was touch'd, *if the other might traverſe the office, that he did not kill himſelf feloniouſly: for* if it be *found before the Coroner, that a man killed* [*another*] *feloniouſly*, none can traverſe it; for this is an ancient law of the Coroner; contra it is ſaid in this caſe; nota. Br. Traverſe de Office, pl. 36. cites 8 E. 4. 4.

9. It was found by office, *that the Duke of E. was ſeiſed of the manor of D. and died ſeiſed, and the King is heir*, by which *the Earl of L. ſued to the King by petition, in as much as he was ſeiſed, and diſſeiſed by the Duke*, and pray'd reſtitution, and proceſs continued till he had reſtitution, and after the *Earl gave it to E. in tail*, and then it *was found by another office, that the ſaid Duke was ſeiſed of* 40 *acres in D. and C. and died ſeiſed, and the King is heir*, by which the *King by patent gave it to W. S.* and came the ſaid *E. the donee, and ſhewed the firſt matter, and that the* 40 *acres are parcel of the ſaid manor*, and pray'd reſtitution; and upon this

this *ſcire facias was awarded againſt the patentee*, and *he came and pray'd ſearch* &c. And per Sotel, at common law there was no traverſe but *petition*; and this *was in lieu of writ of right for the party, and to avoid delays was the ſtatute made*, that a man may traverſe the office, *which ſtatute does not tell the ſearch which was at common law, but the petition*. Per Spilman, the ſtatute which gives traverſe is only of ward, and of fine for alienation &c. [89] which are only chattles, and of thoſe was no traverſe at common law; but of franktenement traverſe was at common law. Per Yelverton, peradventure ſuch manner of monſtrans de droit, as above, was at common law; for the firſt matter above was petition, but the ſecond matter upon the ſecond office is to be taken only as a monſtrans de droit; ſo by him ſuch monſtrans de droit was at common law, but no traverſe in any caſe; but firſt he ought to have had petition to enable him to traverſe &c. Per Spilman, in caſe *where a man may traverſe an office he may ſue by petition*; quod non negatur. Br. Traverſe de Office, pl. 18. cites 9 E. 4. 51.

10. Office was returned upon diem clauſit extremum, *that W. was ſeiſed of the manor of T. and held of the King in chief, and was ſeiſed of another manor in tail to him and his heirs of his body begotten*, which was *held of T. by knight's ſervice* &c. *and that A. was couſin and heir of the ſaid W.* viz. *daughter of R. ſon and heir of the ſaid W.* and upon this *came one Richard and ſaid, that the manor which was held of C. was given to the ſaid W. and to the heirs males of his body, and that the ſaid W. had iſſue the ſaid R. father of Alice the eldeſt, and the ſaid R. youngeſt, and of ſuch eſtate died ſeiſed*, and prayed to be admitted to his traverſe of the office; and the opinion of the Court was that he ſhall be well received to traverſe the office. Br. Traverſe de Office, pl. 37. cites * 12 E. 4. 18.

But where it is *found* by office *that the youngeſt is heir where the eldeſt is heir in fact*, the eldeſt has no remedy; becauſe both claim from one and the ſame anceſtors; for there the King has cauſe to ſeize; and e contra here of the manor held of C. For the one, viz. A. the daughter is heir to the one manor and the youngeſt is heir to the other manor; for the ſtatute, which wills that the King ſhall have the cuſtody of all lands, is intended where it deſcends to the ſame heir to whom the land held of the King deſcended; but where any parcel deſcends to another heir, he ſhall not have it; and the ſame law where the other had ſpecial tail in part, the remainder over. Br. Traverſe de Office, pl. 37. cites 12 E. 4. 18. * [Both the other editions are 2 E. 4. 18. but they are miſprinted.]

11. A *manor was given to W. S. and E. his feme, and to the heirs of the body of W. S.* the *remainder to the right heirs of this ſame W. S. who had iſſue J. S. who was ſeiſed of another manor held of the King in capite in chivalry*; and *W. S. died ſeiſed*, and *E. ſurvived*, and *J. S. had iſſue J. S. knight, and died*, and the *King ſeiſed the body of J. S. knight for his nonage*, and after *E. died*, and diem clauſit extremum iſſued to inquire of what lands ſhe died ſeiſed, upon which *the gift made to W. S. and E. was found* as above, *and that the manor was held of the biſhop of E. and that the heir in ward is the next heir*, by which the King ſeiſed the manor held of the biſhop of E. &c. And after *the heir in ward died without heir*, by which iſſued a commiſſion in nature of a diem clauſit extremum to enquire of what lands and tene-

ments

ments the heir in ward died ſeiſed, upon which it was found that he died without heir, and that the one manor is held of the King in capite, and the other of the biſhop; and the biſhop would have traverſed for his eſcheat. And per Hody, after the death of the heir in ward within age a *devenerunt* ſhall iſſue, and *not diem clauſit extremum*, and if the *party fail the right order and courſe of offices, in ſuch caſe he ſhall never have livery*; and yet the office is good for the King, but the *party ſhall not have traverſe* in this caſe, *but ought to ſue in another office in due order, and then he may traverſe*; which matter was agreed per totum. But in this caſe, if the King ought to have prerogative of the ſued in remainder, then the office is good for the King, and ill land by the party, upon which he ſhall not have traverſe. But if the King ought not to have prerogative of the manor held of the biſhop, then the diem clauſit extremum, or commiſſion in nature of a diem clauſit extremum is well ſued, and then the biſhop may traverſe; but Brooke ſays, quære what he ſhall traverſe; for *it ſeems*, that *all the office is true, and then* it ſeems that *he ſhall have petition, or monſtrans de droit*. Br. Traverſe de Office, pl. 14. cites 15 E. 4. 10. Skrene's Caſe.

12. *Things whereof the King is not in poſſeſſion by office*, as of *rent* and *common* &c. there a man may traverſe *by way of plea in treſpaſs, replevin* &c. brought by the King againſt him. Br. Traverſe de Office, pl. 40. cites 20 E. 4. 14. and 21 E. 41.

[90]

Contra where the King is intitled by a certain time, and makes livery within the time, and yet the traverſe remains good. Ibid.

13. Office *found* for the King *after the death of the tenant, his heir of full age. J. S. traverſed the office, and did not pray to have the land in farm*, and after the *King made livery to the heir*, and then the *traverſer prayed that the land be reſeiſed, and that he may have it in farm*, and could not have it; for the livery was lawful, and he may ſue againſt the heir, and the King will not do the heir ſo much wrong as to deny to make livery. Br. Traverſe de Office, pl. 23. cites 1 H. 7. 21.

14. It was *found* by office *that W. B. was ſeiſed in fee of the manor of B. and died ſeiſed, and held of the King in capite, and that A. was his ſiſter and heir aged 40 years*, and B. came and *traverſed the office, in as much as W. B. infeoffed him; abſque hoc, that he died ſeiſed or held in capite prout* &c. and *pending the traverſe A. the heir had livery*, and there it was doubted if the livery be good or not; but it ſeems that it is good. Br. Traverſe de Office, pl. 24. cites 1 H. 7. 27.

Br. Petition, pl. 20. cites S. C.

15. Traverſe ſhall be only *where livery may be made*, and *not where it is found by office, that A. was ſeiſed for term of life, the reverſion to the King and died*; for there ſhall not be livery, therefore no traverſe ſhall be; per Huſſey. Br. Traverſe de Office, pl. 26. cites 3 H. 7. 3.

16. *Office was returned* in Chancery *that the tenant of the King had aliened certain land without licence*, and *the alienee would have made fine, and had livery* of the land, and the *King's attorney ſurmiſed that the feoffment was made to the uſe of the King, and prayed that the land remain in the hands of the King*. And the Chancellor ſaid, the alienee ſhall have livery; for this matter

touches

touches all the realm, and it is only ſurmiſe which is made for the King, which ſhall not delay the party of right; but if ſuch matter for the King appeared by matter of record in the Court, it ſhould be otherwiſe: but *upon ſurmiſe there is no reaſon to put the party to a traverſe.* Br. Surmiſe, pl. 6. cites 4 H. 7. 5.

17. It was *found that J. S. died ſeiſed,* by which came *W. N. his ſon,* and *ſaid that the ſaid J. S. in his life was ſeiſed in fee, and infeoffed A. and B. in fee, to the uſe of the ſaid W. N. and his heirs, and died,* and after by the ſtatute of uſes anno 27 H. 8. he was ſeiſed in poſſeſſion, *abſque hoc that J. S. his father died ſeiſed prout* &c. It is a good traverſe. Br. Traverſe de Office, pl. 50. cites H. 29. H. 8.

18. 2 & 3 *E.* 6. *cap.* 7. *A traverſe, or monſtrans de droit, is given without petition, tho' the King be intituled by double matter of record.*

19. 2 & 3 *E.* 6. *cap.* 8. *ſ.* 7. *Where it is untruly founden, that any perſon attainted of treaſon, felony or premunire, is ſeiſed of any lands at any time of ſuch treaſon, felony, or offence committed or after, whereunto any other perſon hath juſt title of freehold; every perſon grieved thereby ſhall have his traverſe, or monſtrans de droit without being driven to any petition of right, and like remedy and reſtitution upon his title found or judg'd for him, as hath been uſed in other caſes of traverſe.*

(G. 3) Traverſe. *What Offices* may be traverſed.

1. *ALL offices* which are *found ought to be traverſed, but offices found after the traverſe* need not to be traverſed. Br. Traverſe de Office, pl. 9.

As where the King *ſeiſed certain land by two offices,* by the *one* of *which* it was *found that J. S. was ſeiſed of certain land held of the King, and died his heir within age,* and *by the other that this J. S. was ſeiſed of others held of a common perſon, and alien'd in fee by colluſion to the intent to infeoff his heir at full age, where in truth thoſe* * *were the lands of S. C. and the King granted the land and ward to J. S.* by which *S. C. came and traverſed the one office and the other, that he himſelf was ſeiſed of the land till by thoſe falſe offices ouſted, and* traverſed *that the father of the infant was not ſeiſed of the one land,* [91] *nor* that he *did not make feoffment by colluſion of the other land; and* tendered traverſe *upon another point,* that is to ſay, three points in all, and had ſcire facias againſt the patentee to have the patent repeal'd; and the *patentee and the counſel of the King took iſſue upon the one point only,* viz. *that the father of the infant was ſeiſed of the one and the other, and died ſeiſed, and found for S. C.* by which he prayed judgment and livery, and Norton alleged in arreſt, becauſe the *colluſion is not try'd.* And the opinion was, that yet he ſhall have judgment; for the King and party took iſſue upon another point, that is to ſay, upon the dying ſeiſed, and the feoffment by colluſion is contrary to it; for he cannot die ſeiſed, and yet make a feoffment by colluſion, and † the *King cannot change his iſſue after trial of it.* Br. Traverſe de Office, pl. 9. cites 9 H. 4. 6.

* Orig. (ſummoner).——† Br. Prerogative, pl. 13. cites S. C.

2. Where a man *does felony, and after infeoffs A.* of his land, *and after is convicted* of the felony *by verdict of* 12, there A. cannot traverſe to ſave the land *by ſaying that he was not guilty of the felony*; the reaſon ſeems to be inaſmuch as none can have attaint to reverſe this verdict privy or ſtranger; for the indictment was by other 12, and ſo guilty by 24. Br. Traverſe de Office, pl. 35. cites 7 E. 4. 1. 2.

But if he had confeſſed the felony, there the *feoffee* may traverſe that the felon was not guilty &c. Ibid.——

Br. Eſtoppel, pl. 163. cites S. C.

(G. 4)

(G. 4) Traverſe, *by what Perſons* it may be. Capacity.

1. IT was *found* by inqueſt of office *that certain land was given to a man and his feme for their lives*, which *baron alien'd in fee*, by which he in *reverſion entered, and was a ſott*, viz. a fool, whereupon the *King ſeiſed* &c. and this *office was traverſed in the Chancery for the King*, viz. as it ſeems, that the *feme had no ſuch eſtate*, quod mirum! for it ſeems that it cannot be traverſed for the King; for the office is the title and declaration of the King, and therefore he cannot traverſe his own title; but execution was awarded, and this for the feme, as it ſeems. Br. Traverſe de Office, pl. 20. cites 29 Aſſ. 43.

Br. Petition, pl. 17. cites S. C.

2. *He who is admitted to petition ſent indorſed into Chancery*, when he comes there ſhall traverſe the office found for the King in his petition; quod nota. Br. Traverſe de Office, pl. 21. cites 37 Aſſ. 11.

3. A man was *outlawed of murder*, and after it was *found* before the Coroner, *that he purchaſed land after the felony, and thereof infeoffed J. N. who never took the profits*, by which *ſcire facias iſſued* againſt him *to anſwer to the King of the iſſues*, who came and *ſaid, that he would traverſe the office*; but per Percy, you cannot; for he is outlawed of felony; and per Hennington, *the party himſelf ſhall not be received* to traverſe the indictment or the felony without anſwering to the outlawry; *but* we who are *ſtrangers* may traverſe the indictment; for it is only an inqueſt of office, and may ſay that he had nothing at the time of the felony, nor ever after. But by the Reporter, if the felon be indicted, and attainted at his own * coſts, the feoffee cannot traverſe the felony, and after, the year and waſt was adjudged to the King, and of the reſt they would adviſe. Br. Traverſe de Office, pl. 4. cites 49 E. 3. 11.

* Orig. (a ſa mys demeſne.)

Br. Tenure, pl. 21. cites S. C.

4. The King was *falſely intitled to a ward of the heir of R. C. by tenure of him in fee, where* in truth R. C. *was tenant in tail*, the reverſion to A. the heir of his donor, there A. traverſed the office, and it was adjudged for him upon demurrer; quod nota. Br. Traverſe de Office, pl. 17. cites 4 H. 6. 19. 20.

5. If it be *found* by office, *that A. held of the King by knights ſervice, where he held of N. in ſocage*, there the *lord cannot traverſe*, becauſe the ward does not belong to him, but *a prochein amy of the infant* ſhall traverſe it; quod nota. Br. Traverſe de Office, pl. 30. cites 6 H. 7. 15.

And if he holds land of another lord, this *lord may* [92] traverſe the office for his intereſt.

6. If it be *found* by office, *that J. N. who had not any land died ſeiſed of land, and held of the King in capite in chivalry*, his heir within age, the *heir ſhall be in ward*, and has no remedy; per Brian J. But Townſend ſaid, that he may traverſe; for the office is falſe, and there is none who can traverſe but himſelf. Br. Traverſe de Office, pl. 25. cites 1 H. 7. 3.

Ibid.—*And* by the ſame reaſon he himſelf when the office is falſe in tenure and in matter, ſhall have traverſe there *by the common law*; quod Cateſby, Nele, and Huſſey conceſſerunt. Ibid.

7. It

7. It was *found* by an office *virtute officii, that one J. S. tenant of the King, gave land to T. and his heirs males &c. and he as coſin and heir claimed &c. and it was found virtute brevis, that he gave to the ſaid T. in tail general, who had four daughters, who claimed the land, and tendered their traverſe to the firſt office, ſaying, that it was not given in ſpecial tail* as above, *and that they are heirs, and one of them was within age* &c. and ſo ſee that an *infant* may traverſe, and it was found for the heirs general, and they pray'd judgment and ouſter le main of the King. Per Grevil, the traverſe is in the Chancery, and is ſent here to be try'd, and therefore ſhall be ſent there, and judgment ſhall be given there, and not here, as of foreign voucher in Cheſter, or foreign releaſe; but per Brudnel J. there thoſe two Courts are not at common law * as to the voucher and foreign releaſe, but where thoſe Courts are at common law it ſhall not be remanded, as record removed from C. B. here into B. R. it ſhall not be remanded, but we will give judgment here. Per Fineux C. J. if title of the King be found againſt him, judgment ſhall be given here, and the hands of the King ſhall be amoved: and if error be in Cheſter and redreſſed here, we will give judgment and make execution here. And after the Juſtices were purpoſed to give judgment againſt the heir general and would be adviſed of the livery; quod nota. But Fineux once ſaid there, that an infant cannot traverſe, contra it ſeems here: for the one was an infant in fact, and yet they were in opinion to give judgment. Quære if the age appeared to them of record; it ſeems that it did by reaſon of the office. Br. Traverſe de Office, pl. 19. cites 21 H. 7. 35. Br. Parol ou Pleas, pl. 4. cites S. C. * Orig. (del.)

8. None can traverſe, *unleſs he makes title to the ſame land in the premiſſes, or ſpeaks of his traverſe.* Br. Traverſe de Office, pl. 48. cites 22 H. 8.

9. *Two traverſed* an office, and *at the Niſi Prius it was ſhewn by record, that the one was outlaw'd*, by which the Juſtices ceaſed; and in Bank it was ſaid by Engleſield, that they did ill; for they had no power to allow the outlawry, but only to take verdict; but Fitzherbert contra; for traverſe is in lieu of action, and therefore if the one be outlaw'd he cannot have it, and ſo it was ruled; quod mirum! Br. Traverſe de Office, pl. 1. cites 26 * E. 8. 1. * It ſhould be H. 8.

10. *Termor* cannot traverſe office *by the common law*, unleſs it was found in the office, and then he may have monſtrans de droit, and ouſter le main. Br. Traverſe de Office, pl. 50. cites H. 29 H. 8.

(G. 5) *Scire Facias and not Traverſe*, in what Caſes it ſhall be.

1. IF the *King re-ſeiſes* or reſumes *after livery by cauſe ſhewn*, the party griev'd ſhall have *traverſe to the* cauſe, and ſcire facias againſt the tertenant; *but* if it be *without cauſe ſhewn*, he

is put to petition to the King, and ſcire facias againſt the tertenant. Br. Traverſe de Office, pl. 5. cites 2 H. 4. 10.

2. The Duke of N. was *ſeiſed of the office* of the marſhalſea *in tail*, and *granted it to W. B. for life with warranty and dy'd*, and [93] *it was found that the Duke died ſeiſed of the office in tail*, by which W. B. was out of poſſeſſion till he had traverſed, and he who traverſes, if it be found for him, ſhall have ſcire facias againſt him who has the office or the thing for any eſtate certain, contra againſt him who has only at will. Br. Traverſe de Office, pl. 33. cites 5 E. 4. 3.

Br. Record, pl. 60. cites 14 E. 4. 6. S. C.—Br. Pleadings, pl. 104. cites S. C.

3. In a *traverſe of office in Chancery* they were at *iſſue*, which *was ſent into B. R.* to be try'd, and he who tendered it came and *ſaid, that the King had granted the land to P. by patent before the traverſe, by which he ought to have ſcire facias againſt the patentee in Chancery*, and had it not; for he would not proceed, but would have a new traverſe; and it was *ſaid, that he cannot traverſe in Bank; for they have only the tranſcript, and not the record itſelf*; for this remains in Chancery; and by all the Juſtices in the Exchequer Chamber, he may have ſcire facias now in Chancery upon the firſt traverſe; for *miſpleading* there, *nor default of form, is not material in Chancery*; for it is a Court of Conſcience. Br. Traverſe de Office, pl. 39. cites 14 E. 4. 1. 7.

(G. 6) *Aſſiſe or Traverſe.* In what Caſes.

1. WHERE the *King is intitled to a chattel*, as ward or livery *by falſe office*, and the heir ſues livery, the *party may have aſſiſe; contra* it ſeems where the King is intitled *to the fee* by falſe office, and the donee ouſted, the *party is put to his traverſe*. Br. Traverſe de Office, pl. 7. cites 7 H. 4. 17.

(G. 7) Where the Party may *Traverſe*, *or* ſhall be put to his *Petition*.

S. P. Br. Traverſe de Office, pl. 32. cites 4 E. 4. 21. --*But* where *a man is attainted* of felony or treaſon, *or outlaw'd in debt or treſpaſs*, and after it is *found* by office which rehearſes the attainder, and *that at the time of the felony, outlawry*, or the like, *he was poſſeſſed of ſuch a horſe* &c. and *in truth the horſe &c. were the goods of J. N.* and in his poſſeſſion, or that the property was in the ſaid J. N. There J. N. may traverſe for ſuch *perſonal thing*, or other ſuit, without ſuing by petition, notwithſtanding that the eſcheator or other had ſeiſin of the goods for the King, or by freſh ſuit againſt him who was attainted or outlawed. Ibid.

1. IF a man be *attainted* of treaſon or felony, *by matter of record, and alſo it is found by office, that he was ſeiſed of ſuch land at the time of the attainder, and the King grants it over, where in truth J. N. was thereof ſeiſed in fee at the time* &c. J. N. cannot enter, nor have action or traverſe, but is put to his petition, by reaſon that the King is intitled by *double matter of record*, viz. the attainder, and the office. Br. Traverſe de Office, pl. 51. cites 10 H. 6. 15.—And the like was held for law P. 33 H. 8

‡ *So* where the King is intitled *by office only*, there the party grieved may traverſe. Br. Traverſe de Office, pl. 32. cites 4 E. 4. 21.

2. *But*

2. *But where the King has no other title but by falſe office*, there the party who may make title may traverſe as well againſt the King as againſt the party, if the King had granted it over; but now this is aided by the ſtatute of anno 2 E. 6. cap. 8. Ibid. See the Statute at (G).

3. If the *King enters* upon me *by matter in fact, or otherwiſe without record*, I ſhall ſue by petition. Br. Traverſe de Office, pl. 32. cites 4 E. 4. 21. *So if a man enters upon me, and infeoffs the King by deed inroll'd*, I am put to petition. Ibid. ——*So if a man be ſeiſed of land, to which I have right and is impleaded, and ſays that he holds for life the reverſion to the King, and* he *dies*, and the *King enters*, I am put to petition. Ibid. [94]

4. *And at common law*, if the *King was intitled by falſe office*, the party had no other remedy but by petition, and *now the ſtatute gives traverſe* where the King is intitled by office, and therefore if there be other matter than the office, as the attainder above, traverſe does not lie, but partition; for it is out of the caſe of the ſtatute. Ibid.

5. *And* where *land comes to the King by forfeiture by record, out of which I have a rent*-charge or rent-ſeck, *which is not found* in the office, I am put to petition. Ibid. Br. Office devant, pl. 38. cites 4 E. 4. 22, 23. S. C. —*But if* the rent had been *found* in the office, yet he ſhould not diſtrain upon the King; but if the King grants the land over, he may diſtrain the feoffee; contra if the rent was not found in the office. Br. Traverſe de Office, pl. 32. cites 4 E. 4. 21.

6. *The ſame law of execution of a ſtatute merchant* &c. as of the rent; and thoſe caſes are where the King is intitled by *matter of record*; contra where he is intitled by *matter in fact, as where a man infeoffs the King of land charged to me*, I cannot diſtrain, but if the King gives it over, there I may diſtrain; and where the *King ouſts me without office* or record, I cannot enter nor diſtrain; but if he gives it by patent or otherwiſe, then I may enter or diſtrain; contra where the King is intitled by office. Ibid.

(G. 8) *Judgment and Execution* of Traverſe. *How.*

1. *LANDS of a prior was ſeiſed ſuppoſing that he was a prior alien*, who came and ſaid that he was born in Gaſcoigne *within the allegiance of the King*, and this being found, he was reſtored, and had ouſter le main; and ſo it ſeems that the execution of every traverſe *is ouſter le main*; for a man cannot enter upon the King. Br. Traverſe de Office, pl. 49. cites 27 Aſſ. 48. The judgment of a traverſe is no other but *quod manus Domini Regis amoveatur et* quod *poſſeſſio reſtituatur* to him who traverſed. Br. Traverſe de Office, pl. 54. cites Frowike's Reading.

(H) *How* it muſt be *returned or received, and where.*

Eſcheator returned office in the Exchequer which was *not indented*; and the Juſtices ſaid that he ought to have *imprisonment* of two years, *and* make *fine to the King* by the ſtatute * 37 E. 3. Br. Office devant, pl. 10. cites 15 E. 4. 10.——* This ſeems to be miſprinted, and ſhould be 36 E. 3. Stat. 1. cap. 13.

1. 36 *E.* 3. *Stat.* 1. *cap.* 13. ENacts that *enqueſts ſhall be* taken openly *and* by indenture. *And if the eſcheator do contrary to this act, he ſhall ſuffer two years impriſonment, and be ranſomed at the King's will.*

If the eſcheator charges an inqueſt who afterwards are *agreed upon their verdict*, and they *deliver it in paper* to the eſcheator; this, before the ingroſſing, indenting and ſealing it, *is no verdict*. D. 170. a. b. pl. 2. 4. Mich. 1 & 2 Eliz. Ld. Powes's Caſe.——By 36 E. 3. and 3 H. 8. an office in paper as this was is of no effect. Jenk. 218. pl. 64. cites S. C.

2. 8 *H.* 6. *cap.* 16. Enacts that *the eſcheator or commiſſioner ſhall* return *the office* within a month *on pain of* 20 *l. to be divided betwixt the King and the proſecutor.*

[95] Office virtute brevis or commiſſionis, ſhall be returned in Bank,

3. 18 *H.* 6. *cap.* 7. Enacts that *the eſcheator ſhall return an office found before him into the Chancery or Exchequer within one month after the taking thereof, in pain of* 40 *l. given by the ſtatute of* 8 *H.* 6. 16. *and beſides to anſwer ſo much to the King as he is damnified for not returning the ſame.*

and traverſed there, & Office virtute officii ſhall be returned in the Exchequer, and traverſed there, viz. in the Exchequer. Br. Traverſe de Office, pl. 32. cites 4 E. 4. 24.

4. 23 *H.* 6. *cap.* 17. Enacts that *the eſcheator ſhall take his inqueſt within one month after the delivery of the writ unto him, and that in ſome good town openly.*

5. By 1 *H.* 8. *cap.* 8. *ſ.* 1. *If any eſcheator or commiſſioner return into any of the King's Courts any inquiſitions or offices concerning hereditaments, not found by the oaths of* 12 *men, and indented and ſealed; the ſame eſcheator or commiſſioner ſhall forfeit for every ſuch office or inquiſition* 100 *l. to the party grieved, and no man ſhall ſit by virtue of any commiſſion to inquire of hereditaments, except he have hereditaments of the yearly value of* 40 *marks above repriſes upon pain of* 20 *l. and it ſhall be lawful for all perſons that be not ſufficient of freehold at the time of any ſuch commiſſion, to refuſe to ſit and inquire by virtue of the ſame commiſſion.*

6. The Court ought not to *receive the office*, tho' one would affirm on *oath* that it is the very office; but it ought to be brought in *under the Great Seal of England.* And alſo the Court ſhall not receive it without a writ. 1 Le. 65. Mich. 29 & 30 Eliz. C. B. Moile v. the Earl of Warwick.

(H. 2) *Proceedings.*

1. OFFICE found alienation without licence before the eſcheator, and it was *returned into the Exchequer*, and *then ſent into the Chancery*, and *then into B. R.* to be diſcuſſed *upon traverſe;*

verſe; quod nota, the order of it. Br. Office devant &c. pl. 6. cites 7 H. 4. 41.

2. 1 *H.* 8. *cap.* 8. *ſ.* 4. Enacts that *the inquiſition ſhall be* taken by indenture, *whereof* one part *ſhall* remain with the foreman, *and the* other part *is* to be delivered *by the commiſſioners or* eſcheators into the petty bag-office, *from whence it is* afterwards *to be* tranſcribed into the Exchequer; *and the jurors ſhall preſent by indenture, in pain to forfeis* 20 *s. a-piece. The eſcheator alſo, or the commiſſioners, or ſome of them, ſhall receive the jurors preſentment without delay, in pain of* 5 *l.*

The officer *in the petty-bag ſhall* file *the office* within three days after receit *thereof, in pain of* 40 *l.*

The officer *in the Exchequer that* refuſeth *to receive an office upon tender, ſhall* forfeit 40 *l. and then the eſcheator or commiſſioners ſhall be diſcharged of their forfeiture of* 40 *l. for not returning the office within a month, ſo that they return another into the Chancery or Exchequer (as the cauſe requires) within a month after the firſt month.*

The clerk of the petty-bag ſhall ſend a tranſcript of the office into the Exchequer, the next term after he receives it, in pain of 5 *l.*

3. By 1 *H.* 8. *cap.* 10. *ſ.* 3. *After office found afore any eſcheator or commiſſioner put into the Chancery or Exchequer, if any perſon which will tender a traverſe to the ſaid office, and deſireth to have the lands to farm, and find ſurety, and ſheweth evidence to the Chancellor, according to the ſtatute* 8 *Hen.* 6. *cap.* 16. *come into the Chancery within three months after the office ſo put into the Chancery or Exchequer, he ſhall be by the Chancellor thereto admitted, and all other grants thereof be void.*

4. 2 & 3 *E.* 6. *cap.* 8. *ſ.* 13. Enacts that *in all ſuch caſes, as any perſon ſhall be enabled by this act to have any traverſe, and ſhall purſue his traverſe, he ſhall* ſue *writs of* ſci. fa. *againſt all ſuch as ſhall have intereſt by the King or his patentees, as is requiſite upon traverſes or petitions heretofore purſued. And in every ſuch ſci. fa. the patentees or defendants ſhall have like pleas, as they had in any ſci. fa. before this time awarded againſt any patentee in any caſe of petition; and upon every traverſe purſued by virtue of this act, in ſuch caſe as the party that ſhall purſue ſhould by the common law have been put to ſue by petition to the King, there ſhall be* two writs of ſearch *granted, as like writs have been granted upon petitions made to the King.*

[96] Note in many caſes two matters of record with neceſſary averments ſhall amount to an office, but thereupon a ſci. fa. is to be granted, wherein the party may traverſe any of the material averments. 2 Init. 694.

(I) *Falſe* Inquiſition.

See (G) pl. 2.—(G. 4) pl. 5. 6.—(G. 7)—Br. Entry Cong. pl. 27. cites S. C.—Br. Office devant, pl. 9. cites S. C.

1. WHERE the King is *intitled to the ward of land and body by office before the eſcheator*, and after the *feme* comes and *furmiſes that the land was to her in tail*, and has writ to the eſcheator to find it, who *finds* it, and upon this has ouſter le main, where the inquiſition is falſe, becauſe *there was no ſuch gift in tail*, there *this is an intruſion upon the King*, and his dying ſeiſed ſhall not toll the right heir. And ſo ſee that *after office* found *for the King it cannot be defeated but by traverſe*, or the like, and not

by other inqueſt of office. Br. Traverſe de Office, pl. 12. cites 21 E. 3. 12.

2. None ſhall have livery but he who has office found for him; and this is to be underſtood of general livery; but *he who has title and no office found for him* may traverſe falſe office found againſt him. Br. Traverſe de Office, pl. 45. cites 43 Aſſ. 20.

3. If it be *found that J. S. who is outlawed in action of debt &c. is ſeiſed of my land* which is falſe, by which the eſcheator takes the profits, I may diſturb him without traverſing the office; for upon ſuch outlawry the King ſhall not ſeiſe, and then I may retain my poſſeſſion; per Cotteſmore; quod fuit conceſſum. Br. Traverſe de Office, pl. 43. cites 9 H. 6. 20.

Br. Office devant &c. pl. 40. cites S. C. accordingly.— * See the Statute at (G. 2).

4. If it be found by office, *that the tenant of the King died ſeiſed his heir within age*, viz. *of the age of two years, where he is of the age of ten years*, he has no remedy; but Brooke ſays the law is contrary now by the ſtatute of * 2 *E.* 6. *cap.* 8. but by the common law no traverſe was given in this caſe. Br. Traverſe de Office, pl. 47. cites 5 E. 4. 4.

5. A man ſhall have his traverſe where the office is falſe. Br. Traverſe de Office, pl. 26. cites 3 H. 7. 3.

6. Where the *tenure* is *found of the King, as of his duchy of Lancaſter*, where in truth it is falſe, yet this need not to be travers'd; for the King has this duchy as Duke, and not as King, and a man ſhall not be put to traverſe, unleſs where office is *found for the King as for the King of England*; for then he has prerogative, and as Duke no prerogative. Br. Traverſe de Office, pl. 53. cites H. 1. E. 6.

See (B) pl. 1. in marg.

(K) *Relation* thereof to what Time &c.

1. *Tenant for life with clauſe of re-entry* is attainted, the reverſioner enters, the office ſhall not relate *to take the freehold out of the reverſioner*. Arg. Godb. 317. cites 27 Aſſ. 30.

[97] *But* where it is *found* by office, *three years after the alienation, that the tenant of the King alien'd without licence*, this ſhall not have relation to give the *meſne profits*; for it is *only nomine diſtrictionis*. Ibid.—— *But* where it is found three years after the alienation *that the tenant alien'd in mortmain*, there he ſhall have the meſne profits; for this gives him title to the land; per Choke; quod fuit negatum; for the *lords mediate and immediate* ſhall have their times. Ibid.

2. It is *found by office that A. was bound to two, and the one was ſeiſed de ſe*; per Choke, the office ſhall have relation, *and the King ſhall have the intire obligation*; as where it is * found that the King's *tenant dy'd, his heir within age*, the office ſhall have *relation* to the death, and the King ſhall have the meſne profits. Br. Office devant &c. pl. 43. cites 8 E. 4. 4. 24.

Br. Traverſe de Office, pl. 15. cites S. C.

3. Office ſhall have relation *to the death of the tenant of the King*, tho' it be found after, *and ſhall avoid meſne acts* by this relation, *as collation by lapſe* &c. *meſne between the death and the office found*. Per Higham. Br. Office devant &c. pl. 11. cites 14 H. 7. 22. and 15 H. 7. 6.

4. If *recovery* be had *againſt the heir before office*, and after office

office is found, the recovery bars the heir; and *ſo* of *feoffment* made *by the heir before office*, this bars the heir; for the office found after gives the King only the profits. Br. Office devant &c. pl. 25. cites 1 H. 7. 17. per Rede.

5. The office ſhan't have any *relation* for the *profits beyond the time of the attainder*; tho' for avoiding *incumbrances* made by the perſon *attaint*, it ſhall have relation to the time of the treaſon done. Pl. C. 488. b. Mich. 17 & 18 Eliz. Nichols v. Nichols. ——2 Roll. R. 421. accordingly per Jones J. and he ſaid, that as to the *veſting the freehold*, it has relation only to the time of the office.——Jo. 78. S. P.

6. A. entered into a *ſtatute of* 1000*l.* to B. and afterwards B. was a *fugitive beyond the ſeas*, *in* 27 *Eliz.* afterwards and before any office found, B. returned and releaſed the ſtatute; and afterwards office is found: this releaſe ſhall not bar the King; for he was intitled by the flight, and the office was but an informing of him, and the ſtatute was in him before the office. Cro. J. 82. Mich. 3 Jac. B. R. The King v. Wendman.

(L) In what Caſes *Forfeiture* ſhall be *before* any *Office found*.

See Forfeiture (C) Treaſon.

1. IF one *departs out of the realm without licence*, and upon a ſpecial command under the Privy or Great Seal, to return by a certain day upon pain &c. he refuſes, his lands and chattels ſhall be ſeis'd to the Queen's uſe for the contempt. D. 128. b. pl. 61. Hill. 2 & 3 P. & M. Anon.

A precedent was then ſhewn of the like matter in 19 E. 2. in Scacc. againſt the Earl of Richmond, call'd William de Brittaine. Ibid.

2. A *ſheriff* of the county of W. *for* term of his *life*, *or in fee*, was *indicted for eſcapes of felons* felonice & voluntarie; *and alſo* was indicted *for holding his tourn in loco non conſueto contra formam ſtatuti* de Magna Charta. The indictments were removed in B. R. and the King's attorney brought an information againſt him upon the indictments: and per Cur. the office of the ſheriff was ſeiſed into the hands of King quouſque &c. and this without ſcire facias, or any other proceſs awarded againſt him &c. D. 151. b. pl. 4. Mich. 4 & 5 P. & M. Sir John Savage's Caſe.

3. *Goods of felo de ſe* are forfeited before inquiſition. 1 Lev. 8. Mich. 12 Car. 2. B. R. The King v. Ward executor of Wentworth.

1 Saund. 275. Contra per the Reporter, Trin. 21 Car. 2. in Caſe *of the King* v. Sutton.——1 Hawk. Pl. C. 68. cap. 27. ſ. 9. Contra, that no part of the perſonal eſtate is veſted in the King before the ſelf-murder is found by ſome inquiſition.

4. Nothing can be forfeited as a *deodand*, nor ſeiſed as ſuch, [98] till it be found by the Coroner's inqueſt to have cauſed a man's death. 1 Hawk. Pl. C. 67. cap. 26. ſ. 8.

(L. 2.) *At what Time* it ought to be found.

1. OFFICE ſhall not be taken *after office upon a ſurmiſe, which is contrary to the matter of the firſt office; contrary, if it ſtands with* the matter of the firſt office. Br. Office devant &c. pl. 33. cites 4 H. 7. 15.

2. If the *King grants land for life*, and after the *patentee dies*, yet the King cannot grant it over till the death be found by office; and this by the ſtatute 18 H. 6. Br. Office devant &c. pl. 56. cites 29 H. 8.

(M) *Pending Traverſe of another Office.*

S. P. Br. Office devant, pl. 8. cites 11 H. 4. 80.

1. IT was found that the *tenant of the King died ſeiſed, his heir within age*, and the *King ſeiſed the ward and granted him over*; and the *feoffees came and traverſed the office that the anceſtor infeoff'd them*, abſque hoc *that he died ſeiſed*, and *had ſcire facias* againſt the patentee to repeal the patent: and the *defendant ſaid that there is another office found; alſo that the feoffment was by concluſion &c.* Judgment if he ſhall be compelled to anſwer to the writ; this office is not traverſable. And becauſe the office of the colluſion was found pending the writ, by which the defendant averr'd by way of plea, that the feoffment was by colluſion in maintenance of his patent, and ſo to iſſue upon it; and the party not compelled to traverſe the laſt office; but contra if it had been found before his traverſe; note the diverſity. Per Norton, if *pending the ſuit another office* had been *found which intitled the King to the fee ſimple*, he ſhall be compelled to traverſe it; Tirwhit ſaid yes; for the King has a higher right by the one office than by the other; contra here, for the one and the other do not intitle but to the ward; and ſo ſee a *diverſity* where the *office* which is *found pending the firſt office is of the ſame* effect, and *where of a higher title.* Br. Traverſe de Office, pl. 11. cites 21 E. 3. 1. 2.

2. If it be *found* by office *that the tenant of the King died ſeiſed of my land*, by diem clauſit extremum, *quod falſum eſt*, and the *King ſeiſes*, and after *the heir dies in ward*, and after it is found by another diem clauſit extremum, as above, where mandamus ought to have iſſu'd; in this caſe I ought to traverſe the one office and the other, before that I can have my lands out of the hands of the King. Per Gaſcoyn and Hulſe J. Br. Traverſe de Office, pl. 8. cites 8 H. 4. 17.

(N) Of *ſeveral conſiſtent or contrary Offices* found, and the Effect thereof.

1. WHERE office is found for the King, and another office is found contrary for one party, this *ſhall not diſcharge the office which ſerves the King*, but ſhall go to his traverſe &c. Br. Office devant &c. pl. 9. cites 21 E. 3. 1. S. P. Br. Traverſe de Office, pl. 12. cites 21 E. 3. 1. 2.

2. If it be *found by office that A. is heir*, and within age, *and by another office that B. is heir*, there the *firſt ſhall ſtand*, and the ſecond is void; for it intitles the King only to that which the firſt intitled him to. Br. Office devant &c. pl. 44. cites 14 E. 4. 4. 5. by the Serjeants. [99] *But if the laſt intitles the King to the eſcheat or to ſee*, this is good, and he who is found heir before by the firſt office ſhall not have livery till he has travers'd the office. Ibid.

3. In aſſiſe *it was found by virtue of the writ that J. T. was ſeiſed* &c. *and attainted of treaſon; and the ſame day, before the ſame eſcheator*, it was found *by the ſame jury, that the ſaid J. T. was ſeiſed of other land at the time of the treaſon.* And per Brudnell and Keble, the eſcheator cannot ſit by virtue of the writ de diem clauſit extremum, quæ plura, as here, or the like, and * *after by virtue of his office at one and the ſame time, but it ſhall be taken by virtue of the writ.* But Butler, Hoberd, Rede, Wood and Fiſher, contra, that the eſcheator *may ſit by virtue of the writ, and after by virtue of his office*, and that *it is not contrary*: and that by the opinion of Huſſey, if *diem clauſit extremum finds the heir of the King's tenant of full age, and by virtue of his office he is found within age*, yet he ſhall have livery; and therefore it ſeems that the laſt office is not well found, nor that it ought to have iſſued after the firſt; for it is contrary; but here it is not contrary, but the laſt office *found lands which are not mentioned in the firſt office*, and therefore well, which was not deny'd by the Court but that it was well; and it is not contrary, 'tho' it was one and the ſame day, and by one and the ſame jury; for it may be at diverſe hours and diverſe inſtants. And ſo ſee that if the King be ſerv'd by one office, he ſhall not have another office which ſhall do contrary; contra if the laſt office ſtands with the firſt. Br. Office devant &c. pl. 35. cites 9 H. 7. 8.

(O) *Imperfectly* found, *Relieved* or not, and *How.*

1. IT was *found* by diem clauſit extremum in London, *that J. N. tenant of the King died ſeiſed without heir*, of land in London, *by which the King granted it to T. N. for his life*, and a writ to the Mayor to put him in ſeiſin, who return'd that the ſaid *J. N. deviſed it by teſtament inrolled within the year to E. his feme for term of life*, who is yet alive, and *the reverſion to be ſold by*

by her: the grantee of the King enter'd, and *E. ſu'd ſcire facias to re-have the land*; and becauſe this *deviſe is not found* in the office, nor is any office found for the ſaid E. the deviſee, therefore the *ſcire facias* does not lie; but by ſome E. may have aſſiſe. Quære; it ſeems *E. ſhall have petition or monſtrans de droit*; for E. cannot traverſe; for the office is true, and the *deviſe ſtands with the office*, and both are true. Br. Office devant &c. pl. 19. cites 29 Aſſ. 31.

2. Where *tenant in tail of an office grants the office to T. B. for life with warranty*, and *dies*, and it is *found* by office *that the grantor held of the King and dy'd, his heir within age*, by this the *grantee is out of poſſeſſion* of the office; for it was found that he died ſeiſed of the office. Br. Office devant &c. pl. 39. cites 5 E. 4. 3.

3. It was *found that J. S. and his feme infeoff'd the King in fee to their uſe*, and the office awarded inſufficient; for the *King cannot be infeoff'd without deed inroll'd*; for *no livery can be made to him*; by all the Juſtices, and the office is inſufficient; for it
[100] cannot find matter of record as outlawry &c. and the King cannot be ſeiſed to another's uſe. Br. Office devant &c. pl. 41. cites 5 E. 4. 8.

4. *Office in one county found J. N. heir, and within age*, and *in another county* they found *W. heir, and within age, who was a younger brother*. And per Townſend, Juſtice, in this caſe the *King ſhall have the ward of both till full age, and at full age they ſhall interplead which of them is right heir*; and he who is found right heir ſhall have livery of the whole; but this cannot be diſcuſſ'd during their non-ages, for clear law: *but ſee* now 2 *E.* 6. 8. *where this matter is remedy'd*. And if both die within age, their heirs within age, *ſeveral devenerunts ſhall iſſue* into each county, according to the nature of the firſt office, and they ſhall interplead at full age, as their anceſtors ſhould do; *but if it be found that the one died without iſſue, and that the other is heir to him*, there the interpleading is gone. Br. Office devant &c. pl. 27. cites 1 H. 7. 14.

(P) *Superſeded.*

1. IF it be *found by office that J. S. held ſuch land in burgage, by which* the land was *ſeiſed into the hands of the King*, ſuperſedeas ſhall be awarded. Brooke ſays, quod mirum! for it ſeems that ouſter le main ſhall be after ſeiſure, and ſuperſedeas to the eſcheator *before ſeiſure*. Br. Superſedeas, pl. 33. cites 7 E. 4. 17. 22.

But where office is inſufficient as to intitle the King by deed of feoffment which is not inroll'd, and the *King grants it by patent*, ſpecial writ ſhall be awarded that the patentee ſhall not intermeddle, and the iſſues ſhall be deliver'd to him who was ouſted. And ſo ſee that burgage land ought not to be ſeiſed into the hands of the King, as land of chivalry, or ſocage in capite. Ibid.

(Q) *Pleadings.*

1. OFFICE found that *H. S. was ſeiſed in fee, and leaſed to J. H. for life*, and was *attainted* &c. and *that J. H. is dead, and that M. & E. his ſeme, are tenants*; by which ſcire facias iſſued againſt them, who came and *ſaid, that J. H. was ſeiſed in fee and died ſeiſed* &c. *abſque hoc, that H. S. any thing had in demeſne or in reverſion at the time of the forfeiture*; and becauſe he *did not deny the ſeiſin of H. S. nor the leaſe for term of life to J. H. and did not ſhew how J. H. came to the fee before the forfeiture* it is no plea to ſay that H. S. had nothing in the reverſion, without ſhewing how H. S. diſmiſt himſelf of it; for which [reaſon] Knivet awarded that the King ſhall have execution, and that M. ſhall recover pro rata of one A. of whom he had pray'd aid before by * partition made between E. and A. as daughters and heirs of J. H. Br. Office devant &c. pl. 22. cites 40 Aſſ. 24.

* Orig. (Petition.)

2. It was found by office return'd in Chancery, that W. of H. who was ſeiſed in fee of the manor of B. in the county of D. *was aiding to G. M. enemy of the King*, by which the land was ſeiſed into the hands of the King; upon which W. of H. came and *ſaid that he was not aiding, and prayed reſtitution*, and upon the matter tried had reſtitution. Br. Office devant &c. pl. 23. cites 43 Aſſ. 28.

3. Office was traverſed, it was *found that J. N. held of the King immediately, and alien'd to W. P. without licence*; and the *office was return'd into the Exchequer, and after ſent into Chancery, and thence into B. R. where the iſſue was if the land was held of* [101] *T. C. who held over of the King, or of the King immediately*, and it was *found for the party*; and notwithſtanding that *record was alleged that J. N. tenant had paid reaſonable aid to the King for marrying his daughter as tenant immediate*; yet becauſe it was not pleaded, it was awarded that the party have livery out of the hands of the King, with the iſſues in the meſne time. Br. Traverſe de Office, pl. 6. cites 7 H. 4. 41.

4. *None ſhall have land out of the hands of the King without making title.* Br. Traverſe de Office, pl. 38. cites 13 E. 4. 8. per Cur.

5. A man may *confeſs and avoid* the office, or other matter of record; *as* where it is *found that tenant in tail remainder over in fee was, and that* he in *remainder is attainted* of felony, and *the tenant in tail is dead without iſſue*, he who traverſes may *ſay, that before the ſtatute of tail, and poſt prolem ſuſcitatam, the tenant in tail infeoff'd him, and that after he in remainder was outlaw'd, and the feoffor died without iſſue*, and pray that the hands of the King may be amov'd; and this is good confeſſing and avoiding. Br. Traverſe de Office, pl. 39. cites 14 E. 4. 1. 7.

6. In office of alienation without licence, it was touch'd by the Serjeants at the Bar, that if *land* be *in the hands of the King by*

* Br. Traverſe de Of-

fice, pl. 27. cites S. C. but is, that the land ſhall be ſeiſed again

by twenty diverſe titles, the *party ſhall anſwer to all the titles*; but if the party *traverſes one cauſe which is found for him, and after another cauſe is found* &c. the land ſhall * not be ſeiſed again; quod nota bene. Br. Office devant &c. pl. 32. cites 4 H. 7. 5.

[which ſeems to be miſprinted, the year-book being agreeable to Br. Office devant &c. pl. 32.]

Br. Traverſe de Off. pl. 15. cites S. C.

7. Where the *King is not in poſſeſſion by the office* as in diverſe caſes, this *may be traverſed in the action* which ſhall be brought by the King upon ſuch office. *But* where the King is *in poſſeſſion by the office without action*, there the party grieved *ſhall traverſe in the Chancery*, where the office remains. Br. Office devant &c. pl. 11. cites 14 H. 7. 22. and 15 H. 7. 6.

8. *Nonſuit or relinquiſhing of traverſe is peremptory: contra* of nonſuit *in a petition*. Br. Traverſe de Office, pl. 54. cites Frowike's Reading.

[For more of Office or Inquiſition in general, ſee Coroner, Eſcheator, Prerogative, and other proper Titles.]

[Officers and] Offices.

(A) Grant. *By whom* they ſhall be *granted*.

D. 176. a. pl. 28. Hill. 2 Eliz. cites

[1. 12 *E.* 1. *Rot. Clauſarum Membrana* 8. CYrographarius *in Banco* amotus *per breve*, alius factus per Regem.]

a precedent for the office of Chirographer, in theſe words, viz. Dominus Rex mandavit hic quaſdam literas ſuas patentes, in hæc verba. Henr. Dei gratia, Rex Angl. Hæres & Regens regni Franciæ, & Dominus Hibern. Omnibus ad quos preſentes literæ perveniant, ſalutem. Sciatis quod de gratia noſtra ſpeciali, ac de aſſenſu concilii noſtri, nec non de adviſamento capitalis juſtic. de com. Banco noſtro, ac aliorum juſtic. noſtrorum, conceſſimus dilecto nobis Rob. Kirkham officium Chirographie in Banco noſtro pred. habend. *quamdiu nobis placuerit*, cum feodo & profic. ad idem offic. pertin. *Proviſo ſemper quod pref.* R. *in propria perſona ſua ſupradict. officio, abſque aliquo deputato ſub ſe faciendo continue moretur, juxta form. cujuſd. ſtatuti, in hac parte editi & proviſi.* In cujus rei teſtim. has literas noſtras fieri fecimus patentes. Teſte Humfrido Duce Gloceſtriæ, Cuſtode Angliæ, apud Weſtm. 16 die Octobr. ann. regni octavo.

[102] [2. 18 *E.* 1. *Rotulo Clauſarum Membrana* 17. *Rex commiſit Johanni de Bradford officium* Kirografici *in Banco cuſtodiendum* quamdiu Regi placuerit, *& mandatum eſt Johanni Mettingham & ſociis ſuis Juſticiariis de Banco, quod illud officium tenere permittant donec aliud habuerint in mandatis &c.* 1 *E.* 2. *Rot. Patentium Membrana* 18.]

[3. *P.* 1. *H.* 4. *B. R. Rot.* 16. *Inſpeximus Chartam Regis Richardi* 2. *factam Thomæ Thorne Valecto Buttelarie, ſuper officio* Proclamatoris de Banco ſuo *pro termino vitæ ſuæ.*]

[4. *P.* 9. *H.* 5. *B. R. Rot.* 5. *Dominus Rex concedit J. T. officium* Proclamatoris Curie Regis.]

[5. *Tr.* 2. *H.* 4. *B. R. Rot.* 25. *The office of the* Marſhal of B. R. *was granted by the King by his letters patents to William Finborrowe.*] The Earl Marſhal of England granted the office of Marſhal of B. R. as incident to his office, it having been forfeited by the attainder of the grantee for life; and therefore it ſeems that the Earl and not the Queen had power to grant it, and the rather, for that it was granted only for life. 4. Le. 19. pl. 65. Mich 23 Eliz. B. R. The Queen v. Earl of Shrewſbury.

[6. *De conceſſione officii* Clerici ad negotia Regis coram Juſticiariis ad placita coram Rege proſequenda, & *defendenda, (it ſeems it is the Clerk of the Crown.)* Hill. 1 E. 3. B. R. Rot. 1. Tr. 12 E. 3. Rot. 24. Mich. 23 E. 3. Rot. 1.]

7. Breve regium direct' Juſtic. de Banco, ad admittend' Rob. Darcy, ad officium *Cuſtodis Breviuм & Rotulorum*, viz. Capitalis Clerici, quod quidem offic. pertinet etiam ad donationem Regis. D. 176. a. pl. 28. cites Hill. 1 H. 6. Rot. 1.

8. The *Maſter or Dean may make to himſelf a Bailiff*, and aſſign to him an Auditor, to make him account before, and he may make acquittance to him, and he may take offerings, and make *ſteward, receivers*, and ſuch officers; and all theſe are *good during his life*. Per Brudnell, Br. Corporations, pl. 34. cites 14 H. 8. 2. 29.

9. The office of *Exigenter of London &c.* became void by death of the officer. Afterwards *the Chief Juſtice died*; the *Queen Mary granted the office of Exigenter to C.* by patent, and *afterwards by patent of the ſame date granted the office of Chief Juſtice to B.* who was ſworn into his office, and refuſed C. and admitted S. Upon a ſuit between C. and S. before certain commiſſioners appointed by the Queen; S. demurr'd to the juriſdiction &c. whereupon they committed him to the Fleet; but the Court of C. B. granted a corpus cum cauſa to the Warden of the Fleet, he being a neceſſary member of the Court. D. 175. a. pl. 25. Mich. 1 & 2 Eliz. Scrog v. Coleſhill. 4 Rep. 33. a. S. C. cited in Mitton's Caſe, and ſaid there, that the grant of the Queen was held void, becauſe it was *incident to the office of Ch. J. of C. B.* which the Queen cannot have, and the next Ch. J. ſhall avoid it.

10. The *Juſtices of aſſiſe* appoint the *Clerk of the aſſiſes*. The *Sheriff* appoints *the* * *gaoler and* † *county clerk*. The *Cuſtos Rotulorum* appoints *the* ‡ *clerk of the peace*. Jenk. 216. pl. 59. * See 14 E. 3. cap. 10. and 4 Rep. 34. a. Mitton's Caſe.

——† The King cannot make the ſhire or county clerk (who is to enter all judgments and proceedings in the county court) for the making him belongs to the Sheriff by the common law. 2 Inſt. 425. cites 4 Rep. 32. Mitton's Caſe.——And it would be very dangerous to the ſheriffs, ſhould others be appointed to keep the entries and rolls; for ſhould the records be imbezzled, the ſheriff muſt anſwer for them as immediate officer to the Court. And the ſame law of the ſheriff 's tourn. 4 Rep. 33. b. Paſch. 26 Eliz. Mitton's Caſe.——‡ See Clerk of the Peace.

11. *Curſitors* are appointed *by the Lord Chancellor*. The *Exigenters and Philizers by the Ch. J. of C. B.* Jenk. 216. pl. 59.

It was afterwards argued, that this was an office of truſt repos'd in the Corporation for the public good, and that the office itſelf is not veſted in the Mayor; and therefore he cannot grant it, tho' he may make a deputy to execute it; becauſe the maſter ſhall be anſwerable for his acts, and cited 29 H. 6. Dyer 238. that a Mayor of a town may make a deputy; but he cannot grant this office, or make a revenue of it. Roll Ch. J. ſaid it was conſiderable, in regard it was an office of truſt, whether it may be leas'd out, altho' he may make a deputy; and therefore ordered it to be argued again the next Term. Ibid.

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12. In *covenant brought by the Mayor and Commonalty of London for rent reſerved by them on a leaſe of the Garbler's office* the defendant pleaded that it was an *office of truſt repoſed in the City, and could not be leas'd* for years. Hale contra; becauſe the Mayor &c. have a *fee-ſimple in the office by their charter*, and not a meer truſt repoſed in them to execute it. But if it could not be granted, here is no forfeiture; for this leaſe ſhall be accounted but a deputation, and not a granting over of the office. And Roll Ch. J. ſaid that without doubt the *Mayor* may make a deputy to execute this office; but he *has a fee-ſimple*, and therefore may make a leaſe of it, and the leſſee's covenant will bind him to pay the rent. Judgment for the plaintiff, Niſi &c. Sty. 357. Mich. 1652. Mayor and Commonalty of London v. Hatton.

(B) *By what Words.*

Where a patent purported only the grant of an office, and not words of creation of the office, as Conſtituimus officii &c. the plaintiff was nonſuited in aſſiſe for ſuch office, becauſe he could not prove it was an ancient office. 2 Brownl. 328. Paſch. 8 Jac. C. B. Coſar v. Bull.

[1. THE *King* cannot *create an office* without words of creation, as *Conſtituimus J. S.* &c. But *Conceſſimus* ſuch office to J. S. is not good without the ſaid words, 21 E. 4. 79. 8 E. 4. B. 9 E. 4. 11.]

2. Appointing an officer *in other manner than the law directs*, as nominating a Clerk of the Peace ſince 1 W. & M. to hold during pleaſure, inſtead of quamdiu ſe bene geſſerit, is no execution of his authority, and the nominee has no title. 4 Mod. 295. Trin. 6 W. & M. B. R. The King and Queen v. Owen.

3. When the King grants what is rather an *employment* than an office, as office of Searcher for the Cuſtoms, the word *aſſignavimus* is the moſt proper word. Carth. 352. The King v. Kemp.

(C) *To what Perſons* Offices may be *granted*, [pl. 6, 7, 8, &c.—*And How*. *Jointly*, pl. 1, 2, 3, 4, 5. And ſee (C. 2).]

[1. GRANT of the office of the *Chief Prothonotary of Bank to two* is void. 18 E. 4. 7. b.]

[2 Grant *to two to be Chief Juſtice* in any Bench is void. 18 E. 4. 7. b. 11 Rep. 3. b. Curle's Caſe.]

[3. But

[3. But a grant *to two to be Clerk of the Crown* is good. 11 Rep. 3. b. Curle's Caſe.]

[4. So a grant *to two to be Clerk of the Crown in the Chancery is good.* *9 E. 4. 1. 11 Rep. 3. b. Curle's Caſe.]

*S. C. cited 2 Jo. 127. Hill. 31 Car. 2. B. R. in Caſe of Howard v. Wood.

[5. A grant *to two to be* an officer of the *Auditor of the wards* is good; * yet it is but one office and *partly judicial.* But this is *by the ſtatute of* 32 & 33 *H.* 8. 11 Rep. 3. Auditor Curle's Caſe.]

* Fol. 153.

[6. An *infant* is not capable of the office of *Steward of the Court of a manor*, in poſſeſſion or reverſion. Mich. 40 & 41 El. B. R. between *Scambler and Walters*, which ſee Co. Litt. 3. b.]

[104] Cro. E. 636. S. C. But adjornatur. —J. Jones ſaid, that SCAMBLER's CASE, cited by Ld. Coke Co. Litt. 3. b. was adjudged contrary, viz. that an infant was capable of a ſtewardſhip in reverſion. Mar. 43. Trin. 15 Car. in Caſe of Young v. Fowler.—A prebend was granted to an *infant of* 3 *years old*, but was adjudged void; becauſe he was not of age of diſcretion; but had he been ſo, it had been good; per Barkley J. Mar. 43. in Caſe of Young v. Fowler, cited Prideaux's Caſe.

[7. If the office of *Regiſter of a biſhop* be granted to J. S. who is an *infant of the age of* 12 *years* at the time of the grant, *habendum at the death of J. D.* who is Regiſter in poſſeſſion for his life, *to be exerciſed by him or by his deputy*, and after J. D. dies, J. S. then being of the age of 39. this is a good grant, it being to be exerciſed by him or his deputy, and ſo not void at the making of it; and he being of full age when it falls to be exerciſed by him. Mich. 8 Car. B. R. between * *Young* and *Stowell*, per Curiam, reſolved upon a trial at Bar, for the office of the Regiſter of Rocheſter. Trin. 15 Car. B. R. between *Young* and *Fowler*, (which was the ſame caſe before) adjudged, per tot. Curiam upon a ſpecial verdict.]

* Jo. 310. S. C.—Cro. C. 279. S. C. ——Where the grant of the office in reverſion to an *infant*, is to exerciſe the ſame *per ſe vel deputatum*, 'tis not good. But to exerciſe it *per ſe vel deputatum ſufficientem*, it is good. Cro. C. 556. Young v. Fowler.—And ſo denied the Caſe of SCAMBLER v. WALTER, but with the above difference. Ibid.

[8. So if the office of *regiſterſhip* be granted *in reverſion* by a biſhop or other perſon, *to an infant* of the age *of* 12 *years to be exerciſed by him or his deputy*; this is a good grant, inaſmuch as he may make a deputy, tho' he be an infant, this being for his benefit. Mich. 8 Car. B. in the ſaid Caſe of *Young* and *Fowler*, per Curiam reſolved, and ſo the Court afterwards certified their opinion in Chancery to be in this caſe, 8 December 1632.]

Mar. 38.—Jo. 311. Young v. Stoel.—— Cro. C. 279. S. C. but if he puts in an inſufficient *deputy*, it is a forfeiture of his office.——So if he does not elect a ſufficient one. Cro. C. 556. in Caſe of Young v. Fowler.

9. It was mov'd, whether a *batchelor of law may be a commiſſary, ſince the ſtatute* 37 *H.* 8. 2. Popham ſaid, that adminiſtration and probate of wills, was by the common law, which any might do; and the ſtatute 37 H. 8. is *in the affirmative*, that doctors of the civil law may be commiſſaries, and therefore takes not away the liberty at common law. Cro. E. 314, 315. Hill. 36 Eliz. B. R. * Pratt v. Stocke.

S. C. cited Jo. 264. in Caſe of Walker v. Lamb. —— *S. C. cited Cro. C. 259. and judgment accordingly, as to the office of *Official of the Archdeaconry of Leiceſter*, and alſo as to the office of Commiſſary of the Biſhop of Lincoln, being granted to a lay-perſon, and not a doctor, but a batchelor only of the civil law. Cro. C. 258. Trin. 8 Car. B. R. Walker v. Lamb.

10. *Cuſtody*

Tho' publick offices as that of *Conſtable of England*, cannot be *originally granted* to a woman, yet they may *deſcend* to her.

10. *Cuſtody of a caſtle* was granted *to a woman*. It was inſiſted that a feme cannot have ſuch office, becauſe it appertains to the war, and is to be executed by men only. Sed non allocatur, becauſe it was granted to her *exercend. per ſe vel deputatum ſuum*: and it doth *not appear to be a caſtle of war*, but may be a private houſe. Cro. J. 17. Mich. 1 Jac. Lady Ruſſel's Caſe.

Jenk. 236, 237. Humphry de Bohun's Caſe.

11. Grant of an office *of ſkill to an infant in præſenti* is void; but if *in futuro*, and that when the office is to be exerciſed, he be of full age and expert, the grant is good. Jenk. 121. pl. 44. cites 5 Jac. The Bp. of Rocheſter's Caſe.

[105] (C. 2) *Joint Officers. In what Caſes* they may be.

Br. Grants, pl. 170. cites S. C. —Br. Jointenants, pl. 68. cites S. C.—— Jenk. 142. pl. 93 S.P. and cites S. C.

1. IF the King grants the office of *Chief Prothonotary to two*, this is void per Cur. and the Juſtices may refuſe to inrol it; for two cannot have the cuſtody of the rolls; for then he may grant it to 20, and they cannot ſit in the common bench. But it was ſaid, that it was of the office of *Cuſtos brevium*; for the other is of the gift of the Chief Juſtice. Br. Patents, pl. 69. cites 18 E. 4. 7.

And *ſo* if the King grants the office of *cuſtos brevium to two* it is void.

Br. Grants, pl. 170. cites S. C.—— Br. Jointenants, pl. 68. cites S. C.

2. *So* if the office *of Chief Juſtice* of the one Bench or the other be granted to two, the patent is void; and if they occupy by ſuch patent, *all that is done before them is error*. Ibid.

3. The office of *Clerk of the Hamper* was granted to two, pro termino vitæ eorum & alterius eorum diutius viventium, and good. Admitted. D. 179. b. pl. 44. Paſch. 2 Eliz. Kempe v. Hales.

D. 285. b. pl. 39 Trin. 11 Eliz. Humfrey de Bohun's Caſe.

4. An office of inheritance, to which a judicature is annexed, as the office of *Conſtable of England deſcended to two daughters*, they may exerciſe it by deputy. Jenk. 236, 237. pl. 14.

*Ibid. cites the Caſe of Aſſiſe of SWEYENDEN and BAGOT. 9 E. 4. 1. for the office of *Clerk of the Crown in Chancery*; and though in the Caſe of WALKER v. LAMB. Cro. Car. [258] it was doubted whether the grant of the office of *Regiſter* to two was good, yet this was only upon the reſtriction of the ſtatute of 1 Eliz. of grants by biſhops, and not at common law.

5. The *Stewardſhip of a Court-Leet and Baron* is grantable to two. * 2 Jo. 127. Hill. 31 & 32 Car. 2. B. R. Howard v. Wood.

A *judicial* office may be granted to two, *as well as a miniſterial one*; and

6. The office of *Vicar General* was granted by the biſhop of L. to A. and B. *habend. conjunctim & diviſim exercend. per ſe vel ſufficientem deputatum*. It was objected, that a *judicial office* could not be granted to two; for if they differ, nothing can be done; but it was anſwered, that the ſame may be ſaid of four Judges,

as

as in B. R. and in miniſterial officers, as two ſheriffs; and the Court held the grant good. 2 Salk. 465. Mich. 3 W. & M. B. R. Jones v. Pugh.

no inconveniency more in the one caſe than in the other.

If there be two *Chancellors, and they differ*, the *Biſhop may ſit himſelf*, and their authority ceaſes. 12 Mod. 10. S. C. by name of Jones v. Beau.

7. Grant of an office of *Chancellor* of a dioceſs to two *conjunctim & diviſim* was held good, becauſe of the long and conſtant uſage. Carth. 3 W. & M. B. R. Jones v. Bew.

8. A *grant* of the office of *Official* to two and *the longeſt liver* is good by uſage. Show. 288. Mich. 3 W. & M. Jones v. Bean.

Carth. 213. Jones v. Bew. S. C. ——12 Mod. 10. S. C.

(C. 3) *How* Joint Officers are *conſidered in Law.*

1. *SHeriffs of London* are as two in London, but in Middleſex are but as one. 2 Show. 433. Paſch. 1 Jac. 2. B. R. Raymond & al. v. Barber.

If *proceſs be directed to* the ſheriffs of London, and one dies,

the proceſs is gone, becauſe one cannot act without the other; for they both make but one ſheriff. 8 Mod. 304. in the Caſe of Salter v. Groſvenor.—He muſt wait till another is made; uſage makes that; per Cur. Show. 289. 2 Show. 286. Mich. 3 W. & M. in Caſe of Jones v. Bean.—Paſch. 35 Car. 2. B. R. Rich v. Player.

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2. Where two *ſheriffs* are, and *one is challenged*, the venire ſhall be directed to the other; ſo of coroners. Show. 329. Mich. 3 W. & M. The King v. Warrington.

Carth. 214. S. C.—— 4 Mod. 65. 1 Salk. 144.

3. Two bailiffs of a corporation *make but one officer*, and the one *cannot act without the other*; therefore if a *leaſe to one* of them is made by the corporation, he is both leſſor and leſſee, which cannot be. 8 Mod. 304. Trin. 10 Geo. Salter v. Groſvenor.

(C. 4) Joint Officers. *What one may do alone.*

1. PRoceſs *directed to the coroners* to ſerve *ought to be ſerved by all* the coroners; *but* where they are to *give judgment*, the judgment of two of them ſuffices, where they are four; for in the one caſe they are judges, and in the other but miniſters. Br. Proceſs, pl. 172. cites 14 H. 4. 34.

But it was agreed, that *rediſſeiſin may be ſerved by two coroners*; for the *ſtatute ſays*,

Coronatores plurally, and does not ſay, Omnes Coronatores. Br. Retorn de Briefs, pl. 66. cites 39 H. 6. 40.——Br. Proceſs, pl. 97. cites S. C.——*But the ſtatute is, that appeal ſhall be commenced in full county before the ſheriff and the coroner*, and there if the one be abſent, the other can do nothing; for it is a joint authority. Br. Retorn de Briefs, pl. 66. cites 39 H. 6. 40.

But where *proceſs comes to the coroners*, or to the *ſheriffs of London, where there are two*, there *either coroner or ſheriff may arreſt* the party, or ſerve the proceſs; but this ſhall be *in the name of all*, and the act of all, and the return ſhall be in the name of all the coroners or ſheriffs of London, or otherwiſe ill, and ſo it is put in ure at this day. Br. Retorn de Briefs, pl. 66. cites 39 H. 6. 40.—Br. Proceſs, pl. 97. cites S. C.—And it was agreed per Cur. that where it is *returned by one coroner only, becauſe the others are dead, or becauſe there is only one there by the caſtom*, the return is not good unleſs it be *expreſſed in the return*, that the others are dead, or that there is only one in this county by ancient cuſtom; and ſo ſee that it is admitted, that if *three coroners die*, the *fourth may ſerve the proceſs before more* coroners *are elected*. Ibid.

If two coroners be, and one makes a *return*, the ſame is good; but if the *other denies it*, then it is void. Godb. 439. cites 14 H. 4.

Coroners as miniſters muſt all join, but *as judges* they may divide. Hob. 70. in Caſe of Lambe v. Wiſeman.

But Juſtices of aſſiſe have joint power, therefore the *one cannot do any thing without the other without* writ of *Si non omnes*. Br. Retorn de Briefs, pl. 66. cites 39 H. 6. 40.

2. The *Juſtices of Peace* have joint power, and yet one of them may make proceſs upon the ſtatute of labourers, and arreſt a man for ſurety of the peace, and make precept in the name of the one alone, and ſuperſedeas likewiſe; per Nott; and per Laicon, the *commiſſion of the peace is joint and ſeveral*; and it is a true ſaying, for at this day it is ſuch, Rex talib. &c. ſalut. Sciatis quod aſſignavimus vos conjunctim & diviſim ad pacem noſtram ac ad ſtat. &c. cuſtodiend' &c. Br. Retorn de Briefs, pl. 66. cites 39 H. 6. 40.

3. Where one office is granted to two, though the King may conſtitute one at one time, and another at another time by ſeveral patents, yet *he that is firſt conſtituted has no judicial voice till the other be conſtituted*; as in caſe of Auditor of the Court of Wards, where it was provided by ſtatute, that two perſons ſhould be one officer. 11 Rep. 4. Hill. 7 Jac. B. R. Auditor Curle's Caſe.

4. Where *two perſons are conſtituted one officer, habend. to them, & eorum alterius diutius vivent &c.* If *one of them dies*, the ſurvivor ſhall remain one of the perſons &c. and the King may add another to him, but *till another be added his voice is ſuſpended*; as in the Caſe of 14 H. 4. 35. a. If writ iſſues to the *ſheriffs of London*, and one of them dies, the other cannot execute the writ;
[107] becauſe his power is ſuſpended till he has a companion choſen to him. 11 Rep. 4. b. Hill. 7 Jac. B. R. The 5th Reſolution in Auditor Curle's Caſe.

5. Office of *Stewardſhip* granted to two, one of them cannot hold Court alone; per Anderſon. Goldſb. 2. pl. 4.—Admiſſion by one of them is ſufficient. Vent. 320. cites Mo.

(C. 5) Joint Officers. *Forfeitures* &c. *by one.*

Contra it ſeems *where the one is attainted of treaſon* or felony, and they have the office for term of life; for this forfeiture is not for miſuſer of the office. Ibid.—* Orig. (ſeyſmer ou miſſeyſer.)

1. WHERE there are two *joint bailiffs*, *the receipt of the one is the receipt of the other*; and therefore it ſeems that the forfeiture of the one is the forfeiture of the other; for both are one and the ſame officer, and the office is entire; and this ſeems to be by falſity in the office, or non * uſer or miſuſer in it. Br. Office & Off. pl. 51. cites 1 E. 3. 3.

If one ſheriff ſuffer an *eſcape* both are liable; ſo for a falſe return by one coroner, all the coroners are liable; but where proceſs was directed to ſix coroners to arreſt a perſon, and the proceſs was delivered to one of them, with whom the party to be arreſted

2. Where there are joint officers a *breach of truſt* in one is ſo in all; per Holt Ch. J. Show. 105. in Caſe of Boſon v. Sandford.

arreſted was then preſent, in ſuch caſe, for not arreſting the party, the action ought to be brought againſt that coroner only; for that was a *perſonal tort*, which could not have been charged on the reſt. 2 Mod. 33.——Freem. Rep. 191. Paſch. 1675. C. B. S. C. Naylor v. Sharpleſs & al. Coroners of Lancaſhire.

(C. 6) Joint Office. *Determined by Surrender of one.*

1. KING H. 8. granted the office of *Clerk of the Hamper* to A. and B. *for their lives, and the life of the longer liver of them*, and *two patents of the ſame form* and ſtate *were made* of the ſaid grant, and one was called a duplicate, and the word *duplicate was wrote a little above the ſeal of that in A's cuſtody*, and the *principal patent was wrote* thus, viz. *Per warrantiam de privato ſigillo auctoritate parliamenti*, and *this remained with B. and was ſurrendered, and cancelled by B.* while A. was in Germany; but there *was no cancellation or vacate of the inrolment*. Queen Mary *reciting the firſt patent and ſurrender, and cancelling, made a new grant to B. and C.* of the ſame office. It was the opinion of ſeveral, that when the original patent is cancell'd, the force of the duplicate is gone in law; for no title can be made by it; becauſe it was ſealed and granted by the Chancellor at his pleaſure, and without any warrant of the King to do it. D. 179. b. pl. 44. Paſch. 2 Eliz. Kempe v. Hales.

In this caſe A. juſt before his going beyond ſea, ſigned and ſealed a *blank parchment*, upon which a brother of A. in A's abſence, wrote a formal releaſe made in the name of A. to the ſaid B. before the ſurrender mentioned, of all A's intereſt in the or any thing

office and patent. Ibid. [But of this no further notice was taken in the ſaid Caſe, ſaid to or upon it.]

(C. 7) Joint Office. Determined *by* the *Death of one.*

1. THE office of *Auditor* was granted to two for term of their lives, *without ſaying* (*and to the ſurvivor*) by the death of one the office determines. Hill. 7 Jac. 11 Rep. 3. b. Auditor Curle's Caſe.

2 Wms's Rep. 108. S. C. cited [108] per Lord Macclesfield—S. C. cited, and S. P. agreed by the Court, and by the counſel of the other ſide, 2 Mod. 260. Trin. 29 Car. 2. in Scacc. ARRIS and ARRIS v. STUKELY, which was a grant of the office of *Comptroller of the Cuſtoms* in the port of Exeter.——S. P. As to grants to two in general; but that it is otherwiſe if granted to two and the ſurvivor of them. 2 Salk. 465. Mich. 3 W. & M. B. R. in Caſe of Jones v. Pugh.

(C. 8) Joint Officers. *Pleadings by or againſt them.*

1. OFFICE of the Regiſter of Admiralty was granted to two, one dies, and the ſurvivor upon a diſturbance brought *aſſiſe*; but becauſe the *plaintiff* could not *prove a grant to two* of the ſaid office, but only to one, the writ of aſſiſe was abated. Bendl. 53. Hunt v. Eleſdon.—And ſee the Pleadings there.

D. 149. a. pl. 81. Trin. 3 & 4 P. & M.—152. b. pl. 9. Mich. 4 & 5 P. & M. S. C. And

great doubt was upon the words quælibet perſona in the preſcription, whether it ſhould be taken in the ſingular or in the plural number, and collectively.

(D) *To what Perſons for a collateral Reſpect* [an Office] may be *granted. Want of Knowledge.*

11 Rep. 87. D. 176.—Hob. 148. Anunſkilful perſon, after two days reſpite, and *admonition* of his want of ſkill, was admitted to the office of *Firſt Remembrancer of the Exchequer*, the Court telling him they had many precedents of denying admiſſion to ſuch officers for want of ſkill, and that not having experience himſelf, he muſt find an able deputy. Hard. 130. Mich. 1658. in Scacc. Dorrington's Caſe.

[1. IF an office, either of the grant of the King, or of a common perſon, which *concerns the adminiſtration, proceeding, or execution of juſtice*, or the *revenue* of the king or the commonwealth, the *intereſt, benefit, or ſafety of the ſubject*, or ſuch like, if thoſe, or any of them are granted to a man who is not expert, or who has no ſkill or knowledge to exerciſe or execute it, the grant is merely void. Co. Litt. 3. b.]

S. P. by ſeveral of the Juſtices, and for proof thereof a copy of the record was produced, and is there entered of WINTER's Caſe. 2 And. 118. pl. 63.

2. Where the King grants an office to one who does not know how to exerciſe it, the patent and grant is void; per Billing Juſtice. Br. Office & Off. pl. 16. cites 9 E. 4, 5.

Br. Patents, pl. 108. cites S. C.—11 Rep. 87.—Hob. 148.—The precedent of the caſe here cited is in D. 150. b. pl. 1. Mich. 4 & 5 P. & M. at which time Brook Ch. J. of C. B. revok'd a grant made by him of the office of chief prothonotary to his wife's brother, and gave it to one Whiteley.—Hobert Ch. J. cites S. C. and ſays, that an office of learning given to a man utterly inſufficient is utterly void; and that though it be to him and his aſſigns, or to be exerciſed by his ſufficient deputy, it mends not the caſe; but *it muſt radically veſt in the firſt grantee* before it can go in title of procuration or deputation to any other. Hob. 148. in Caſe of Colt and Glover v. Biſhop of Coventry and Lichfield.

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3. The *King made Thomas Vinter Clerk of the Crown by his letters patents*, and the Juſtices of B. R. with the aſſent of the Juſtices of C. B. *refuſed him, becauſe he was not exerciſed in this office*, nor any other in this Court as he ought by a long time, and ſo declared to the King, *by which the King, by the advice of the Juſtices, appointed one John Weſt Clerk there who was expert, and ſent to the ſaid Juſtices his letters under his ſignet, which after were inrolled in the ſame Court, that they rejected Vinter, and admitted the ſaid Weſt*, which was done accordingly, in as much as Vinter was inſufficient to ſerve the King and the people; and ſo ſee that the letters of the King under the ſignet are ſufficient &c. And the abſtract of this inrolment was ſhewn to me in writing by my companion Sir James Dyer Juſtice of the Common Pleas in Mich. Term 5 Mary we then ſitting in our places upon the High Bench in C. B. at Weſtminſter &c. Br. Office & Off. pl. 48. cites Mich. 5 E. 4. Rotulo 66. in B. R. Vinter's Caſe.

Litt. R. 22. S. C.—Noy. 91. Paſch. 3 Car. S. C.—Godb. 390. S. C.—Lat. 228. S. C.—Palm. 450. S. C. by name of GLANVILL's Caſe, [which ſeems to be a miſtake, and that that name is mentioned only becauſe GLANVILL moved it for a prohibition.]

4. A *clergyman* was made *Chancellor to a Biſhop, and confirmed by the dean and chapter*, but becauſe he was not learned in the canon and civil laws he was removed; and though it was inſiſted that he had a freehold, and therefore had prayed a prohibition, yet it was denied. Cro. C. 65. Hill. 2. Car. C. B. Sutton's Caſe.

5. A grant of the office of *Herald at Arms* was made to B. for life, and the Earl Marſhal ſuſpended him from the execution of his office, becauſe he was ignorant in his profeſſion; and it was the opinion of the Juſtices, that becauſe he *was ignorant in ſuch his office of ſkill, he had no freehold* in the office. Godb. 391. in SUTTON's Caſe, cites Brook's Caſe. Lat. 229. cites S. C. ——Palm. 421. cites S. C.

6. If the *King gives an office* in B. R. the *Court may remove* the party *for inſufficiency*. Lat. 229. Mich. 3 Car. in Doctor Sutton's Caſe.

(E) *What Eſtate may be granted* of an Office.

[1. *LEASE for years of the Marſhalſea* in the King's Bench is not good; becauſe it is office of *great truſt*, and by ſuch leaſe it may *come to the executor, adminiſtrator*, or ordinary, who will be in without the allowance of the Court. Ergo. 9 Rep. 97. Sir Geo. Reynell's Caſe. Contra 39 H. 6. 34.] Leaſe for years determinable on life of Marſhal's office held good. 6 Mod. 57.

Mich. 2 Annæ. B. R. Sutton's Caſe——Hard. 357. Contra. Jo. 463.—— Cro. C. 587. Mich. 16 Car. B. R. Mead v. Reynell. S. C.

By the ſame reaſon it could not be granted for years, it was not grantable in fee; for there is the ſame inconvenience; per Nicholas J. Hard. 40, Hill. 1655. in Scacc. in Caſe of Jones v. Clerk.—Before Sir G. Reynold's Caſe the law was taken otherwiſe; per Hale Ch. B. Hard. 357. in Caſe of Veale v. Prior—It was ſaid, Arg. that Hale Ch. B. denied Sir G. Reynold's Caſe to be law, and ſaid, that the true reaſon of it was the cuſtom of its being granted in fee; and Lord Finch ſaid, he was of Hale's opinion, that an office may be granted for years. 2 Show. 171. Mich. 33 Car. 2. B. R. in Caſe of Prodgers v. Frafier.

[2. The King having the office of *Marſhalſea* in ward, grants it for life, or *durante minoritate*, it is void. 9 Rep. 97. Sir Geo. Reynell's Caſe. Contra 5 E. 4. 3. per Danby.]

[3. The *Duke of Norfolk*, tenant in tail in capite of the office of the Marſhalſea *died, his heir within age*, the King has a chattel in the office, viz. during his minority. If the *King dies*, this ſhall *deſcend* to the next King, and ſhall not go to his executor. 9 Rep. 97. Reynell's Caſe.]

[4. The *King having* the ſaid office *in ward*, granted it to Winfield *at will*, it is good. 5 E. 4. 3. 9 Rep. 97. Reynell's Caſe. S. P. But per Markham, the grant is void, becauſe it

was made before office found; but Danby contra; that the will of the King appears, which is ſufficient without patent; and ſo it ſeems, that if the grant had been for any term certain, it is not good if it be before office found. Br. Patents, pl. 59 cites 5 E. 4. 3.

[5. The King may grant the *cuſtody of a gaol in fee*. 9 Rep. 97.] [110]

[6. *So* to be *Sheriff of a county* in fee. 9 Rep. 97. b.]

7. 14 *R.* 2. *cap.* 10. enacts, That *no cuſtomer, comptroller, ſearcher, weigher or finder ſhall have any ſuch office for term of life, but only during the King's pleaſure, notwithſtanding any patent or grant to the contrary.*

8. 17 *R.* 2. *cap.* 5. enacts, That *no ſearcher, gauger, alunager, finder, or weigher of wools, or other merchandize, collector of cuſtoms,*

and ſubſidies, or comptroller, ſhall have their ſeveral offices for term of life or years; but ſuch offices ſhall remain in the King's hand, under the governance of the treaſurer, with the aſſent of the council, if need be; and all charters and patents otherwiſe made ſhall be void.

9. *Uſher of the Exchequer* was granted in fee: and there is no queſtion but a *judicial office* may be granted to one and his heirs. Mar. 43. per Barkley J. Trin. 15 Car. in Caſe of Young v. Fowler.

10. The office of *Warden of the Fleet*, which is an office of great truſt, is granted in fee. Per Barkley J. Mar. 43. in Caſe of Young v. Fowler.

11. *Regiſterſhip of policies of aſſurance*, is grantable for years. Hard. 351. Hill. 15 & 16 Car. 2. in Scacc. Veale v. Prior.

(E. 2) Eſtate therein. *Continuance of Eſtate imply'd by Law, or given by the Words.* How long.

1. THE office of a *Town-clerk* is in the nature of it in the eye of the law an office *for life*, and will be ſo intended *till the contrary appear*. 10 Mod. 147. in Caſe of the Queen and Corporation of Durham, cites Vent. 82.

2. *And* tho' the *charter* is that he ſhall be *annuatim eligibilis*, he may continue town-clerk, and will ſo do until they chooſe another. 10 Mod. 147. Queen and Corporation of Durham.

3. *But* if the charter is *eligibilis pro uno anno tantum*, his office will expire at the end of the year, whether they chooſe another or not. 10 Mod. 147. Queen and Corporation of Durham.

(F) *At what Time* it may be granted.

Fol. 154.

8 Rep. 55. b. —Jo. 311. Young v. Stowell. Jenk. 141. pl. 29.—

[1. AN office *miniſterial* may be granted *in reverſion*. 11 Rep. 4. Auditor Curle's Caſe.]

[2. *But* an office *judicial* cannot be granted *in reverſion*. 11 Rep. 4. Curle's Caſe.]

Not by preſent words, but by words de futuro, ſuch office may by the King. Hob. 150, 151.—Jenk. 283. pl. 14.—8 Rep. 55. a. Counteſs of Rutland's Caſe.

By uſage and cuſtom a judicial office may be granted in reverſion. Hard. 357. Hill. 15 & 16 Car. 2. in Scacc. in Caſe of Veal v. Priour.—Per Hale Ch. Baron. 2 Vent. 188. S. P.

[3. *As* the office of *Maſter of the wards*, or *ſurveyor* or *attorney* cannot be granted. 11 Rep. 4.]

This office of Auditor could not be exerciſed by deputy; but

[4. An office *partly miniſterial, and partly judicial* cannot be granted in reverſion, as the office of the *Auditor of the wards*. 11 Rep. 4. Auditor Curle's Caſe.

where perſonal attendance is not requiſite, but a *deputy may be made*, it may be granted in reverſion. 2 Show. 21. Mich. 30 Car. 2. B. R. Howard v. Wood.

[111] The truſtees of the King being his leſſees, granted to A. and B. the *Stewardſhip of the Honour of Pontefract, and the cuſtody of court leets and court barons within the honour*, with the perquiſites, habendum to them (*after a prior grant determin'd*), *for* 30 *years, if the grantees*

grantee, or either of them should ſo long live. It was objected that this is a judicial office, and therefore not grantable in reverſion, according to D. 259. Sir JOHN SAVAGE's Caſe, and Co. Litt. 3. b. And that tho' it be partly miniſterial, as for the court baron, yet as to the court leet it is judicial, and being *one intire office*, cannot be granted in reverſion, according to 11 Rep. Auditor CURLE's Caſe. But reſolved that the grant is good in this caſe of the reverſion; for here the *grant is not of the ſtewardſhip only, but expreſsly of the cuſtody of the courts leet and baron.* And tho' it might not be good for the leet, yet as to the court baron it is good without doubt. And for this point cites the Caſe of YOUNG v. STOEL, and of YOUNG v. FOWLER. And that there is a great *difference* between *one intire office, comprehending two parts, one judicial, and another miniſterial*, as the office of the Auditor of the Court of Wards, whereof the judicial cannot be granted to one, and the miniſterial to another, and *two offices diſtinct in themſelves, but comprehended under one common name*, as ſteward, comprehending the offices of ſteward of court leet and court baron; that it cannot be denied but that the one office may be granted to one, and the other to another. 2 Jo. 126. Hill. 31 & 32 Car. 2. B. R. Howard v. Wood.——2 Mod. 173. S. C. Hill. 28 & 29 Car. 2. in the Dutchy Court; but this went off upon another point.—Freem. Rep. 473, 478. S. C. argued, but no judgment.—2 Lev. 245. Hill. 30 & 31 Car. 2. B. R. S. C. that upon arguments at the bar, the Court was of opinion that the grant to the plaintiff for years, and in reverſion, was void as to the court leet's being a judicial office, but good as to the courts baron: but upon the importunity of Jones attorney-general to be further heard, adjornatur.——The Court took this to be different from Sir GEORGE REYNOLD's Caſe, in 9 Rep. becauſe that was a leaſe for years abſolutely, which carries it to executors and adminiſtrators, and ſo perhaps to perſons unable; for if it had been to J. S. for 99 years, if J. N. ſhould ſo long live, that then that had been nought; but the caſe in queſtion is not ſo, and therefore the reaſons of REYNOLD's Caſe do not reach this. Farther, the Court took a great difference between the place of Judges here in a Court of Record, and Stewards, who inter alia have the keeping of a Court of Record; the former muſt be perſonally attendant, the latter may exerciſe the office by deputy; ſo Auditor CURLE's Caſe muſt be underſtood ſecundum ſubjectam materiam, an Auditor's place, which is an office very great, and can't be exerciſed by deputy. And ſo it is of an office partly judicial and partly miniſterial; if perſonal attendance be requiſite, and where a deputy can't be made, there the reverſion can't be granted; but this office may, and uſually is exerciſed by deputy; for ſeveral noblemen have the ſtewardſhip of courts belonging to ſeveral biſhops, and they exerciſe them by deputy; and this was agreed upon by the whole Court; and judgment for the plaintiff. And the reporter adds a note, and ſays, theſe reverſionary grants are of late invention, being firſt introduced temp. Jac. 1. and are contrary to the rule and reaſon of the common law, nemo enim poteſt dare id quod non habet &c. 2 Show. 24, 25. Mich. 30 Car. 2. B. R. Howard v. Wood.

[5. A biſhop may grant the office of the *Regiſter* of his court to another, *habendum after the death of J. S.* (who has it for his life by a firſt grant) and this is a good grant without recital of the firſt eſtate. Mich. 8 Car. B. R. between *Young* and *Stowell*, per Curiam, reſolv'd upon a trial at bar for the office of Regiſter of Rocheſter. Hil. 10 Car. B. R. between *Young* and *Fowler*, reſolved per Curiam, upon trial at bar for the ſame regiſterſhip.]

Jo. 310. S. C.—— Cro. C. 279. S. C.—— 4 Mod. 279. 3 Le. 30.— Hard. 357. —*Regiſter of Archdeacon* is grantable in reverſion, being warranted by uſage. 2 Vent. 188. Trin. 2 W. & M. C. B. Woodward v. Fog cites Cro. C. Young v. Stoel.

6. Where the *officer of fee grants* the office of Marſhal of B. R. as aforeſaid to J. B. *for life*, the grantor can't grant to the ſaid J. B. who was officer for life to make a deputy, for 'tis void; and yet the miſuſer of ſuch void deputy is a forfeiture of the office of the tenant for life here; quod nota. Br. Forfeiture, pl. 27. cites 39 H. 6. 32. per Cur.

7. The *King* may grant an office *for life, and by another patent* he may *recite the firſt grant, and grant it* to another *after the death of the firſt*, and well. *But* it ſeems he cannot grant it *by name of reverſion*; for there is no reverſion of an office, becauſe it determines after the death of the grantee; *yet* he may grant it * *by name of office habend. poſt mortem* of the firſt patentee. Br.

Corodie or *preſentment*, to a church the King can't grant in reverſion, 8 Rep. 5, *b.* in the

Earl of RUTLAND'S CASE, Mich. 6 Jac. cites 39 *H.* 6. 48. Patents, pl. 30. cites 36 H. 6. 48. per Laicon.——But it ſhould be 39 H. 6. 48.——*For* in thoſe and other like caſes, the King has only a preſentment or commendation of a perſon when the corody or church is void, and not before. Per omnes J. ibid.——* He ought to *recite* that ſuch a one has ſuch an office for life, and then to grant the office aforeſaid, habend. poſt mortem &c. But if there be no ſuch ſpecial recital, the ſecond grant is void. 8 Rep. 55. b.

[112] Arg. cites † 3 H. 7. laſt Caſe. ‡ 6 H. 7. 14. ‖ 8 H. 7. 12. b.—Br. Patents, pl. 52. cites 3 H. 7. 16.—‡ Br. Patents, pl. 54. cites S. C.—‖ Br. Patents, pl. 57. cites S. C.—— There is not any fee or reverſion of offices, *but only a nomination* which the party has to name any he pleaſes when the office ſhall become void. Per Dyer, 3 Le. 31. Mich. 15 Eliz. C. B. Anon.

Cro. C. 279. Mich. 8 Car. B. R. where it was mov'd that the reverſion of an office cannot be granted by a common perſon, it was agreed per Cur. that it cannot be granted as a reverſion, and

8. A granted the *Stewardſhip of his manor to J. S. for life.* J. S. was ſeiſed, and afterwards *by deed reciting the ſaid grant, and that J. S. had the ſaid office for his life, A. by name of the reverſion, granted the reverſion of the ſaid office to W. R.* The Court held the ſecond grant by name of reverſion void; for there was no reverſion thereof in any perſon, and alſo none can be ſteward but one only, viz. he that exerciſes the office: and tho' the grant had been *de officio ſuo*, and had not been (de reverſione officii) in the Caſe of a common perſon, and [it had been] *habendum officium illud poſt mortem J. S.* it is not good; but *in the King's Caſe* it is otherwiſe. Quære. D. 259. pl. 18. Paſch. 9 Eliz Sir John Savage's Caſe.

by the name of a reverſion; for there is no reverſion of an office, *unleſs it be an office of inheritance*, and then it may well be granted in reverſion, *habendum after the death of the grantee for life*; the ſecond point to the Caſe of Young v. Stoel.——S. P. of the ſtewardſhip of a manor in reverſion. D. 259. Sir John Savage's Caſe.——D. 80. b. Marg. 56.——Cartth. 252. Trin. 7 W. 3. B. R. in Caſe of King v. Kemp, ſays, that a *diſtinction* has been taken between a grant *of a reverſion* and a grant *to commence in futuro*. Vide D. 270.—The King may grant an office to commence in futuro, or upon a contingency, which ſhall ariſe out of the inheritance he hath in the office itſelf, for ſuch he may have in point of intereſt, tho' not in execution; and judgment accordingly. 4 Mod. 280, 281. Paſch. 6 W. & M. B. R. S. C.

9. By virtue of an act of parliament made the firſt of Queen Mary, the *Court of Augmentations* was diſſolv'd, and *united to the Exchequer*, and *all records* and books of the Court ſo diſſolv'd, wherein the leaſes and warrants for making them were enrolled, and all accounts of her iſſues and revenues *were ordered to be and remain with the Clerk of the Pipe* in the Exchequer. King *Ed. 6. granted the office of* Ingroſſer of the great rolls of the Exchequer, or the *Clerk of the Pipe, to one Chriſtopher Smith, for life*; *Queen* Eliz. anno 20 of her reign, *granted this office to one Morriſon, after the determination of the grant to Smith*; and afterwards, anno 30th of her reign, reciting the grant to Smith, and her grant to Morriſon, ſhe *farther granted to Woolley* the office of Clerk of the Pipe, and of the Engroſſer of the patents of dimiſſions and offices; and alſo, the Keeper of the accounts, enrolments and records, of the late Court of Augmentations, &c. *habendum* to the ſaid Woolley *for life, after the determination of the grants to Smith and Morriſon*; afterwards Smith died, and tho' Morriſon was then living, yet upon Smith's death Woolley poſſeſſed himſelf of all the records; and it was ruled, that Morriſon might enter the houſe where the records were kept,

kept, and take them from Woolley. Moor 289. Paſch. 32 Eliz. Morriſon's Caſe.

10. The office of *Official of an archdeacon*, and of a *Commiſſary of a biſhop* are within the words and intent of the ſtatutes of 1 Eliz. and 13 Eliz. for they *are hereditaments*, and are pertaining unto them; and that a grant of thoſe offices to two, where they were only grantable to one for life, and being granted in reverſion, is a void grant by thoſe ſtatutes againſt the ſucceſſors; for they reſtrain all grants but thoſe of neceſſity, as well of offices as other things not warranted by thoſe ſtatutes. Cro. C. 259. Trin. 8. Car. B. R. Walker v. Lamb.

11. The *Chief Cryer of this Court* hath his office by patent from the King; and this office may be granted *in reverſion*. Paſch. 23 Car. B. R. for this is the King's own proper Court, where himſelf uſed to ſit in perſon, and it is for his honour to have ſuch officer by patent; and it may be granted in reverſion, becauſe it is but a miniſterial place. 2 L. P. R. 256, 257.

12. *Maſter of an hoſpital, prebendary, donative*, are not grantable in reverſion. Mich. 23 Car. 2. 1 Chan. Caſes 215. [113]

13. *Maſterſhip of St. Catherine's Hoſpital* is not grantable in reverſion. 1 Jo. 177. Mich. 33 Car. 2. B. R. Leſſee of Lord Brunker v. Sir Robert Atkins.

14. The King may grant eſtate in an office to commence *in futuro, or upon contingency*. 4 Mod. 280. Paſch. 6 W. & M. B. R. The King v. Kemp. Carth. 352. S. C. accordingly. ——S. P. 2 Brownl. 234. in Caſe of the Earl of Rutland v. the Earl of Shrewſbury.

(G) *How* it ought to be granted [*Or* rather, *who ſhall be ſaid* to be *an Officer*, and *from what Time.*]

[1. IF the King grant to another the office of a *Herald*, he *is a compleat herald immediately*, before any inveſting with the habit and ornament. Tr. 7. Ja. B. per Curiam in Cheſter Berault's Caſe.]

2. The *Maſters and Vouchers of the Chancery*, who *have no other creation, but by election or admiſſion of the Court*, are not officers till they are admitted and ſworn by the Court. Per Pigot. Br. Office and Off. pl. 16. cites 9 E. 4. 5. *But he who has an office of the grant of the King* is an officer immediately 2 Mod. 263.

without being admitted or ſworn by the Court. Quod nota bene. Ibid.——S. P. Arris v. Stukely.

3. He who has grant of an office in a Court *is not officer till he be admitted* by the Court, as in the Exchequer, Common Pleas &c. Per Vaviſor; quod non negatur; quære inde. Br. Office and Off. pl. 28. cites 11 E. 4. 1. S. P. Per Cur. Br. Office and Off. pl. 45. cites S. C.

4. The *conſtituting a new office* or officer may be good *without* an annual or caſual *fee* being firſt annexed to it. Mo. 809. Paſch. 6 Jac. Biſhop of Sarum's Caſe.

5. The

5. The *Clerks bred up in the cuſtos brevium's office, crown* office, *or prothonotarie's* office in C. B. ought of right to ſucceed each other according to their ancienty, and they cannot be turn'd out without cauſe, altho' the chief officer be reſponſible; and *any employment out of which one cannot be turn'd without cauſe* (as that of tranſcribing records in the cuſtos brevium's office) may be called an office. Keb. 689. Paſch. 16 Car. 2. Humphreys v. Paget.

6. A man cannot have an office at will *without deed.* Per Powell J. 2 Salk. 536. Hill. 10 Ann. B. R. Gatton v. Milwich.

See Sheriff.

(G. 2) *What* Things he may do.

1. WHERE the law gives a *diſtreſs* for the public benefit, the officer may *ſell.* Thus on a diſtringas in a Court Leet for a fine as in caſe of nuſance where the publick is concern'd, the officer may ſell of common right.——But upon a diſtringas in a Court Leet pro certo lete, the officer can't ſell the diſtreſs of common right without a cuſtom. 1 Salk. 379. Mich. 1 Annæ. B. R. The King v. Speed.

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(G. 3) Officer *de Facto*; Of Acts done by an Officer, &c. de Facto, and *in what Caſes he is puniſhable.*

Br. Forfeiture de Office, pl. 18. cites S. C

1. HE who occupies as *Marſhal* in B. R. be he officer of right or by tort, ſhall be *charged with the eſcapes.* Br. Eſcape, pl. 18. cites 39 H. 6. 33.

* 2 Hawk. P. C. 134. cap. 19. ſ. 21. & 135. ſ. 26.

2. The words Sheriff, Gaoler &c. in the ſtatute 13 E. 1. cap. 11. extends to all keepers of gaols; and therefore if one hath the keeping of a gaol by wrong or de facto, and * *ſuffers an eſcape*, he is within this ſtatute as much as he that has the keeping of it de jure. 2 Inſt. 381, 382.

3. An *action* will lie againſt a Mayor de facto *for a falſe return* upon a writ of mandamus. Lutw. 519. Trin. 6 W. & M. in Caſe of Knight v. the Corporation of Wells.

(G. 4) What *Acts or Grants* of Officers &c. de Facto are *valid.*

* If one occupietat abbot of his own head without inſtallation or inſtitution, his deed

1. WHERE an *Abbot or Parſon* is *inducted erroneouſly*, and makes a grant or obligation, and after is *deprived or dereigned for pre-contract* or ſuch like, this ſhall bind, becauſe *he was an abbot* or parſon *in poſſeſſion*; but *a uſurper* who uſurps before inſtallation, or induction, or preſentation, where another abbot or parſon is rightfully in poſſeſſion, or* if one enters,

and

and occupies in the time of vacation *without any election* or preſentation, the deed of ſuch is void. Br. Non eſt factum, pl. 3. cites 9 H. 6. 32.

ſhall not bind the houſe; per Cur. where none is abbot at the time, &c. Br. Abbe, pl. 19. cites S. C.

2. Acts done by an officer de facto, and not de jure, are good; as if one being created *Biſhop*, the former biſhop not being deprived or removed, *admits one to a benefice upon a preſentation, or collates by lapſe*, theſe are good and not avoidable. Arg. quod Curia conceſſit; for the *law favours acts of one in a reputed authority*, and the inferior ſhall never inquire if his authority be lawful. Cro. E. 699. Mich. 41 & 42 Eliz. B. R. in Caſe of Harris v. Jays.

S. P. Where the biſhop de facto *made a leaſe* which was confirmed by the dean and chapter, and after the biſhop de jure died in the life of the biſhop de facto; it was reſolved, that he not being lawful biſhop, and this leaſe being to charge the poſſeſſions of the biſhoprick, it is void; altho' all *judicial acts*, as admiſſions, inſtitutions, certificates &c. ſhall be good; but not ſuch *voluntary acts as tend to the depauperation of the ſucceſſor*, and ſo affirmed a judgment given in B. R. in Ireland. Cro. J. 552. 554. Reuan Obrian & al. v. Knivan.

3. If one *is elected Mayor of a Corporation without being duly qualified* according to a late charter, to be choſe into that office, and after ſuch election he *puts the ſeal of the corporation to a bond*, this obligation is good: for by his coming into the office by colour of an election, he was thereby mayor de facto, and all judicial and miniſterial acts done by him are good; and tho' the corporation might have removed and diſplaced him, yet this not being done he had power to ſeal the bond. Lutw. 508, 519. Trin. 6 W. & M. Knight v. the Corporation of Wells.

(H) *What will excuſe the Exerciſe* of an Office. [115]

[1. 9 Rep. 98. b. MARKE had a *patent for life* to be *Serjeant at arms* to attend the Lord Chancellor, *the Queen by parol licences him not to exerciſe it during her will, till he be otherwiſe commanded by the Queen;* and reſolved a good licence; becauſe the Chancellor is but deputy of the Queen at will, and therefore the ſervice by the ſerjeant done to the deputy is done to the Queen herſelf.]

S. C. cited Mo. 193. in pl. 342. by the name of Whitney v. Steward.—In this caſe the Queen does not depart with any intereſt, but only ſuſpends the ſervice for a time, and therefore ſuch licence by parol is good enough. 9 Rep. 99. a. S. C. cited in Sir GEORGE REYNEL's Caſe. And ſee there 99. b. to the end of 103. b. the entry of the judgment at large.——S. C. cited Cro. E. 424. Mich. 37 & 38 Eliz. B. R. in Caſe of WHETSTONE v. HIGFORD, and ſays it was adjudged to be good; for her corporate body does not take away or deſtroy her natural body, but that ſhe may retain ſervants and do other acts as a common perſon does.

2. A. who was *Searcher of the port of S. for life, was abſent from 10th of June to the 12th of Auguſt* following, and this was by reaſon of his being *impriſoned, and in execution for debt due to the King* at the King's ſuit by precept out of the Exchequer. The queſtion was, if this ſhould excuſe the forfeiture in regard of the neceſſity, he being committed for debt to the King, and likewiſe

likewiſe for miſdemeanor in his office. The Court having conceived ſome doubt hereupon, and there having been ſeveral other cauſes of forfeiture found by the ſame inquiſition, waved this point, and gave judgment upon the others. Cro. C. 491. Mich. 13 Car. B. R. The King v. Books.

See Conſtable—Steward.

(I) *What Office may make Deputy, as incident* to the Office [or otherwiſe.]

If Parkerſhip be granted to an Earl without words to make deputy, he may keep it by his ſervants. 9 Rep. 49. Trin. 8 Jac. Earl of Salop's Caſe.

[1. A GRANTEE of office of *Parkerſhip* may make aſſignee. 11 E. 4. 1.]

[2. The *Eſquire of the body of the King cannot.* 11 E. 4. 1.]

3. *Lord High Conſtable of England* died, and left two *daughters his heirs;* till marriage the daughters may exerciſe the office by deputy, and after marriage the baron of the eldeſt may exerciſe it alone. D. 285. b. Trin. 11 Eliz. pl. 39.

Jenk. 110. pl. 14. S. P. D. of Norfolk's Caſe. ——Where there is truſt and confidence repoſed in an officer, he cannot make a deputy unleſs impowered by expreſs words. Hard. 352. Arg. cites Pl. C. 380.—See D. 156. b. pl. 26.

4. He that has an *office of truſt cannot make* a deputy, unleſs it be granted to him to exerciſe by himſelf or deputy. Cro. E. 187. Trin. 32 Eliz. B. R. Watkins v. Johns.———Le. 289.

5. Per Popham, it is uſual for biſhops to appoint great perſons to be ſtewards, and to *appoint* their under-ſtewards alſo, but it would be hard to maintain it unleſs they were ancient, and *diſtinct offices.* Cro. E. 636. Mich. 40 & 41 Eliz. B. R. Scambler v. Waters.

6. Bailiff of a liberty *may have* a deputy. Cro. J. 242. Paſch. 8 Jac. in Cam. Scacc. Kent v. Elwis.

S. P. Roll. R. 247. in S. C.

7. A *judicial officer* cannot make a deputy, becauſe he is called to do juſtice; otherwiſe of a *miniſterial* officer, who may make his deputy; per Doderidge J. And he ſaid, that at the firſt, in the firſt government the *Earl made* his deputy, viz. *the ſheriff, and he alſo* made his deputy, viz. *the under-ſheriff and his bailiff's errants* within the county called the ſerjeants of the county, and no warrant yet to do ſo, but the ſame was ſtill ſo done. 3 Bulſ. 78. Mich. 13 Jac. in Caſe of Phelps v. Winchcomb.

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* In *judicial acts* the ſheriff cannot make a deputy, as to execute a writ of inquiry. Noy. 21. Bandal's Caſe.—† Dean may make a ſubſtitute *for matters of juriſdiction,* as for correction or viſitation, but *not for the adminiſtration*; and therefore cannot make a deputy to confirm leaſes, nor to make orations to give advice to the biſhop. D. 145. b. Marg. pl. 65. cites R. 2. Fitzh. Grants 104.—‡ Court of *pipowders* to be held before a *mayor and two citizens* by preſcription cannot be held

8. *Conſtable,* * *ſheriff,* † *dean, aldermen of London, chamberlain of London, eſcheator,* may make a deputy, but this is by ſtatute, and ſo by ſtatute (but not at common law) may *Juſtices in eire.* Roll. R. 274. Mich. 13 Jac. B. R. in Caſe of Phelpe v. Winſcombe.———‡ *Mayors* may; per Coke Ch. J. 3 Bulſ. 78. S. C.

held before a deputy. Mo. 831. Mich. 10 Jac. B. R. Goodſon v. Duffield.——Becauſe a *Judge* cannot make a deputy. D. 132. b. Marg. pl. 80.

9. A deputy may be made where an office is diſpoſed of to a perſon *incapable* to manage it in perſon. Arg. Hard. 352. Hill. 15 & 16 Car. 2. in Scacc. in Caſe of DEALE v. PRIOR, cites 9 Rep. the Earl of Shrewsbury's Caſe—and Lady Ruſſel's Caſe.

An *infant* may where it is exercend' per ſe vel per ſufficientem deputatum.

Cro. C. 546. 2 Roll. a. 153. 8. Young v. Fowler.——March 43.

10. In error of a judgment in the *Palace Court* held before James Duke of Ormond, the error aſſigned was, that the Duke was not in the Court (it being held before his deputy according to the grant), another error being aſſign'd and demurr'd upon, it was touch'd in the arguing thereof, that there cannot be a *judicial place* to hold a Court by deputy, and ſo held Foſter Ch. J. and Twiſden J. But Windham J. contra, and ſaid, that ſeveral Recorders are made to hold per ſe vel deputat. and ſo ſaid Wyld at the bar, that he ſo held his place of *Recorder of London* at that time. Foſter ſaid, this is *by the cuſtom* of London: but certainly ſeveral other Recorders hold their Courts by deputies; ſo does the Recorder of Northampton, who is the Earl of Mancheſter, and holds the Courts by his deputy Harvy at this time. And the Steward of the Borough Court of Southwark holds it by deputy. Lev. 76. Mich. 14 Car. 2. B. R. Molins v. Wetby.

11. The office of *Clerk of the Papers* cannot make a deputy; becauſe it is not granted to him and his aſſigns, or to be executed per ſe vel deputatum ſuum; and beſides it *is a perſonal ſervice*, and requires knowledge and ſkill; nor can any exerciſe the office, but he that is admitted by the Court. Freem. Rep. 429. Trin. 1726. Woodward v. Aſton.

12. An office which *concerns the King's revenue* cannot be executed by deputy; per Ld. Chancellor. Chan. Caſes in Ld. Talbot's time 141. Mich. 1735. Law v. Law.

(I. 2) Who may make Deputy *by Reaſon of the Words.*

1. HE who *has an office to exerciſe by himſelf or his deputy* &c. as of *Marſhal* &c. may make a deputy; but *his deputy cannot make a deputy, unleſs the patent be by himſelf or his deputy or his deputy's deputy;* quod nota. Br. Patents, pl. 64. cites 10 E. 4. 14.

2. He that has an *office of truſt* cannot make a deputy if it be not in his patent to exerciſe by himſelf or his ſufficient deputy; contra of other offices. Br. Patents, pl. 66. cites 11 E. 4. 1.

Br. Grant, pl. 99. cites S. C.—S.P. of the office of Chamberlain of the Exchequer, which was granted *to him and his aſſigns*; he cannot make a deputy by theſe words, tho' he may aſſign the office by virtue of them. Jenk. 141. pl. 89. cites S. C. by all the Judges in the Exchequer.

3. The

3. The King granted to H. Earl of Northampton, the *ſhrievalty of the county of Northampton, and the office of ſheriff of Northampton for term * of his life* to have, occupy, and *execute that office and all other offices belonging to the ſheriff in the county aforeſaid, by himſelf or his ſufficient deputy, rendering* therefore to the King and his heirs annually 100*l.* at his Exchequer, *without any other account* to be made thereof *to the King*; and it was held, that he cannot make a deputy; for the King cannot grant to a man to make an officer of record to ſerve the King's Court, nor to make a Juſtice: quære; for cities and burghes have ſuch liberty. Br. Patents, pl. 45. cites 2 H. 7. 6.

(I. 3) Deputy *made how*; *without Writing.*

It can't be without deed, per Walter Ch. B. Litt. R. 135.——In pleading he need not ſhew how

1. A Deputation is good *without deed*; for a deputy doth things only as a ſervant, and in right of his maſter, and ſo may be made without deed; otherwiſe of an * aſſignee. Arg. And of that opinion was Gawdy. Cro. E. 67. Mich. 29 & 30 Eliz. B. R. Clecott v. Dennys.—cites 23 E. 3. Barr. 259. 8 R. 2. Avowry 260.

he was made deputy; per tot. Cur. præter Williams J. 2 Bulſt. 251. Trin. 12 Jac. B. R. in Caſe of Kenicot v. Bogan.—* For an aſſignee conveys an intereſt to himſelf; and muſt therefore ſhew how he was made ſo. Arg. 2 Bulſt. 251.

Jenk. 110. pl. 14. The Duke of Norfolk's Caſe accordingly.

2. A deputy ought to be made *by writing*. 9 Rep. 51. b. Trin. 8 Jac. in the E. of Salop's Caſe.

(K) *Who may give Power* to make a Deputy.

Judicial office cannot be granted by the King to any with power to make deputy. Jenk. 141. pl. 89.

[1. THE *Marſhal of inheritance of B. R.* having power to leaſe it for life cannot give power *to leſſee* to make a deputy. 39 H. 6. 34.]

(K. 2) Where a principal Officer having Power to make a Deputy, *at what Time* he may, or muſt do it.

1. WHERE the Duke of N. *grants* the *office* of Marſhal to J. B. *for life*, and he is thereof ſeiſed, the Duke cannot grant to him to make a deputy; by all the Juſtices; Brook ſays, the reaſon ſeems to be, becauſe by the firſt grant the grantee is officer for term of life; and therefore *if it be not granted to him in the firſt patent* to occupy and exerciſe by himſelf or his ſufficient deputy, *he cannot grant after to make a deputy*; for it

was

was admitted that the Duke himſelf might make a deputy before his grant if he himſelf had exercis'd the office. And ſo it is done at this day. Br. Deputy, pl. 7. cites 39 H. 6. 34.

* (K. 3) Deputy. *His Power.*

1. DEAN may make ſubſtitute for matter of juriſdiction, as for *correction* or *viſitation*, but not for the adminiſtration. So, *not* to *confirm leaſes*. D. 145. b. pl. 65. marg.

2. *Suffragan* has like power as the biſhop; but he *cannot confirm*; for he has participationem ſolicitudinis, non plenitudinem poteſtatis. D. 145. b. pl. 65. marg.

3. All *returns* made by deputy ought to be made in the name of the principal officer, and not in his own name; per Doderidge. 3 Buls. 78. Mich. 13 Jac. in Caſe of Phelp v. Winchcomb.

4. A bailiff was deputed to ſerve proceſs only to ſuch a ſum, and he *exceeded his ſtint*, and ſerved proceſs of a greater ſum, and levy'd the money and went off with it. The Court awarded that he that deputed him ſhould be liable. Litt. R. 33. Paſch. 2 Car. C. B. Anon.

5. What is done by the deputy is done by the principal, and it is the act of the principal, who may *diſplace* him at pleaſure, even tho' he were conſtituted for life; per Holt Ch. J. 1 Salk. 18, 19. Paſch. 12 W. 3. B. R. in Caſe of Lane v. Cotton.—cites Hob. 13. Mo. 856.

By making deputy, the *whole power of the principal* is in the deputy. 6 Mod. 235.

Paſch. 3 Ann. B. R. Godolphin v. Tuder.——2 Salk. 468. S. C.—So, *leave* of deputy is leave of principal. Farr. 78. Mich. 1 Annæ B. R. The Queen v. Smith.

6. The nature of deputation is to *convey all the power of the principal* without any reſervation or reſtriction; for as he cannot enlarge his deputy's power, by giving him a greater one than he has himſelf; ſo he cannot abridge it by reſerving part to himſelf; per Holt Ch. J. in delivering the opinion of the Court. 12 Mod. 467. Paſch. 13 W. 3. in Caſe of Parker v. Ket.

(K. 4) Deputy. In what *his Act* ſhall *bind the Principal.*

1. 'TWAS agreed, that if a man has an office, and makes a *deputy* who *miſuſes the office*, by this the grantee or inheritor of the office forfeits the office; for the deputy is ſub officiario, and the officer remains officer till forfeiture. Br. Forfeiture de Terres, pl. 27. cites 39 H. 6. 32.

S. P. Per Coke Ch. J. Roll. R. 275.—— S. P. Per Holt J. 1 Salk. 19. cites 39 H. 6. 34.—S. P. 11 Mod. 17. per Holt Ch. J. in Caſe of Lane v. Cotton.—*But where an officer of fee*, as here, *grants* the ſame office to another *for term of life*, and the grantee miſuſes &c. there the grantee for life forfeits his office and eſtate for life, but the grantor forfeits nothing; for there the grantee was officer, and ſo is not a deputy; and ſo ſee a *diverſity* between *deputy and aſſignee*. Br. Forfeiture de Terres, pl. 27. cites 39 H. 6. 32.

2. The act of the *under-ſheriff or his deputy* in the name of the ſheriff ſhall charge the ſheriff, and for their act the ſheriff himſelf ſhall be amerced, and no other. Br. Office & Off. pl. 24 cites L. 5 E. 4, 5.

3. A deputy *certifies falſly*, it is his maſter's act, for he ſupplies his place. Arg. Cro. E. 534. cites D. 238.

(K. 5) Deputy; his Power. *In Reſpect of the Words of Deputation.*

1. BY an ordinance of the government of the *college of Windſor* (which conſiſts of a dean, prebendaries, chaunters
[119] &c.), the *dean may make a deputy*, when he is diſpoſed to abſent himſelf, with power to the deputy *in omnibus exercere officium ſuum in perſonas & collegium memorat.* This deputy in the dean's abſence cannot make a *leaſe for years* of their land, altho' the prebends join, and altho' it be under the common ſeal of the college; for the word *College*, as the word Abbey, *extends only to the ſite* of the college, but not to the poſſeſſions of the college. A rent granted out of the abbey goes only out of the ſite of it. By all the Judges. Collegium eſt ſocietas plurium corp. ſimul habitant', and is conſtituted by the King only. Jenk. 229, pl. 77. cites 6 Eliz.

(L) What Eſtate by Implication will give Power to make a Deputy.

[1. THE *Marſhal of the King's Bench of inheritance* cannot make deputy, unleſs it had been granted to him. 11 E. 4. 1.]

Fol. 155. [2. The ſame law of *Chamberlain of the Exchequer.* 11 E. 4. 1.]

Jenk. 141. pl. 89.

(L. 2) Deputy. *What he may claim* a Right to, *as ſuch.*

The caſe was, that one of the deputy clerks brought action of debt pro labore ſuo & pro feodo of his maſter.

1. DEPUTY officer *has all the entire office;* as deputy he *is chargeable over* of the whole, and then if he has intire office, may receive fees, and conſequently may demand them, and bring action for them. Per Ley Ch. J. 2 Roll. R. 367. Mich. 22 Jac. B. R. in Caſe of Orwell v. Nicholſon.

Per Ley Ch. J. none but the chief officer ſhall *have action*, and not the deputy, becauſe he is not *accountable* but of ſuch ſums as he receives; and judgment was, that plaintiff nil capiat per billam. 2 Roll. R. 475. Orwell v. Nicholſon.

2. Tho'

2. Tho' a deputy by his conſtitution is in place of his principal, yet he *has no right to the fees*; they ſtill continue to be the principal's. 2 Salk. 468. Mich. 3 Ann. B. R. Godolphin v. Tudor. If one put in a deputy without any allowance of *ſalary*,

He has no remedy but by *quantum meruit*, and that againſt *his principal*. 6 Mod. 235. Paſch. 3 Annæ. B. R. S. C.

(L. 3) *Deputy's Deputy.*

See Steward.

1. THE office of *Marſhal* may be exerciſed by deputy, if the grant be per ſe vel deputatum ſuum, but *ſhall not be by deputy of deputy, unleſs the grant be per ſe vel deputatum ſuum aut deputatum deputati*; and ſo it is admitted that the deputy may make a deputy in this caſe, and otherwiſe not. Br. Deputy, pl. 8. cites 10 E. 4. 15.

2. Acts done by a deputy *in facto tho' not de jure*, as where he was *deputy's deputy*, are well enough, they being done by him in the proper office, and in conjunction with other officers there. Cro. E. 534. Mich. 38 & 39 Eliz. Leak &c. qui tam &c. v. Howell.

(L. 4) *Pleadings by Deputy.*

[120]

1. DEPUTY *made ſeiſure* of priſage wines; and in trover brought againſt him, he juſtified as deputy, but did not ſhew how he was made deputy; and held he need not ſhew how, viz. whether by parol or by deed: becauſe, 1. he claims no intereſt, but juſtifies all in *auter droit*, viz. of Sir T. W. and alſo he has ſaid that he was *legitime deputat.* which is ſufficient to inſtruct the Court, that defendant had ſufficient privity and authority to ſeize the priſage. Yelv. 198. Hill. 8 Jac. B. R. Kenicot v. Bogan.

(M) *What Perſon may forfeit* the Office, and * to whom [*and what*].

Vide (K. 4)

* None of the pleas of Roll anſwer to this part of the title; but for this ſee (M. 2)

[1. IF the *Marſhal* in fee of the King's Bench makes a deputy, if the *deputy* commits a forfeiture, this forfeits the *inheritance*. † 39 H. 6. 34. Vide 11 E. 4. 1. b. that the deputy is but the ſervant of the officer.]

† Br. Deputy, pl. 7. S. P. cites

S. C.—— Per Jones J. he that has an *eſtate for life* in this office, is the owner, againſt whom the forfeiture ſhall run; and 'twas ſaid that it *ought to be of record in the Court who is officer*, that the parties grieved may know againſt whom to bring their action. Skin. 114. Trin. 35 Car. 2. B. R. Lenthal's Caſe.

[2. *But if he has power to leaſe for life, and leſſee* commits forfeiture; this ſhall not forfeit the *inheritance*. 39 H. 6. 34.]

This was of the *dignity of an earldom*, and

[3. If *Tenant in tail* of an office commits a forfeiture, this ſhall *bind the iſſue*. 11 H. 4. 1. b. 7 Rep. 34. Nevil's Caſe.]

reſolved to be a forfeiture by common law by *attainder of treaſon*, by a *condition in law annexed* thereto. 7 Rep. 33 to 35. Mich. 2 Jac. Nevil's Caſe.

But offices *of truſt and confidence*, and which *require ſkill*, as park-keeper, cannot be forfeited *by attainder of treaſon*. Pl. C. 378. b. Sir H. Nevil's Caſe.

4. Agreed that a forfeiture could not be in the caſe of an *office at will* of a common perſon, yet in the caſe of the King there might. Per Holt Ch. J. Skin. 581. Trin. 7 W. 3 B. R. in the Caſe of the King v. Kemp.

S. P. by Ld. Ch. J. Hale and all the Juſtices of B. R. in the Lady Broughton's Caſe, that the forfeiture belonged to the Dean and Chapter of Weſtminſter, and not to the King, citéd ibid.—2 Lev. 71. Mich. 24 Car. 2. B. R. The King v. Lady Broughton.

5. If an *officer for life*, where the *reverſion in fee is to another*, *commits a forfeiture*, this is only a forfeiture of the eſtate for life; and he in reverſion, and not the King, ſhall take the benefit thereof. Per Lord Keeper, aſſiſted by Holt and Pollexfen, Ch. J. 3 Lev. 288. Mich. 2 W. & M. in Canc. The King and Queen v. Manlove.

S.C. 2 Vent. 387, 213, 267.

6. *Archdeacon within the patronage and dioceſe of the biſhop of Lincoln, for* 100*l. granted the office of Regiſter* of his archdeaconry to J. S. and W. R. who die, and then the archdeacon granted it to the plaintiff: the office being forfeited by 5 *and* 6 *E.* 6. *cap.* 16. the queſtion was, who ſhould have the benefit of the forfeiture? whether the King, or the Biſhop of the dioceſe? It was argu'd for the biſhop, that he had the care and ſuperintendancy of all the dioceſe, and that all is deriv'd out of him, viz. the archdeaconry and the office of regiſtry; that the archdeacon is only a miniſter under him, to eaſe him of part of the care of his dioceſe, for which reaſon the biſhop ought to
[121] have the diſpoſal of it, where the archdeacon is diſabled by the ſtatute; and that tho' forfeitures given by ſtatutes, generally are intended given to the King, yet where the forfeiture is a prejudice to any particular perſon, he, and not the King, ſhall have the forfeiture; as in caſe of forfeiture of the treble value, for withdrawing tithes by the ſtatute of E. 6. But on the other ſide it was argu'd, that the *King is ſupreme ordinary*, and has the care of all the churches of England, and the biſhops themſelves are under him. As the leet is derived out of the tourn; yet if it be forfeited, the forfeiture is to the King, and not to the ſheriff. And of this opinion were all the Court, viz. Pollexfen, Powell, Rookſby and Ventris; and that therefore the plaintiff, to whom the archdeacon had made a grant firſt, and alſo the King afterwards, had title by the King's grant, tho' not by the archdeacon's. 3 Lev. 289. Hill. 2. W. & M. Woodward v. Fox.

(M. 2) *Who ſhall take Advantage* of *the Forfeiture.*

1. WHERE a principal officer is by his office to make inferiour officers under him, and the *inferiour officer* commits a forfeiture, the *ſuperior* officer ſhall take advantage thereof, and place a new officer, as was done 39 H. 6. for the office of the Marſhal of the King's Bench put in by the Great Marſhal of England. Agreed, Poph. 119. Hill. 38 Eliz. in Caſe of Earl of Pembroke v. Sir H. Berkley.

There is a difference when an officer *grants the intire office to another for life*, and the grantee breaks a condition in law, the intire office is forfeited: but if he has another *inferiour office derived out of his office, but not any part of the principal office*, but appertaining thereto, and in his gift, the forfeiture of the inferiour office is given to the grantor, and it is not a forfeiture of both offices; and this is the reaſon of the D. of Norfolk's Caſe. 39 H. 6. Per Popham Ch. J. Cro. E. 386. Paſch. 37 Eliz. B. R. in Caſe of Ld. Pembroke v. Sir H. Berkley.——Cited Arg. 2 Vern. 174. in Col. Leighton's Caſe.

2. Warden of the Fleet, if *he has only eſtate for life*, and commits a forfeiture, it ſhall be to the reverſioner that has the inheritance, and not to the King. Arg. 2 Vern. 173, 174. Trin. 1690. cites DUKE OF NORFOLK'S Caſe, 39 H. 6. and ſays that point was agreed in WHITCHCOTT'S Caſe, and in MITTON'S Caſe, 4 Rep. 32. b. and in CRABLEY the Exigenter's Caſe in Dyer, and in the Lady Broughton's Caſe.

3. If there are *two officers in one intire office*, and one ſurrenders or forfeits this ſhall redound wholly to the advantage of the other; for the office being intire, he cannot grant away his moiety. Agreed. Freem. Rep. 429. Trin. 1676. Woodward v. Aſton.

(N) *What* Act of *Misfeaſance* will be Forfeiture.

[1. IF he does *contrary to the duty of his office*, as if he *doth not* [*do*] *right to the parties*, this misfeaſance is forfeiture. 11 E. 4. 1. b.]

Br. Forfeiture de Terres, pl. 61. cites S. C. per Vaviſour.

[2. *Negligent eſcape* is not cauſe of forfeiture of the office of *Marſhall*. 39 H. 6. 33. b. Contra 4 E. 2. Liber Parliamentorum 78.]

Br. Forfeiture de Terres, pl. 27. cites 39 H. 6. 32. for it is only *finable*.

[3. But if he ſuffer *ſeveral ſuch eſcapes*, it lies in diſcretion of the Court to ouſt him. 39 H. 6. 34.] [122]

[4. *Voluntary eſcapes* is forfeiture. 39 H. 6. 33. b.]

S. P. 9 Rep. 50. a. cites S. C.—Br. Forfeiture de Terres, pl. 27. cites 39 H. 6. 32.——If a *keeper of a priſon permits a wilful eſcape*, 'tis a forfeiture of his office; but eſcape in the night is only negligence of the officer. Per Needham J. Quære inde. Br. Forfeiture de Terres, pl. 54. cites 5 E. 4. 26.——Two voluntary eſcapes by *warden of the Fleet*, was held to be a forfeiture of his office. 3 Lev. 288. Mich. 2 W. & M. In Canc. The King v. Manlove.

[5. A *Filazer* of the Bank *ſurrenders his office from year to year without licence* of the Court, and this was one of the cauſes that his office was forfeited. D. 2 and 3 Ma. 114. 64.]

S. P. 9 Rep. 96. [6. The ſuffering of *voluntary eſcapes of felons, by a Sheriff of a county for life*, or fee, is forfeiture of the office. D. 4 and 5 Ma. 152. 4.]

7. Miſfeaſance of the office of *Marſhal of B. R.* is a forfeiture of the office. Per Priſot. Br. Forfeiture de Terres, pl. 27. cites 39 H. 6. 32.

The miſentry of one proclamation on a fine, and the not entring another at all, was conceived by the Court to be a forfeiture of the office of *Chirographer*; for it was abuſing of it. 2 Brownl. 300. Paſch. 7 Jac. Anon.

8. If a *Steward, Auditor*, or ſuch like, *ingroſs their books falſely*, and make falſe diſcharges &c. quære, if they ſhall loſe their office. Br. Forfeiture de Terres, pl. 17. cites 15 E. 4. 3.

Extortion and *hard uſage of the priſoners*, is fineable, and forfeiture of the office of *Keeper* of the *Gatehouſe* priſon in Weſtminſter. Raym. 216. Mich. 24 Car. 2. B. R. Lady Broughton's Caſe.

9. If the *Warden of the Fleet does not bring in his priſoner* when he is commanded by the Court, this is cauſe to ſeiſe his office, by the opinion of the Court. And if the priſoner *eſcapes* who is condemn'd, he ſhall pay the condemnation. Br. Office and Off. pl. 44. cites 9 H. 7. 55.

10. A Gaoler *retained priſoners acquitted of felony after they paid their fees*, and the King re-ſeiſed the gaol for ever; and this was for miſuſing of his franchiſe. 9 Rep. 96. b. cites 20 E. 4. 5. b. The Abbot of Crowland's Caſe.

Mo. 707. S. C. by name of Sir Henry Berkly v. the E. of Pembroke. * Br. Forfeiture de Terres, pl. 49. S. P. cites 2 H. 7, 8.——S. P. Ibid. pl. 17. cites 15 E. 4. 3. per Brian.——Co. Litt. 233. b.——*But* a parker *ſaying, that he will* kill the deer or cut the trees in the park is no forfeiture alone, unleſs he does it. 11 Rep. 98. b. Trin. 13 Jac. B. R. in Bagg's Caſe.——S. P. either by himſelf or his ſervants; *ſo* of *abating* any *houſe* within the park; but otherwiſe if it was an office of inheritance, which the reporter ſays he does not believe, and cites 5 E. 4. 45. & 28 H. 8. And. 29. the Biſhop of London v. Hero.—4 Le. 120. S. C.

So, ſurcharging the park with agiſtments is forfeiture. Mo. 787. Mich. 4 Jac. Lady Ruſſel v. Earl of Nottingham.

11. Every *voluntary act* done by an officer, *contrary to what belongs to his office*, is a forfeiture of his office, as by foreſters or *parker's* voluntary * *killing bucks*, cutting of trees, wood &c. but otherwiſe it is of things done or ſuffered by his *negligence*, if it be *not common* or often. Poph. 118. Hill. 38 Eliz. Earl of Pembroke v. Sir H. Berkly.

12. If one has the *cuſtody of a caſtle* or houſe for life, and he *denies entrance* to the owner into the houſe, and ſhuts the door againſt him, it is a forfeiture of his office; per omnes J. Mo. 787. Mich. 4 Jac. Lady Ruſſel v. the Earl of Nottingham.—Cro. J. 17. S. C.

Co. Litt. 233. b.—— S. P. 4 Le. 120.—S. P. Mo. 10. pl. 87. Trin. 3 E. 6.—S. P. Bendl. 20.——S. P. per Cur. Poph. 118. Hill. 38 Eliz. Earl of Pembroke v. Sir Henry

13. If a *foreſter* or parker *cut woods*, unleſs for neceſſary bruiſe, it is a forfeiture of his office; for deſtruction of vert is deſtruction of veniſon. 9 Rep. 50. Trin. 8 Jac. in the Earl of Salop's Caſe.

Henry Barkley.—But it ought to be *found by office, and a ſcire facias* to iſſue againſt the * foreſter, to which he may have anſwer. Sav. 1. Paſch. 22 Eliz. Taverner v. Gyles.——Miſ-uſer is a forfeiture of an office *without ſcire facias* ſued if *office be found.* D. 151. b. pl. 4. marg.

(O) What *Non-feaſance* &c. [will be a Forfeiture.]

See Diſfranchiſement (B.

[1. NOn-feaſance of the office *of Marſhal of B. R.* is a forfeiture. 39 H. 6. 34.] Br. Forfeiture de Terres, pl. 27. cites 39 H. 6. 32.—There is a diverſity when the office *concerns the adminiſtration of juſtice* &c. and the officer ex officio and of neceſſity *ought to attend without requeſt.* 2dly, When he ought not to attend *but upon requeſt* by him to whom he is officer; in this caſe *non-uſer &c.* is no forfeiture. 3dly, When it *concerns the private intereſt of any*, and he ought to attend, it is no forfeiture, unleſs ſome *damage happens* to him whoſe officer he is, in ſomething which concerns his charge. 9 Rep. 50, in the Earl of Shrewſbury's Caſe.——Co. Litt. 233. a. S. P.——The office of *Marſhall* concerns the adminiſtration of juſtice, yet his abſenting himſelf was held no forfeiture *unleſs ſummoned*; for he may excuſe himſelf, as that he was ſick &c. according to Ja. Bagg's Caſe. 11 Rep. 99. a. per Twiſden J. Sid. 15. cites it as ruled. 39 H. 6. in the D. of Norfolk's Caſe.

[2. The ſame law of the office of *Chamberlain of the Exchequer.* 11 E. 4. 1. b.]

[3. If *officer be* * *demanded and does not come* (in convenient time as it ſeems) it is a forfeiture. 11 E. 4. 1. b.] * Br. Forfeiture de Terres, pl. 61. cites S. C. And ſo of *non-attendance*; per Vaviſour.—Ibid. pl. 115. S. P. cites 20 E. 4. 6.—*Non-attendance* is *a forfeiture* of the office of *Recorder.* 2 Salk. 435. Hill. 4 Annæ B. R. Whitacre's Caſe.—102.—S. C. 11 Mod. 61. but no judgment.

4. A *Filazer* of Bank *was abſent two years*, and for this diſcharged. Per Curiam. 2 & 3 Ph. & M. Dy. 114.

5. 1 *H.* 4. *cap.* 13. enacts, That *all cuſtomers and comptrollers ſhall be reſident upon their offices in their proper perſons, without making any deputies in their places.*

6. And by 13 *H.* 4. *cap.* 5. *All cuſtomers, comptrollers, gaugers of wine, and ſearchers, ſhall be reſident upon their office, eſpecially at the time of charge and diſcharge of ſhips and veſſels; ſo that no ſuch officer at the time aforeſaid, be abſent from his ſaid office by three weeks at the moſt, in pain to loſe his office, unleſs he be commanded upon record to be in the King's Courts, or otherwiſe in the King's ſervice of record.*

7. Annuity was demanded for office of *Parkerſhip granted* to him *for life*, the defendant ſaid, that the office was granted to the plaintiff ut ſupra, and that ſuch office had been time out of mind, and that the keepers have kept the deer and the wood for the ſame time, and that from the 2d day of July till the 14th day of the ſame month 22 *ſavages were killed by perſons unknown, in negligence of the plaintiff*; and this &c. Per Young, by negligence of the officer, the annuity and office are extinct. Br. Forfeiture de Terres, pl. 54. cites 5 E. 4. 26. Ibid. pl. 55. S. P. cites 5 E. 4. 5. Br. Office & Off. pl. 26. cites S. C.—*But* without aſſigning a *ſpecial default* it is no plea. Br. Dette, pl. 152. cites 5 E. 4. 5.—If I grant annuity *to J. S. to keep my park*, and after the *game is killed in his default*, this is an extinguiſhment of the annuity. Br. Annuity, pl. 49. cites 5 E. 4. 5.

If the office of *Parker* be granted to a man, if he does *not keep the park* it is a forfeiture of his office. Br. Forfeiture de Terres, pl. 49. cites 2 H. 7. 8.—A *parker* ſhall not forfeit his office for *non-attendance*, unleſs a *deer be killed in his abſence*, or the like. Arg. Vent. 144.—But ſhould he

deſert his office *for five years*, it would make a forfeiture without a ſpecial damage. Arg. on the other ſide. Vent 165. Trin. 23 Car. 2. B R. In Ld Hawley's Caſe.—Contra, if the non-attendance be for a few days and no damages happen. Co. Litt. 233. a.

8. *But* a Parker is not bound to keep the park every day, nor *Sunday*, nor *Feſtival days*, but ſhall be at Divine ſervice; nor *in the night*, nor to keep it againſt 6 or 8 men, for it is out of his power. Br. Forfeiture de Terres, pl. 54. cites 5 E. 4. 26. per Needham J.

[124] If I grant the ſtewardſhip of my manor of D. to hold two Courts at two certain days; if he *does not hold the Courts*, he has forfeited the ſtewardſhip; per Hale J. Mo. 9. Trin. 3 E. 6. Anon.

9. If a *Steward does not hold the Courts*, or does not hold them for the profit of the Lord, it is a forfeiture of his office; per Chocke. Br. Forfeiture de Terres, pl. 54. cites 5 E. 4. 26.

10. A Parker for life *refuſed to ſerve a warrant* ſent him by the owner of the park, and would *not ſuffer it be ſerved*; this is a forfeiture; per Hales and Brown; but per Montague Ch. J. it is a diſobedience only, and no forfeiture. Mo. 9, 10. Trin. 3 E. 6. Anon.

11. *In all caſes* where the officer relinquiſhes his office, and *refuſes to ſerve*, he loſes his office, fee, profit, and all. Co. Litt. 233. b.

12. If Tenant in tail of an *office of truſt* miſ-uſes or non-uſes it, theſe are forfeitures of ſuch offices for ever by force of a condition in law tacitly annexed to their eſtates, as it is held in 11 E. 4. 1. 20 E. 4, 5, 6. 39 H. 6. 32. 22 Aſſ. 34. 8 H. 4. 18. 2 H. 7. 11. 14 H. 7. 1. and Pl. C. 370. Nevil's Caſe. 7 Rep. 34. b. Mich. 2 Jac. Nevil's Caſe.

13. *Clerk of a market* forfeits the office for non-attendance; for his attendance is neceſſary for the public good. 9 Rep. 50. a. Trin. 8 Jac. in the Earl of Salop's Caſe.

14. It was found by inquiſition upon a commiſſion iſſu'd out of Chancery, that J. S. *Searcher of the port of S. for life*, had committed ſeveral miſdemeanors to the great prejudice of the King, and forfeiture of his office, and among the reſt was this, viz. that he *voluntarily ſuffer'd a ſhip laden* with ſeveral commodities (naming them) *to be exported, and other ſhips to be imported and unladen without being ſearch'd*; but this was found to be at a time *when neither himſelf nor any of his deputies were there*; ſo as it appears not whether it was by negligence or voluntary. But all the Court held, that this voluntary abſence and neglect, ſo as neither himſelf or ſervants were there to ſearch, is not only craſſa negligentia, but a *voluntary permiſſion*. Cro. C. 491. Mich. 13 Car. B. R. The King v. Rooks.

15. *Another cauſe of forfeiture* in iſſue was, that he *ſeiſed divers goods forfeited for not being cuſtom'd and accounted not to the King for them*, but converted them to his own uſe; he *pleaded*, that he was *ready to account and travers'd the converſion*. Upon evidence it appeared, that he ſeiſed them as forfeited, and never tender'd to account nor brought them into the Exchequer, nor ſignified in the Exchequer what they were (as he ought to have done)

done) but ſold them in London, which was clear converſion; and ſo this iſſue was alſo found againſt him. Cro. C. 492. The King v. Rooks.

16. The non-attendance of a *burgeſs of a corporation* at the ſeſſions is not a good cauſe of removal; for the abſence of a ſingle alderman does not hinder the holding of Courts, or the validity of the acts of that Court; ſo that his abſence does not amount to a non-uſer of the office. 10 Mod. 108. Mich. 11 Ann. B. R. The Queen v. the Mayor &c. of Pomfret.

17. Serjeant Hawkins ſays, it is certain that an officer is liable to a forfeiture of his office, not only for doing a thing contrary to the deſign of it, but alſo for neglecting to attend his duty at all proper and convenient times and places, whereby any damage ſhall accrue to thoſe by or for whom he was made an officer. And he ſays, ſome have gone ſo far as to hold, that an* *office concerning the adminiſtration of juſtice or the common wealth*, ſhall be forfeited *for a bare non-uſer*, whether any ſpecial damage be occaſioned thereby or not; but that this opinion does not appear to be warranted by any reſolution in point, and the authorities which are cited [in the † margin] to maintain it, do not ſeem to come up to it. However that it cannot but be very reaſonable, that he who ſo far neglects a public office, as plainly to appear he takes no manner of care of it ſhould rather be immediately diſplac'd, than the public be in danger of ſuffering that damage, which cannot but be expected ſome time or other from his negligence. Hawk. Pl. C. 167, 168. cap. 66. S. 1.

*9 Rep. 50. a. E. of Shrewsbury's Caſe.—Co. Litt. 233.—This difference taken in 9 Rep. 99. between publick offices that concern the adminiſtration of juſtice and private offices, viz. [125] that non-uſer in the one is no forfeiture without a *requeſt, and ſome ſpecial loſs occaſioned thereby* as in the other it is, was agreed. 10 Mod. 108. Mich. 11 Annæ B. R. in Caſe of the Queen v. the Mayor and Burgeſſes of Pomfret.—† 39 H. 6. 32. 20 E. 4. 5. b. 22 Aſſ. 34. 2 H. 7. 11. b. Pl. C. 379. L. Quinto E. 4. 27. 11 E. 4. 1.

(O 2) Forfeiture. *Pleadings.*

1. *ANNUITY for keeping a park*; the *defendant ſaid, that the plaintiff by* 12 *days, and ſhew'd certainly when* &c. *parcum predict. cuſtodire neglexit, and that* 12 *unknown killed* 22 *deer through the negligence of the plaintiff*, and it was held no iſſue; for *neglexit cuſtodire* is to deny to keep the park, by which Young took the iſſue that by 12 days as above &c. parcum predict. *non cuſtodivit*; per quod &c. as above; and per Danby Ch. J. this is the better iſſue. Br. Iſſues joines, pl. 30. cites 5 E. 4. 26.

2. A judgment was had in a writ of *annuity granted* to the plaintiff *for life, to exerciſe the office of Steward*; a ſcire facias was brought for the arrearages of one year incurr'd after the judgment. The defendant pleaded to the action of the writ, viz. that the plaintiff pending the plea, *being requeſted to hold Court &c. refuſed it.* And this was held by all the Juſtices and Clerks a good plea, without anſwering to the arrearages incurr'd before the writ of ſcire facias. D. 377. pl. 28. Trin. 23 Eliz. Anon.

But where *one tenant in common granted annuity for holding Courts.* and he *ſummon'd a Court without his companion*, and the grantee refus'd, this is no forfeiture; becauſe the ſummons is void. D. 377. pl. 28. marg. cites 27 Eliz. Hurleſton's Caſe.

3. A. was ſeiſed of the office of *Cuſtos Brevium*, and of keeping the rolls, and making the niſi prius in B. R. and that he, and all thoſe who had that office time out of mind &c. had 7 under *clerks* who had certain fees, and that the plaintiff ſuch a day &c. was admitted to the office of one of the clerks, and enjoyed it till he was ejected by A. the defendant &c. Upon a trial at bar the plaintiff had judgment; and it was moved in arreſt of judgment, that this was not an office, but an employment; for A. by their own ſhewing has the making and cuſtody of every thing and is anſwerable for all miſcarriages, ſo that the 7 under clerks are no more than his ſervants, and removeable at pleaſure. 2. If the plaintiff was an officer, he ought to have ſhewn of what office, becauſe by his own ſhewing the defendant had ſeveral, and if he was an officer then his office was void by 5 & 6 E. 6. cap. 16. for it appears by his confeſſion under his hand that he gave money for it, and this is an office of juſtice. 3. He did *not ſet forth* that he was *debito modo admiſſus & jurat.* but adjudged that admitting it to be no office, but only an employment, the defendant could not turn him out at pleaſure; for if he might, then the ſecondary and the clerks of the papers of B. R. might be turn'd out by the chief clerk, and both theſe officers claim'd privilege as his clerks; and as to the buying *offices*, thoſe which are *ſold by any of the Chief Juſtices, are excepted out of the ſtatute of E.* 6. Sid. 74. Paſch. 14 Car. 2. B. R. Whitechurch v. Paget.

[126] (O. 3) Forfeiture of *Offices* by *Sale*. And Sale thereof *prohibited*, in what Caſes.

1. 12 *R.* 2. cap. 2. ENacts that *the Chancellor, Treaſurer, Keeper of the privy ſeal, Steward of the King's houſe, the King's Chamberlain, the Clerk of the Rolls, Juſtices of the Benches, Barons of the Exchequer, and all others called to name and ordain Juſtices of peace, ſheriffs, eſcheators, cuſtomers, controllers, or any other officer or miniſter of the King, ſhall be firmly ſworn, that they ſhall not name or order any officers or miniſters for any gift or brocage, favour or affection: and none which purſueth by him or by other, privately or openly, to be in any ſuch office, ſhall be put in the ſame or any other: but that they make all ſuch officers and miniſters of the beſt and moſt lawful and ſufficient men in their judgments and knowledge.*

The ſale of a bailywick of a hundred is not within this ſtatute. For ſuch an office does not concern the adminiſtration of juſtice; nor is it an office

2. 5 & 6 *E.* 6. 16. enacts, That *none ſhall bargain or ſell any office or deputation, or any part thereof, or receive or take any money, fee, reward, or any other profit, directly or indirectly, or any promiſe, agreement, bond or aſſurance to receive any ſuch profit for the ſame, which office ſhall concern the adminiſtration or execution of juſtice, or the receipt, controulment, or payment of any of the King's money or revenue, or any account, aulnage, auditorſhip, or ſurveying of any of the King's lands, or any of his cuſtoms, or any adminiſtration or attendance in any cuſtom-houſe, or the keeping of any of the King's towns,*

towns, caſtles or fortreſſes (being places of ſtrength or defence), or any clerkſhip in any Court of Record; in pain that the bargainee thereof ſhall loſe his place, and the bargainor be adjudged diſabled to execute the ſame; and every ſuch bargain and agreement ſhall be void.*

of truſt.—4 Le. 33. pl. 91. Trin. 19 Eliz. B. R. Godbolt's Caſe.—*But* the office of *Curſitor* is within the ſtatute; per Winch. Brownl. 71. in Caſe of Williamſon v. Barnſley.

If any one *procures an office* to himſelf of the gift *of the King for* 1000*l.* yet the *office is not loſt* by this ſtatute. *So if* it be *taken of the King himſelf for money*, yet the office is not loſt; per Hobart att.-general. Arg. Roll. R. 157. Paſch. 13 Jac. in Caſe of Warren v. Smith.

The office of *Clerk of the Fleet priſon* is not within this ſtatute. Vid. Fin. R. 50. Hill. 25 Car. 2. 1673 Meakin v. Whitchcott & al.

In debt on bond, the defendant pleaded this ſtatute; and the queſtion was, whether the office of *Soliciter of the Treaſury* be within the ſtatute? Holt, Eyre and Gregory J. held it was not, but Dolben J. thought it was, et adjornatur. Comb. 126. Trin. 1 W. & M. B. R. Loyd v. Rowſe.

* In debt upon bond, *defendant pleaded, that it was enter'd into for the ſum therein mentioned, the ſame being for the purchaſe of an office, and aver'd that there was no other conſideration &c.* The plaintiff demurr'd; and it was inſiſted that defendant ſhould have pleaded the ſtatute of 5 and 6 E. 6. againſt ſelling offices; which makes ſuch bonds void; for the rule is, that when a ſtatute makes a ſpecialty void, it muſt be pleaded, and cited 5 Rep. 119. Lutw. 464. that the condition here does not ſet forth that the payment was to be for the purchaſe of an office, and ſo the entry into it may be for a valuable and legal conſideration, ſo that *this is a mere averment dehors*; that this bond may be within the exception of the ſtatute, which plaintiff cannot ſhew, the defendant not having pleaded the ſtatute; for the plaintiff muſt anſwer the plea. But per Cur. *this ſtatute is a public law*, and therefore we muſt take notice of it, and ſo of the caſes excepted out of the ſame, within which, for any thing that appears, the plaintiff may be; and inclin'd that for that reaſon the defendant ſhould have pleaded the ſtatute, to give the plaintiff an opportunity of ſhewing that his caſe was within the exception of it. Gibb. 45. Hill. 2 Geo. B. R. Hornby v. Cornford.—After the defendant's counſel offer'd to pay the money and ſo it ended. Ibid.

Provided that this act ſhall not extend to any office of inheritance, for the keeping of a park, houſe, manor, garden, chaſe or foreſt; nor to the two chief juſtices, or juſtices of aſſiſe, but that they may grant offices as they did before the making of this act; alſo all acts done by any officer removable by force of this ſtatute ſhall be good in law, until he be removed.*

* Sid. 74. Whitchurch v. Paget.

3. A. brought debt againſt M. executrix of B. upon a bond of 1000 marks. The caſe was, that B. the *teſtator was cuſtomer of the Queen by patent to him and his deputies*, and by indenture between him and J. S. who died leaving A. his executor, *for* 600*l. paid and* 100*l. a year to be paid during A's life, made deputation of the office to A.* And *B. covenanted with A.* that *if B. died before A.* then *B.'s executors ſhould repay to A.* 300*l.* And divers other covenants were in the ſaid indenture concerning the ſaid office and the enjoyment of it; and B. was bound to A. in the ſaid bond for performance of covenants. The breach was alleged in nonpayment of the 300*l.* inaſmuch as A. ſurvived B. But tho' the ſaid covenant for re-payment of the ſaid 300*l.* was lawful, yet the other covenants being againſt the ſtatute of 5 E. 6. 16. the bond was adjudged utterly void, and that the addition of one lawful covenant ſhall not make it good; for if it ſhould the ſtatute would ſerve to very little purpoſe. 3 Rep. 82. b. 83. a. cites 38 Eliz. C. B. Lee v. Colſhill.

Part of the agreement was to procure a new grant to A. [127] and B. and the ſurvivor of them; and B. covenanted accordingly with A. that he upon requeſt of A. would ſurrender the patent to the Queen, to the intent that a new one might be made according to the ſaid agreement which ſaid agreement was for the office; and ſo the bond void. 2 And. 55. pl. 42. S. C. by name of Smith v. Coleſhill.——Ibid. 107. pl. 58. S. C. by name of Lee v. Coleſill.—Cro. E. 529. pl. 58. Mich. 38 & 39 Eliz. S. C.

Mo. 781. 43 Eliz. S. C. accordingly by name of Stockwith v. North.—H. being *high ſheriff contracted with B. for the under-ſheriff's place*, and for the payments thereof *gave a bond of* 200*l.* *to H's ſon*; the Court inclin'd that the bond was void (and the reporter ſays, that it was ſo adjudg'd in B. R. ut audivit), but by the defendant's miſpleading it was put off till the next term. Freem. Rep. 19. Mich. 1671. C. B. Browning v. Halford.

4. N. was *ſheriff* of Nottingham 43 Eliz. and took money for the offices of *gaoler and bailiwick*, and he firſt *gave them to his ſervants who ſold them, but he had the money*, and he was fined for that; for it is contrary to 4 H. 4. cap. 5. and alſo by the Court, that that is a corruption, and a great cauſe of oppreſſion in the officers, and ſuch ſale of offices is malum in ſe and finable. Noy. 102. Stockwell v. North.

5. In action on the caſe for 20*l.* a year to be paid to a Juſtice of Wales for the *office of Clerk of the fines*, where the clerk's fee was 5 *s.* 4*d.* of every fine, Coke ſaid, that the aſſumpſit is void by the ſtatute 5 & 6 E. 6. cap. 16. for it is not lawful to ſell ſuch an office. Goldsb. 180. pl. 113. Hill. 43 Eliz. Walter v. Walter.

S. C. cited by Coke Ch. J. and that Sir A. J. was a perſon diſabled to take that office, ſo as at no time during his life he could have it, tho' it ſhould become void by the death of any other officer thereof, and that a new grant ſhould be made to him. Cro. J. 386. Mich. 13 Jac. B. R. in caſe of the King v. Biſhop of Norwich and Saker.——2 Inſt. 154. S. C. by name of Sir Arthur Ingram's Caſe.—Roll. R. 236. 237. cites S. C. and that Sir A. J. was for ever incapable of the ſaid office by force of the ſaid ſtatute.———Hob. 75. pl. 92. cites S. C. and P. for the perſon being diſabled by the ſtatute could not be enabled by the King.

6. Sir Robert Vernon being *Cofferer of the King's houſe*, and having the receipt of a great ſum of money yearly, and of the King's revenue, did for a certain ſum, bargain and ſell the ſame to Sir A. J. and *agreed to ſurrender the ſaid office to the King, to the intent a grant might be made to Sir A. J. and he ſurrendered the ſame accordingly*; and thereupon the ſaid *Sir A. J. was admitted* and ſworn cofferer. And it was reſolved by Ld. C. Egerton, the chief juſtice, and others to whom the King referr'd the ſame, that the ſaid office was void by this ſtatute; and that Sir A. was diſabled to have or to take the ſaid office, and that *no nonobſtante could diſpenſe with this act* to enable the ſaid Sir A. And thereupon the ſaid Sir A. was removed, and Sir Marmaduke Darrel ſworn by the King's commandment into his place. And note, that *all promiſes*, bonds and aſſurances, *as well on the part of the bargainor as of the bargainee are void* by the ſame act. Co. Litt. 234. a.

12 Rep. 78. S. C.—— 2 Brownl. 11. S. C. by the name of Robotham v. Trevor.

7. The offices of *Chancellor, Regiſter and Commiſſary* in eccleſiaſtical Courts, are within the ſtatute of 5 & 6 E. 6. For tho' they concern matters principally pro ſalute animarum, yet they alſo concern matters about matrimony and legitimation, which *touch the inheritance of the ſubjects*, and about matters of legacy for chattels real and perſonal; and in that reſpect are Courts of juſtice. Cro. J. 269. Hill. 8 Jac. B. R. DR. TREVOR'S CASE for the Chancellorſhip of Landaff.

[128] 8. The *Stewardſhip of a Court Leet* is within this ſtatute; per Winch. J. who ſaid it had been ſo adjudged in Gray's-Inn. But the queſtion in the principal caſe was, whether a bond conditioned for performance of articles in an *agreement to ſurrender*

render and yield up his letters patents of the ſtewardſhip of Bromſgrove to the plaintiff, to the intent he might renew them in his own name, was within the ſtatute or no, the words of the ſtatute being *(to have and enjoy)* and Winch. ſaid, that it was within the ſtatute. Brownl. 70, 71. Trin. 12 Jac. Williamſon v. Barnſley.

9. A. a *Biſhop's Regiſter* for a ſum of money *granted the deputation to J. S for a term of years, who* enjoyed the ſame for ſome time, but *was turned out before the term expired. A. having got the agreement in writing, refuſed to deliver it to J. S. ſo that he could have no remedy at law,* and therefore *brought a bill in Chancery.* The defendant demurred, and for cauſe ſet forth this ſtatute prohibiting the ſale of any office of juſtice, or the deputation thereof, and averred that the office of regiſter concerned the adminiſtration of juſtice; and for that the *plaintiff by his bill confeſſed that he had given money, or contracted for it contrary to the meaning of the ſtatute,* therefore he was diſabled to execute the ſame; and the demurrer was held good. N. Chan. R. 27. 9 Car. 1. Lake v. Prigeon.

10. A *bond* was entered into before the wars, conditioned *to pay* 40 *l. a year for* 12 *years out of the profits of an office, which was* [afterwards] *taken away by the uſurpers.* The *office was revived,* and the obligor being ſued upon the bond, he exhibited his bill to be relieved againſt the bond. The obligee inſiſted, that the office continued ſome part of the 12 years, and being now revived, the obligor ought to pay the 40 *l.* a year for 12 years, or be diſmiſſed; for the obligee having the law with him ought not to be hurt in equity without ſatisfaction according to the condition. Decreed, that the obligor pay the 40 *l.* for ſo many years as the office continued, and thereupon the bond to be delivered up. Chan. Caſes 72. Hill. 17 & 18 Car. 2. Lawrence v. Braſier.

S. C. taken notice of by Lord Chancellor, as cited by the counſel for the defendant, in the Caſe of LAW v. LAW. Mich. 1735. about the buying of offices, and ſaid that it does not at all appear in the caſe what the office was; and the only queſtion there was, whether the party ſhould pay for the time he was diſpoſſeſſed. Chan. Caſes, in Ld Talbot's time. 142.

11. Debt on bond for performance of covenants in a *demiſe of the bailywick of the Savoy,* by which among other things he demiſed to the defendant *goods of felons, waifs, eſtrays, &c. and made the defendant his deputy bailiff, rendring rent* 60 *l. a year.* Upon demurrer, the Court held the indenture void within the ſtatute of 5 & 6 E. 6. for tho' the bona felonum may be legally demiſed, yet it being with the making the defendant deputy bailiff, and demiſe of the bailywick to him, this makes all void. 2 Lev. 151. Paſch. 27 Car. 2. B. R. Ellis v. Ruddle.

But becauſe the truth of the caſe was, that the King was *ſeiſed in fee of the bailywick,* and demiſed it to the plaintiff, who demiſed it to the defendant, and *offices in fee are excepted* out of the ſtatute, by which all *under leaſes are inclusive y excepted,* the Court, becauſe the ſeiſin in fee of the King did not appear upon this record, ordered the parties to replead. Ibid.—Leaſing the bailywick of the Savoy rendring rent, was agreed per Cur. not to be a buying an office within this ſtatute; for all the bailywicks of liberties in England are bought and ſold. and the *Marſhalſea of B. R.* and the *Under Warden of the Fleet's* place &c.—Freem. Rep. 428. Trin. 1676. Nelſon's Caſe.

12. The ſtatute of 5 & 6 E. 6. extends not to the office of *Provoſt Marſhal in Jamaica;* for being a *conquered country,* the laws

In the Caſe of Secretary to the Go-

vernour of Barbadoes, curia advisare vult. 2 Mod. 45.

laws of England do not take place there till declared ſo by the conqueror or his ſucceſſors. 2 Salk. 411. Trin. 5 W. & M. B. R. Blancard v. Galdy.

Trin 27 Car. 2. C B. Daws v. Sir Paul Pindar.—In debt upon bond, the defendant pleaded this ſtatute, and that there was an agreement for a rent for the office of *Secretary of Barbadoes*, and averred it to be an office of juſtice. Upon a demurrer, the queſtion was, if this office being in Barbadoes, not within the King's dominions at the time of the ſtatute, were void by this ſtatute. The Court inclined that the plea was good, this office *being a grant by patent under the Great Seal of England*; and were it an *office in the Admiralty or Spiritual Court*, it would be within the ſtatute. But adjornatur. 3 Keb. 26 Paſch. 24 Car. 2. B. R. Daws v. Painter.

[129] 13. An officer within the ſtatute 5 E. 6. (viz. a *ſurrogate*) makes a deputation of his office, *rendering thereout* 90 *l. per ann.* Defendant pleads the deputation void by the ſtatute, and ought to have no account, it being in effect a *farming* within the ſtatute; after long debate the plea was allowed. 2 Chan. Caſes 42. Hill. 32 & 33 Car. 2. Juxon v. Morris.

Ld Chancellor Talbot cited S. C. and ſaid, that it had nothing illegal in it; for the payment was not to be abſolute, but only in caſe the profits amounted to 400 *l.* or more; beſides the whole profits belonging to the ſheriff himſelf, it was but a reſervation of what was his right, viz. the profits of the office. Chan. Caſes in Ld. Talbot's time 142. Mich. 1735. in Caſe of Law v. Law.

14. A bond was made without condition, but intentionally for performance of covenants to ſave the *high ſheriff* harmleſs from eſcapes, and *to pay* the high ſheriff *out of the profits* of the office, 400 *l.* The Lord Chancellor was ſeemingly of opinion for the payment, and ordered a trial what the agreement was, whether to have the 400 *l.* or not. 2 Ch. Caſes 48. Hill. 32 & 33 Car. 2. Lockner v. Strode.

2 Vent. 187. 212. 267. S. C.

15. An *Archdeacon's Regiſter* is within this ſtatute, and tho' the *perſons* to whom the ſale and grant was made *die*, yet the archdeacon is diſabled by the ſtatute to make any other grant thereof; but the King ſhall have the nomination, and that before any office found. 3 Lev. 289, 290. Hill. 2 W. & M. C. B. Woodward v. Fox.

S. C. cited by Lord Chancellor. Chan. Caſes in Ld. Talbot's time. 142. in Caſe of Law v. Law.

16. A. gives *bond* to B. *for B's quitting his pretence and procuring A. to be purſer of a man of war*; Per Cur. We cannot ſet aſide the bond, but will relieve on payment of the 400 *l.* principal without intereſt or coſts. 2 Vern. 308. Hill. 1693. Symonds v. Gibſon.

So for a ſurrender of a *captain's commiſſion* to make way for the lieutenant, tho' the captain died before the lieutenant was admitted. Vern. 98. Mich. 1682. * Berisford v. Done.—So for ſurrender of an office where the *obligor was refuſed to be admitted*, becauſe not fit for the employ, as was thought by the ſuperiours. Vern. 99. cited by Mr. Hutchins in Caſe of Berisford v. Done, as decreed the laſt Term.

* S. C. cited by Ld Chancellor Talbot, who ſaid, that no law prohibits the ſale of a commiſſion in the army, any more than it does that of a purſer of a ſhip. Chan. Caſes in Ld Talbot's time. 142. in Caſe of Law v. Law.

The ſtatute does not extend to *military offices*. Ch. Prec. 199. Trin. 1702. Ive v. Aſh.

Comb 356. Hill. 8 W. 3. B. R. S. C.

17. Bond was given by deputy to principal to pay him *half the profits* of the office. This bond is not within the ſtatute; becauſe the condition is not to pay him *ſo much in groſs*, but half the profits, which muſt be ſued for in the principal's name; for they belong to him, tho' out of them a ſhare is to be allowed to the deputy

deputy for his ſervice. 2 Salk. 466. Hill. 8 W. 3. B. R. Culliford v. De Cardonel.

18. Where an officer is within the ſtatute, and the *ſalary certain*, if the principal makes a deputation, reſerving a *leſſer ſum* out of the ſalary, it is good; ſo if the *profits are uncertain*, ariſing from fees, if the principal makes a deputation reſerving a *ſum certain out of the fees* and profits of the office, it is good; for in theſe caſes the deputy is not to pay unleſs the profits riſe to ſo much. But where the reſervation or agreement is *not* to pay *out of the profits*, but to pay generally *a ſum certain*, it muſt be paid at all events, and ſuch bond is void by the ſtatute. 2 Salk. 468. Mich. 3 Ann. B. R. Godolphin v. Tudor.

12 Mod. 90. S. C.—— 6 Mod. 234. Mich. 3 Ann. B. R. S. C.—— S. P. Cumb. 356. Culliford v. Cardonell, S. P.——

19. *A. procured B.* his brother *a place of Surveyor of the Exciſe, and further promiſed to procure B. to be made Collector*; whereupon *B. gave to A. a bond to pay him* 10 *l. a year, ſo long as he (B.) ſhould continue ſurveyor* (his then office), *and* 20 *l. a year ſo long as he ſhould be collector*. B. paid one payment of 10 l. to A. and died, leaving M. his wife who adminiſtered. A. ſued the bond againſt her, who brought a bill to ſet aſide the bond, and * to have the 10 *l.* refunded. Ld Chancellor ſaid, that this is but one agreement, notwithſtanding it reſpects two periods of time, viz. that of having obtained the office of ſurveyor, and that of procuring the collectorſhip; and then the condition is to pay two ſeveral ſums; that the office is certainly within the ſtatute as it concerns the King's revenue. And tho' this be *not a ſale within the ſtatute directly, yet in effect it is*, there being little or *no difference between a commiſſioner's taking a ſum of money, and another perſon taking it to influence the commiſſioner*. That the inconveniences are the ſame, ſince thereby the perſons appointing are deceived, and ſo is the public. The objection that this being a penal law is not to be extended in equity is eaſily anſwered; for tho' penal laws are not to be extended as to penalties and puniſhments, yet if there be a public miſchief, and a court of equity ſees private contracts made to elude laws enacted for the public good, it ought to interpoſe. And his Lordſhip ſaid, that marriage brocage bonds fall directly within the reaſon of this caſe; and decreed the bond to be cancelled, and a perpetual injunction. Chan. Caſes in Lord Talbot's time. 140. Mich. 1735. Law v. Law.

* Non conſtat, whether this matter was decreed or not.

[130]

(O. 4) *Officer diſcharged or Office determined.* In what Caſes, and *the Effect thereof*, as to the Fees &c.

1. NOTE that the office *of King of Heralds* was granted to Garter cum feodo et proficuo ab antiquo &c. et conceſſit to him 10 *l. for term of life pro feodo* pro officio illo &c. and there was a *general reſumption anno* 2 *E.* 4. *with proviſo for annuities and penſions*; and by all the Juſtices, if the office be gone the *annuity*

Br. Office and Officer, pl. 50. cites S. C.—— Br. Patents, pl. 60. cites S. C.——

And where an annuity is granted to the *Clerk of the Crown* for life for the office, a diſcharge of the office is a diſcharge of the annuity, by the opinion of the Juſtices. Br. Eſtate. pl. 4 cites 5 E. 4 8.—*So* if a *man grants an office at will with* 10*l. fee* pro officio illo exercendo *for term of his life*, if the office be retaken, the fee is gone, and yet the one is at will, and the other is franktenement. Br. Eſtate, pl. 64. cites 50 E. 3. 10.

annuity is expired; for this is *granted by reaſon of the office*, and *yet the office was at will, and the annuity is for* term of *life*. Br. Eſtates, pl. 44. cites 5 E. 4. 8

Where a man grants the office of *bailey, ſteward, receiver, parker*, &c. *and a fee certain for his labour only*, there the grantor may expulſe ſuch officers, but they ſhall have their fee: for it is only an *office of charge; but where* the ſteward and parker *have profits of courts, windfalls*, deer ſkins, *and ſuch like caſual profits*, it is ſaid that they cannot be expulſed, and that of ſuch offices they may have an *aſſiſe*. And the officer may *relinquiſh his office* when he will, but then his *fee ſhall ceaſe*, and Whorwood attorney-general granted the caſes above; tamen quære; becauſe aſſiſe lies of the office. Br. Grants, pl. 134. cites 31 H. 8. and Mich. 5 E. 6.—S. P. per Coke Ch. J. Roll. R. 83. Mich. 12 Jac. B. R. cites 18 E. 4. and 15 E. 4.—Cro. E. 336. Ferrer v. Johnſon.

2. I may ouſt a *baily, receiver*, &c. paying to him his fee; for the reſt is *charge and not profit*. Quære of a *ſteward*; for aſſiſe will lie of ſuch ouſters. Br. Grants, pl. 93. cites 8 E. 4. 7. and 34 H. 8.

Br. Office and Officer, pl. 29. cites S. C.

3. Where I grant to a man to be keeper of my park for two years by deed, and after I command him that he ſhall not meddle, this is a void command, and he may occupy; for it is a diſadvantage to the parker to ceaſe to occupy; per Choke. Br. Covenant, pl. 31. cites 18 E. 4. 8.

Br. Office & Off. pl. 29. cites S. C. ——If one grant an office of *bailiff* or *ſteward* &c. *with the profits* thereof, without rendering an account, he cannot diſcharge the grantee, but he ſhall continue to have the profits of the office; ſecus if *no fee* or profits had been granted for the exerciſing thereof. Cro. E. 335. Trin. 36 Eliz. C. B. Ferrer v. Johnſon.

4. If I grant to a man to be my *ſteward of my courts, taking* 10*l. per annum of the iſſues and profits of the courts for his fee*, and I *command* him, *that he ſhall not meddle*, this is a void command; for it is a diſadvantage to the ſteward; for he cannot have his fee, if no courts be held; *but* upon ſuch grant, and 10 l. *fee to be paid by the grantor*, or if it be granted *out of other land*, there ſuch command is good; for the ſteward ſhall have his fee, though he holds no courts, and there it is no diſadvantage to any but to the grantor himſelf; per Littleton. Br. Covenant, pl. 31. cites 18 E. 4. 8.———And this was held for law in the time of H. 8. Ibid.

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There is a diverſity between officers that have *another profit but a certain collateral fee*; for there the grantor may diſcharge him of his ſervice, as bailiff, receiver, ſurveyor, auditor &c. the exerciſe whereof is but labour and charge to them; but he muſt

5. A. ſeiſed in fee of a manor granted *to J. S. by deed to be bailiff thereof for life*; afterwards *A. ſold the manor to B.* who appointed W. R. to collect the rents, which W. R. did, and thereupon J. S. brought an action; but upon a demurrer, all the Court were of opinion, that B. might diſcharge J. S. becauſe he *does not ſhew any fee granted for executing the ſaid office, nor that he had any other profits thereby*; and then it is only an office of trouble, and J. S. has no cauſe to complain; but in caſe he had a fee or other certain profit for executing thereof, it had been otherwiſe. Adjudg'd for the defendant. Cro. E. 859. Mich. 43 & 44 Eliz. C. B. Harvy v. Newlin.

must have his fee; for none can derogate from his own grant to the prejudice of the grantee; and where, though the grantee has no other profit but his fee, yet *that fee is to be received and taken out of the profits appertaining to the Lord within his office*; for there the grantor cannot discharge him of his service or attendance; because that may be to the grantee's prejudice if the grantor will not grant the office at all. And there is another diversity where the grantee, *besides his certain fee, hath profits and avails by reason of his office*, there the grantor cannot discharge him of his service or attendance; for that would be to his prejudice. *As* if a man grants to another the *stewardship of his courts with a certain fee*, the grantee cannot discharge him of his attendance; because he has other profits and fees belonging to his office which he should lose if he were discharged. Co. Litt. 233. a. b.

6. Though it be true, that an officer to whom an office is granted *for life or years*, and is to have the profit of *casual fees*; as steward, bailiff, or parker (as is 31 H. 8. Br. Grants, 134. and 34 H. 8. 93.), cannot be discharged of the office, for then he should not have his casual fees, that is to be understood, that the grantor can *not appoint another* where the park or manor always continues, as 18 E. 4. 9. But when the park itself is determined and disparked, the office appendant thereto shall also be determined, but cannot discharge the officer before and make another; but though the casual profits of the office are gone with the office being destroyed, yet an *annual fee* granted for life in consideration of the office, and not out of the park &c. but *to issue out of all the grantor's manors in that county* &c. and granted *by a distinct clause*, the fee shall continue, the office not being determined by the default of the grantee. Cro. C. 59. Hill. 2 Car. in the Exchequer Chamber, Sir Charles Howard's Case.

Jo. 151. S. C.—— The King may discharge the patentee of *keeper of a park* of his office, tho' the park continue; and if one grant the *stewardship of a manor*, and he dismembers the manor, the *office determines*. But it was agreed, that the *annual fee certain* remains in both cases, be he discharged, or be the park disparked. Hutt. 86. Hill. 2 Car. Sir Charles Howard's Case.

7. If a Corporation grant the office of a Town-clerk, or of Recorder, and after surrender their patent, and take a new patent, all the offices are determined. Hutt. 86. Hill. 2 Car. in Sir Charles Howard's Case.

(P) *How* an Officer may be *discharged.*

[1. A *Filazer* of the Common Pleas having committed a forfeiture, was discharged by the Court of Common Pleas *by words openly in Court without any record* made of it, *or ever calling the officer to answer*, and a good discharge. D. 2 & 3 Ma. 115. 64.

Though no record was entered in the Rolls of Court of the cause of forfeiture, nor any discharge of a *filazer*, yet when the Ld. Ch. J. discharged him, *ex assensu sociorum* suorum *by words* openly in Court, calling the filazer to him, which was well prov'd, this was a good discharge, and no cause of assise to the plaintiff. D. 115. pl. 64.

2. A *Corporation have power to chuse a Recorder* either pro termino vitæ, or *ad voluntatem eligentium*; they chuse a recorder, and after remove him, and constitute another under their common seal; Per Cur. such recorder is removeable at pleasure, and

2 Show. 70. the King v. the Mayor of Cambridge.— S. C.—If a

Corporation have power to remove at their will and pleaſure, this will muſt be expreſſed under their common ſeal; but in a return to a mandamus debito modo amotus is ſufficient. Vent. 355. Trin. 33 Car. 2. B. R. Haddock's Caſe.

ſuch removal is *not neceſſary to be* * *under their common ſeal, unleſs he was conſtituted under their common ſeal*, (though it was objected that a Corporation aggregate cannot determine their will but under their common ſeal, and that that was not ſhewn) and now it is well enough, the new recorder being conſtituted under their common ſeal, which act removes the other. Vent. 342. Trin. 31 Car. 2. B. R. Pepis's Caſe.

(P. 2) Removeable *without Cauſe ſhewn* or not.

Vent. 342. S. C by the name of Pepis's Caſe.

1. A Corporation have power to chuſe *a Recorder* by charter *ad terminum vitæ* or *ad libitum*; they chuſe J. S. recorder, and afterwards removed him, and held good without ſhewing cauſe. 2 Show. 70. Trin. 31 Car. 2. B. R. The King v. the Mayor &c. of Cambridge.

(Q) Officer. *Receiver-General*; *what* Things *he may do.*

So if the diſtreſs is taken for rent by the Lord's bailiff, the General Receiver cannot make deliverance without the command of his Lord. Br. Office & Off. pl. 5. cites S. C.

[1. MY Receiver-general has not power *to make deliverance of a diſtreſs taken by me.* 2 H. 4. 15. b.]

(R) *Inconſiſtant Offices.*

Roll. R. 455.

1. A *Foreſter is made Judge*, the other inferior office is gone. Roll. R. 452. cites D. 29 H. 8. Br. Offices.

Br. N. C. 5 Mar. 1. pl. 498.

2. If *an incumbent of a benefice be made a Biſhop*, the firſt benefice is void; for he who has the office of the ſovereignty cannot have the office of the inferior, by ſome of the Juſtices; but quære; for *a Juſtice of B. R. may be a Juſtice in oyer, or of oyer and terminer, or of the peace, or of gaol delivery*, and *yet if they err* in their pleas in the oyer, or in the oyer and terminer, or their proceſs or outlawry, before Juſtices of the peace, writ of *error lies thereof before the King in his bench*, but the pleas in B. R. are held coram Rege ubicunque fuerit in Anglia, and ſo is a Court removeable, viz B. R. and by the ſtatute of Magna Charta C. B. teneantur in loco certo, then it is contrary to the oath of the Juſtice of the one Court and the other; for the one is certain, and the other is uncertain. Br. Commiſſions, pl. 25. cites 5 M. 1.

3. The

3. The *making a Juſtice of C. B. a Juſtice of B. R.* determines and drowns the inferior authority of being Juſtice of C. B. And it is impertinent, that one may reverſe his own judgment, as in this caſe he might by error brought in B. R. but the ſame perſon has been *Juſtice of C. B. and Chief Baron of the Exchequer*, as Brooke was in the time of H. 8. and Starkie in H. 7th's time. Held by ſix J. againſt two. D. 158. b. pl. 34. Paſch. 4 & 5 P. & M. Dyer's Caſe.

S. P. and held accordingly. Cro. C. 128. Mich. 4 Car. B. R. Sir Geo. Crook's Caſe; but for better ſecurity a patent of revocation was made according to a precedent of Juſtice Jones's patent, when he was removed out of C. B. to be Judge in B. R.——And though the conſtituting him Juſtice of B. R. was intended only *pro illa vice*, and that he ſurrendered it the next day, yet the firſt patent is thereby determined. Br. N. C. 5 Mar. 1. pl. 498.—Br. Commiſſions, pl. 25. cites S. C.—Jenk. 214. pl. 53.—*But* a man may be *Juſtice of C. B. and* Juſtice *in oyer and terminer, or of gaol delivery* ſimul & ſemel; for none of thoſe Courts have controlment of the other. Br. N. C. 5 Mar. 1. pl. 498.—Br. Commiſſions, pl. 25. cites S. C.—Knevit was Chief Juſtice and Chancellor together in the time of E. 3. D. 159. pl. 35. marg.

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4. King H. 7. made R. B. *Remembrancer in the Exchequer* by patent *for life, to be occupied by himſelf or his ſufficient deputy*; afterwards King H. 8. made B. *Third Baron of the Exchequer*, the patent of which was, *quamdiu ſe bene geſſerit in the ſame office of baron*. About four years afterwards the King granted a patent of the ſaid office at the requeſt of B. to the ſon of B. pro termino vitæ habend. immediate cum primum & proxim. poſt mortem dicti B. (the father) furſum-redd. vel dimiſſion. ſeu aliquo modo quocunque & quandocunque vacare contigerit: And becauſe thoſe letters patents were inſufficient and void, in as much as the ſaid R. B. had no legal eſtate at the time of making thereof, nor at any time after that he was conſtituted third baron &c. Scire Facias iſſued for the King into Middleſex, to annul and revoke the ſaid letters patents &c. and upon Sci. Fa. returned and default made, the judgment was given accordingly. D. 197. b. pl. 47. Paſch. 3 Eliz. Blage's Caſe.

Roll. R. 452. cites S. C.—— 1 Jo. 295. cites S. C.

5. Diverſe offices have been ſeiſed, becauſe a man had *ſo many, quod eis intendere nequit*; per Noy attorney-general, and judgment accordingly. Jo. 295. 8 Car. in Itin' Windſor, Sir Charles Howard's Caſe.

6. Whether the ſame perſon may be *Mayor and Town-clerk of the ſame vill in which the Mayor is Judge of the Court of Record?* was the queſtion. The Court ſeemed to think he could, but delivered no opinion. Sid. 305. Mich. 18. Car. 2. B. R. Verrior v. the Mayor of Sandwich.

7. *Chief Juſtice* cannot be *Prothonotary of the ſame Court, or Clerk of the papers*, though he may diſpoſe of them; Arg. which the Ch. J. affirmed. Sid. 305. in Caſe of Verrior v. the Mayor of Sandwich.

A judge cannot be an officer. Roll. R. 452. cites D. 115. 3 Mar.—Jo. 295. S. P.

(S) *Aſſignable.* In what Caſes.

Br. Grants, pl. 99. cites S. C.——

1. *Office of* truſt* cannot be aſſign'd over, unleſs it be granted to have to *him and his aſſigns.* Br. Patents, pl. 66. cites 11 E. 4. 1.

* S. P. Br. Grants, pl. 108. cites 21 E. 4. 20.—The office of *Chamberlain of the Exchequer* is granted to A. and his aſſigns. A. may aſſign this office, but not make a deputy without ſpecial words to enable him. Jenk. 141, pl. 89. cites 11 E. 4. 1. By all the Judges in the Exchequer.

Vaugh. 181. cites S. C.

2. The office of *Filazer* is an office of perſonal truſt, to do the buſineſs of the Court, and not aſſignable, nor can execution be upon it. Per Shelley, D. 7. b. pl. 10. Paſch. 28 H. 8. Anon.

3. Office of being *Carver at my table* cannot be aſſign'd. D. 7. b. pl. 10. per Shelley.

4. All *offices of truſt*, as *Steward*, *conſtable*, *bedelary*, *bailiffwick*, muſt be perſonally occupied, unleſs they be granted to be occupied by a deputy, and are not aſſignable. Vaugh. 181. Mich. 20 Car. 2. in Caſe of Bedell v. Conſtable, ſays Littleton, S. 379. is expreſsly ſo.

5. A man's bailiff or *receiver* are offices of perſonal truſt, and not aſſignable; ſo is the office of every *ſervant*. Vaugh. 182. ut ſup.

[134] (T) *Actions.* Deputy and Principal. *In what Caſes* Actions lie *againſt the Deputy, and in what againſt the Principal.*

S. P. per Holt Ch. J. 12 Mod 17. Mich. 1 Annæ, B. R. in Caſe of Lane v. Cotton.—

1. A Servant or Deputy, quatenus ſuch, can't be charged for *neglect*, but the Principal only ſhall be charged for it; but for a *miſfeaſance* an action will lie againſt a ſervant or deputy, but not quatenus a deputy or ſervant, but *as a wrong-doer*. Per Holt Ch. J. 12 Mod. 488. Paſch. 13 W. 3. Lane v. Sir Robert Cotton.

As if a bailiff who has a warrant from the ſheriff to execute a writ, *ſuffer* his priſoner by neglect to *eſcape*, the ſheriff ſhall be charged for it, and not the bailiff; *but if* the bailiff *turn the priſoner looſe*, the action may be brought againſt the bailiff himſelf, for then he is a kind of a wrong-doer, or reſcuer; and it will lye againſt any other that will reſcue in like manner; and for this diverſity vide 1 Le. 146. Cro. 175, 143 41 Ed. 3, 12. 1 Roll. 78. which is not well reported, but the inference may be well made from it. Per Holt Ch. J. 12 Mod. 488. Paſch. 13 W. 3. Lane v. Sir Robert Cotton.

2. The *reaſon* why a principal ſhall anſwer for his deputy is, becauſe as he as principal has power to put him in, ſo he has *power to put him out*, without ſhewing any cauſe, and that tho' he had expreſsly given him an *eſtate for life* in the deputation. Per Holt Ch. J. 12 Mod. 488, 489.——cites Hob. 13.—Mo. 856.—39 H. 6, 34.

(U) *Remedy*

(U) *Remedy to recover*, or be admitted into *Offices*.

1. 13 *E.* 1. cap. 25. GIVES aſſiſe *of novel diſſeiſin for bailiwicks and other offices in fee, and that in ſuch caſes the writ ſhall be (as in other caſes)* de libero tenemento.

Aſſiſe is given of an office by the ſtatute, becauſe, as ſome thought, office was not accounted franktenement at common law, and by ſome for haſty remedy. Br. Precipe, pl. 19. cites 10 Aſſ. 11.

This ſtatute as to the offices, was but a declaration of the common law, and to remove a doubt which then was, and ſo the words therein (jacet de cætero &c.) are to be intended, that jacet de cætero *abſque difficultate*. 8 Rep. 47. b. in Jehu Webb's Caſe.—And made herein in affirmance of the common law, altho' it mentions offices in fee only, yet ſuch as have offices in tail, or for life, ſhall have an aſſiſe; and tho' the words of the act are general, yet the act is to be *intended of offices of profit*, and not of offices of charge, and no profit. But it extends to offices *in the Admiral* Court, *Eccleſiaſtical* Court, *or any other Court where* either the civil or eccleſiaſtical law, *or any other law than the common law* &c. *of England doth rule*, as well as to offices in Temporal Courts, which are governed by the common law. 2 Inſt. 412.——8 Rep. 47. a. b. cites abundance of Caſes in Jehu Webb's Caſe.

If a man be *diſſeis'd of the whole office*, he ſhall have an *aſſiſe de officio cum pertinentiis*. And albeit the ſtatute ſpeaketh de officiis, yet if it he be *diſſeis'd of parcel of the profits*, he may have an *aſſiſe of that parcel*. 2 Inſt. 412.

The *office muſt be in certo loco*, which is to be ſo underſtood, as tho' the office be removable, yet it muſt be in certo loco, *when the aſſiſe is brought*. 2 Inſt. 412.—S. P. for the clauſe of (de proficuo in certo loco capiendo) extends to eſtovers &c. and not to the clauſe of offices. 8 Rep. 47. b. in Jehu Webb's Caſe, cites 4 E. 4. 2.

2. A writ of *entry in the Quibus* lies upon diſſeiſin of an office. F. N. B. 192. (E.)

3. If an *office extends into diverſe towns, hundreds or counties*, it is an office for which an *aſſiſe lies* of the profits, *by the ſtat. Weſt.* 2. where note, if an office extends into diverſe vills or counties &c. an aſſiſe lies for the profits *in any vill or hamlet where the grantee is ouſted*; for the profits are things ſeverable. F. N. B. 179. [416.]

4. If one be *ſheriff or bailiff of an hundred, or manor*, for life, [135] if he be *ouſted* of the office, he *may have a writ* or plaint *within the ſhrievalty or bailiwick* of ſuch county, city, hundred or manor *without ſhewing in which of the vills*, becauſe well known. Ibid.

5. *But* if it be *for the bedelry of an honour* &c. there he ought to bring his *writ in all the vills where the office extends*. Alſo in the former caſe, the hundred or county (city) ſhall be put in *view*; ſee theſe books. 16 E. 2. Aſſ. 370. 18 E. 2. Aſſ. 377. 8 E. 3. 56. F. N. B. 179. [416.]

6. If the *King grants 6 d. on each ſack of wool within the county of York*, the grantee ſhall have an *aſſiſe of the profits in any particular place within the county where he is diſturbed*. F. N. B. 179. [416.]

7. *But* if he brings an *aſſiſe of the office*, the *whole county ſhall be put in view* as in the principal caſe [which ſee at (W) pl. 2. NORRIS v. CONISBROOK.] was held, ſeeing the office there extended into diverſe counties, (for 'twas averr'd to be *within the liberties of London* &c.) therefore the *aſſiſe* for the office ſhould be *brought in confinio comitat. but for the profits* it may be brought *in any place or vill where the diſſeiſin is*. F. N. B. 179. [417.]

8. *But* then how ſhall it be *in caſe the office extends throughout England*; and it ſeems to be moſt reaſonable, that the office ſhould be ſeverable, becauſe it does not charge the land, but only reſpects the perſon; and therefore he may alſo have an aſſiſe of his office *in whatever place he is diſſeiſed*; as ſuppoſe he diſſeiſed him of his office of meaſurer in ſuch a town &c. ſee there the Caſe of the Uſher of the Exchequer. 22 H. 6. 10, 11. Et poſtea partes concordaver. See an aſſiſe of the office of Filacer, and the poſt put in view. Dyer 14. DAUX's Caſe; and if it be an *office concerning land*, it ſeems he ought to *name the tenant of the ſoil*. 8 E. 1. Aſſ. 285. F. N. B. 179. (K) in the notes there (a), and in the new page 417.

9. A. and B. being *under-wardens of the Fleet, granted the office of Clerk of the Fleet priſon to J. S.* on his payment of 900 l. to them, and giving 2000 l. bond for the faithful diſcharge of his office. The under-warden's place came afterwards to D. who ſeiſed the books and papers of J. S. relating to the clerk's office, and granted it to W. R. Upon a bill by J. S. it was decreed that he be reſtored to the office, and to have an account of the profits ſince his being turned out; but the plaintiff's title (which was controverted by the defendant's) was not to be better'd by the decree, nor is he to be reliev'd thereby againſt damages which W. R. may recover; and the 2000 l. bond to ſtand as a ſecurity to W. R. to indemnify him againſt any damages he hath, or may ſuffer, by any act of the plaintiff by reaſon of his ſaid office. Fin. R. 50. Hill. 25 Car. 2. 1673. Meakin v. Witchcott, Duckenfield & al.

10. The Marſhal of B. R. having not attended for 2 terms, another was ſworn into his place; but (as the Court declared) without prejudice to his right to the office; for that was left to the law. The new marſhal, to get poſſeſſion, made a forcible entry into the priſon; and a motion being made, that the Court, in regard of the power they had over their officer, would interpoſe and quiet the poſſeſſion till the title be legally ſettled, and the rather, becauſe it would look diſreſpectful in him to apply to an inferior juriſdiction to have an inquiſition of forcible entry; and that the Juſtices of the Peace would hardly dare to meddle with it, by reaſon of its immediate dependency on this Court. But the Court ſaid there could be no diſreſpect in uſing the remedy the law gives; that this would be to hold plea of forcible entry by parol, whereas B. R. has no original juriſdiction of forcible entry, and currat lex; for it is a queſtion of right between two contending officers. 6 Mod. 91. Hill. 2 Annæ. B. R. Sutton's Caſe.

According to the ſtate of the caſe the ſurrender was previous to A's [136] entry into, and enjoy-

11. A. being in poſſeſſion of the office of *Clerk of the Crown &c. in B. R.* by the death of one former grantee, and the ſurrender of the other, *ſolicited a new patent*, and therein *to add the life of B.* to that of his own, and the patent to be made Tenendum by B. or deputy, during his life after A's death; *and takes a note from B. in the mean time, promiſing to execute a declaration of truſt, and declaring that his name is us'd in truſt for A. his*

his executors and aſſignees. The patent was afterwards had. A. died very much in debt, and without ever calling on B. for a declaration of truſt. The Maſter of the Rolls (before whom this Caſe was firſt heard) thought that B. was intitled to this office in his own right, and not as a truſtee, notwithſtanding ſuch note; that conſidering that an office relating to the adminiſtration of juſtice, and particularly this of the Crown Office, highly concerns the Public as to the due execution thereof, and that ſuch office is not to be conſidered as the private property of the perſon enjoying it, independently of his ſkill and integrity in the diſcharge of his duty; and therefore ſuch grants being made upon this foundation, the *Crown ought to be privy to any truſt to be declared by the grantee*, and the ability and integrity of ſuch ceſty que truſt be known and approved: beſides he thought the note could not be conſtru'd as a preſent declaration of truſt, but referr'd to a future act. And that the inſolvency of A. could not affect a matter of this conſequence, in which the Crown and the Public muſt be conſidered prior, and preferable to the caſe of Creditors; and ſo diſmiſs'd the bill brought againſt B. But upon a re-hearing before the Ld. Chancellor, his Lordſhip thought the note proper for a preſent declaration of truſt; and that it ought to be carried into execution: that all truſts relate to ſome future act to be done, and this does no more. And ſo reverſed the decree; but order'd the Maſter to make B. a liberal allowance. Caſes in Chan. in Lord Talbot's time. 97. Trin. 9 Geo. 2. Bellamy v. Burrow.

ment of office; but page 107. it ſeems by what Lord Chancellor ſays, that A. was in the office prior to the ſurrender, and had it for his own life, and the life of the ſurrenderor, in whoſe ſtead a grant was obtain'd for B's life.

(W) Remedy for Recovery of, or to be admitted to Offices. *Count.*

1. AN aſſiſe was brought de libero tenemento of the office of *Filacer*, and the plaintiff *made his title in his plaint, and alleged the cuſtom for the Chief Juſtice to grant*, &c. and *that B. Ch. J. granted it to him when the office was void*; that he was *admitted and ſworn, and had ſeiſin by taking 3 d. for a capias in a plea of treſpaſs againſt C. D.* and the *place where the plaintiff ſat upon his admiſſion to the office was put in view.* But having been admitted Filacer, he was put out of his office by the Court for abſenting himſelf, and letting his office to farm, without licence of the Court, and one of the defendants was put into his place; but no record made of it, nor was he called to anſwer for himſelf: but the Ch. J. diſcharged him ex aſſenſu ſociorum ſuorum by parol, openly in the Court, calling the now plaintiff to him; and this being well prov'd, was a good diſcharge, and no cauſe of aſſiſe. D. 114. b. pl. 63. Paſch. 2 and 3 P. & M. Vaux v. Jeffern, Lynton and Keeble.

S. C. cited 8 Rep. 47. b. in John Webb's Caſe.—— Hard. 127. Arg. cites S. C. and ſays that the refuſing to let this matter be inquir'd of was, becauſe the Court having determined the matter of fact, this was rather a point of trial than a judgment, and therefore ſhall now be inquir'd into.

2. An aſſiſe was brought in Middleſex of the profits of the

office of packing woolls &c. within the liberties of London, granted by the King, by NORRIS v. CONISBROOK, and 'twas agreed; 1. that the plaint in an aſſiſe ſhall never abate for want of form; and therefore, tho' the courſe is an aſſiſe of office or corody, or common apprender, &c. to *ſhew the diſſeiſin, and then the title*; yet if he ſhews the title and then the diſſeiſin, it ſhall not abate. 9 E. 4. 6. But in thoſe caſes *where he makes title in his plaint*, (as regularly he ought to do in an aſſiſe of office, corody &c. (yet ſee Raſt, Entr. 75. Hors de ſon fee, pleaded in part of an aſſiſe of rent. 15 E. 4. 24. or of land, 40 E. 3. 38.) there *he ought to make his plaint to purſue his title*, as if a grant be made to have the ſurveying and packing of all cloths which ſhould go beyond ſea, he ought to ſhew that thoſe cloths of which he was ouſted the ſurveying, were cloths to go beyond ſea. 2. He who
[137] makes a plaint in an aſſiſe of office, *need not be ſo preciſe in ſetting out his title, as if he was to ſue againſt the King by petition*; for one need not make ſo exact a title againſt pernors of profits, as againſt a tenant; and therefore he *need not ſhew who had the office before, or that it was an ancient office.* 9 E. 4. 11. And yet if it was not an ancient office, it ought to be created and granted by the word Conſtituimus &c. 8 E. 4. 6. F. N. B. 179. (K) in the notes there (a), in the new page 416.

3. If one makes a plaint of an office, he *need not ſhew that it is an office of profit, or that fees belong thereto*, 8 E. 4. 22. and yet * if it be only an office of charge, an aſſiſe does not lie thereof, 27 H. 8. 38. but if he be ouſted by a pernor, he has his remedy by ſome original writ, according to his Caſe; and ſo 'tis in caſe of a corody, F. N. B. 179. (K) in the notes there (a), and new page 416. cites 17 E. 2. Nuper obiit 12. in the Caſe of Conſt. 27 H. 8. 12. 4 E. 3. Brief 736, 793, 794.

* 8 Rep. 47. b. in Jehu Webb's Caſe. cites 27 H. 8. 12. and 31 E. 1. Tit. Aſſ. 440. and 21 E. 3. 4. b.—2 Inſt. 412. cites the ſame Caſes.—A. brought aſſiſe of the *office of Maſter of the Tennis Plaies of the King in Weſtminſter* &c. Exception was taken to the plaint, becauſe it ſays that the office aforeſaid is an ancient office in Weſtminſter aforeſaid; and that the King by his letters patents granted &c. but did *not ſhew that any profit belong'd to the ſaid office*; and that a man ſhall not maintain an aſſiſe of office without profit, according to 27 H. 8. 12. But reſolv'd that the plaint was good enough; for true it is, that of an office of charge no aſſiſe lies, as is held in 30 Aſſ. 4. 8 E. 4. 22. and 27 H. 8. 12. and that 30 Aſſ. 4. was aſſiſe brought of the office of Meſſor of the manor of D. cum pertinentiis; and there Shard took a *diverſity between an ancient* office *and a new office*; for in an aſſiſe of a *new office* the plaintiff ought to ſhew what fee or profit is granted for the exerciſe thereof; becauſe it *cannot have fee or profit appurtenant thereto*, as an ancient office may. And the plaintiff had judgment. 8 Rep. 45. b. 49. a. b. 50. Mich. 6 Jac. C. B. Jehu Webb's Caſe.

4. If he be ouſted of the office, then the aſſiſe ſhall be brought of the *office, cum pertinentiis*; for if his plaint be * of the *office and* of the *profits* thereof, he *makes his claim of one thing twice*, and therefore his plaint ſhall abate, 8 E. 4. 22. agreed; and ſo is 30 Aſſ. 4. for the office of † Metor. 2. If one be *ouſted of parcel of the profits of his office*, this *may be alledged to be an ouſter of the whole office*, if the party will, 5 E. 4. 8. per Cur. But if he will, he may make his plaint only of the profits of his office, and if he be ouſted of parcel of the profits, he *may have an aſſiſe of thoſe profits*: ſo * if one has a corody de pane & ſervicia, if he be ouſted of only part of the bread &c. he ſhall have an aſſiſe of the

S.P. 8 Rep. 49. b. cites 22 H. 6. 11. b.—* 8 Rep. 49. b. in Jehu Webb's Caſe, cites 30 Aſſ. 4. S. P. by Burton; and that in ſuch caſe the writ ſhall abate; for by the recovery of

the whole quantity of bread for the neceſſity, but he need not bring an aſſiſe of his corody. 22 H. 6. 10. 3 E. 3 Aſſ. 175. 13 E. 3. Plaint 23. 11 Aſſ. 22. 30 Aſſ. 4. And ſo note a *diverſity* between a *thing ſeverable* and *entire*. F. N. B. 179. (K) in the notes there (a), and in the new page 416.

the office, the fee and profit, as parcel thereof, ſhall be recovered: and ſays, that with

this accords 8 H. 4. 22. b. where in aſſiſe of an office in C. B. he made his *plaint of the office, and fee, and wages, and commodities;* and exception being taken becauſe it was demanding the ſame thing twice, the plaintiff ſaid he had amended his plaint; for it is no other but *of the office of cum pertinentiis;* and tho' Pigot ſaid that then the plaint is not good; becauſe a man ſhall not maintain aſſiſe of an office without profit; yet the Court as to this held the plaint good. And with this accords 5 E. 4. 3. 22 H. 6 9. b. 9 E. 4. 6. a. b.——† The year-book is (meſſor.) As to his office, ſee Pleta 172. lib. 2. cap. 84.—‡ And if he be diſſeiſed of all the bread, he ſhall not plead of the ale; and if he does, his plaint ſhall abate. 8 Rep. 49. b. 50. a. cites 3 E. 3. Aſſiſe 175, by Scroope.

(X) Pleadings.

See (O. 3)

1. ANnuity demanded by office of Parkerſhip granted to him for life, the defendant ſaid that the office was granted to the plaintiff ut ſupra, and that ſuch office had been time out of mind; and *that the keepers had the keeping of the deer and the wood* for the ſame time, *and that from the 2d day of July till the 14th* day of the ſame month, 22 ſavages were killed by perſons unknown, in negligence of the plaintiff. Arderne ſaid that more is in the plea than need to be, viz. that the keepers had the keeping the deer and the wood in park. For this is intended in the law; 'twas held that neglexit cuſtodire is no good iſſue; for neglexit is a denial. Young, *he did not keep the park for* 12 [138] *days ut ſupra.* Per Danby, this *is the better pleading.* Br. Forfeiture de Terres, pl. 54. cites 5 E. 4. 26.

2. When one *preſcribes to have an office, and the profits* thereof, he ought to *ſhew it to be an ancient office.* Cro. J. 605. Mich. 18 Jac. B. R. in Caſe of Dawney v. Dee.

Where one *claim'd the office* of a ſurveyor by grant from

the predeceſſor biſhop in fee, and *averred that* the ſame was *antiquum officium*, it was held naught; becauſe he claim'd the office itſelf by preſcription: ſo if one be impleaded in a quo warranto for the park itſelf, it is no plea to ſay that it was antiquus parcus, but he muſt plead a preſcription for the park. But where *another thing is claim'd as incident to the ſame*, it is otherwiſe; as where a keeper claims *profit of a park by preſcription*, he alleges not a preſcription in the park, but antiquus parcus generally. Hob. 44. in Caſe of Cowper v. Andrews.—10 Rep. 59. b. Trin. 11 Jac. The Biſhop of Saliſbury's Caſe.

[For more of Officer and Offices in general, ſee **Actions, Aſſiſe, Forwards**, and other proper Titles.]

One Entire Conveyance.

(A) *What is*; *tho' done at ſeveral Times*, or conſiſting of ſeveral Parts.

1. IF a man has a manor to which an *advowſon is appendant*, and he makes *feoffment of an acre, and afterwards in the ſame deed grants the advowſon*, this makes the advowſon in groſs; otherwiſe it would be if the feoffment was made of the entire manor. Per Shelly, J. D. 48. b. pl. 3. Paſch. 33 H. 8. Anon.

Mo. 667. S. C.—— Yelv. 23. S. C. affirm'd in error.--There may be *ſeveral deeds* contained *in one piece of parchment*. Arg. Cart. 143. cites Matthewſon's Caſe.

2. One *note of* 40*l.* by which A. acknowledges to have received ſo much of B. *to the uſe of C. and D.* and to repay &c. is as ſeveral bills to C. and D. in one deed, and as divided debts, and they may ſue ſeverally for 20*l.* Cro. E. 729. Mich. 41 and 42 Eliz. C. B. Shaw v. Sherwood, als. Norwood.

3. The *condition of a bond, and the bond*, are but one deed, and the date of the one is the date of the other. Cro. E. 732. Mich. 41 and 42 Eliz. Forth v. Harriſon.

Ow. 126. S. C.

4. *Fine ſur conuſance* &c. come ceo &c. the conuſee *renders* to another in tail, reſerving rent, and by the ſame fine *grants* quod tenementa prædicta integre *remanebunt* to the conuſor and his heirs; reſolved that 'tis a reverſion; for being one fine it enures as if it had been at ſeveral times, and ſhall be intended as rendring the tail at one time, and the reverſion at another time; and ſo is the uſual courſe of fines, and ſo it has been always expounded: but 'tis not ſo in grants by deed. Cro. E. 792. Mich. 42 and 43 Eliz. C. B. White v. Weſt, alias Geriſh.

S. C. cited 6 Mod. 126. in Lord Derwentwater's Caſe.—— 2 Roll. R. 245. Farrowes and Curſon v. Farmer and Ferrers.—— Cro. J. 643. S. C.——

5. *Bargain and ſale, recovery and fine*, tho' made at ſeveral times, yet they all, by the mutual agreement of the parties, make but one aſſurance of one and the ſame manor, according to one and the ſame original bargain and contract; and therefore, every one of them tending to perfect the ſame bargain, none of them ſhall deſtroy any part of it, or ſubvert the true intention of the parties in any thing, but ſhall be taken as one aſſurance, made at one and the ſame time. 2 Rep. 75. Hill. 43 Eliz. C. B. Lord Cromwell's Caſe.

[139] S. C. cited 2 Mod. 234. 235.—Mo. 616. Bullock v. Thorne and Standen.—Mo. 718. Bridges's Caſe.—Per Trevor Ch. J. 11 Mod. 184. in delivering the judgment of the Court, in Caſe of Abbot v. Burton.——G. Equ. R. 17 Paſch. 8 Annæ. Lord Atham v. Lord Angleſey.

6. A. made a *feoffment to B. and C. on condition to infeoff J. S.* the *deeds were all ready to be deliver'd* at the same time; but it happened that *B. and C. delivered their deed first* to J. S. before A. had delivered his to B. and C. and in B. and C.'s deed was a letter of attorney to one to make livery. A. delivered his deed, and afterwards livery was made by virtue of the letter of attorney. Adjudg'd, that the livery was void, because B. and C. had then nothing to pass. Cited 2 Bulf. 304. Hill. 12 Jac. Per Coke Ch. J. as Ld. Dacre's Case.

7. A *deed declaring the uses of a fine*, which was then covenanted to be levied, *and the fine tho' levied several years after*, are but one assurance; per Croke and Montague; for the execution of all things executory respect the original act, and shall have relation thereunto, and all make but one act, tho' done at different times. Cro. J. 510, 512. Mich. 16 Jac. B. R. Havergill v. Hare.

S. P. agreed the deed and fine being between the same parties and concerning the same lands. —4 Mod. 265. Pasch. 6 W. & M. B. R. in Case of Jones v. Morley.

8. If a *proviso* be put in *after the In cujus rei testimonium*, and subscribed to the deed before the sealing of it, this is then part of the deed; if it be after the sealing, yet it may be as a condition annexed to the deed; per Doderidge J. 3 Bulf. 302. Mich. 1 Car. B. R. Thompson v. Butler.

9. *Three several leases by a copyholder in fee* to another for one year each, but two days to intervene between the determination of the first, and the commencement of the second, and so between the second and the third, being *all made at one time*, shall be intended one intire contract. Arg. and seems admitted. Cro. C. 234. Mich. 7 Car. B. R. in Case of Matthews v. Whetton.

10. A *feoffment* first, and afterwards a *fine* by tenant in tail, make but one assurance, and does not operate by way of release or confirmation only. Cro. C. 321. Mich. 9 Car. B. R. King v. Edwards.

Fine and feoffment to the same person and uses, tho' made at *several times*, yet are but one conveyance. 2 Lev. 54. Trin. 24 Car. 2. B. R. Whaley v. Tancred. ——Mod. 252. Trin. 29 Car. 2. C. B. in Case of Addison v. Otway.——D. 157. Putnam v. Duncomb.

11. *Surrender and admittance* to a copyhold shall be accounted one intire act, contrary to other learnings. Arg. Sti. 146. Mich. 24 Car. in Case of Barker v. Denham.

12. *A deed and a will* construed and decreed to be as one intire provision, and limitation, how portions shall be raised, and at what time paid. 2 Chan. Rep. 1. 20 Car. 2. Every v. Gold.

Decreed that a deed and will make but one will. Per Jeffries C. 2 Ch. R. 296. 36 Car. 2. Woodhall v. Benson.

13. Tho' the *limitations of the trust of an inheritance and of a term* are *by several clauses* in the deed, yet all must be taken as one intire conveyance; per Cur. Vent. 195. Pasch. 24 Car. 2. B. R. Sir Ralph Bovey's Case.

14. Hale

3 Bulſ. 216. per Mountague Ch. J.

14. Hale ſaid, that in 1646, a *leaſe for years* was aſſigned, and the *truſt of it entail'd*, and *two days after* the truſt of the *inheritance entail'd* in the ſame manner; and it was held by the beſt counſel then in England, that tho' this was done by *ſeveral deeds*, and *at ſeveral times*, yet being *in purſuance of one agreement*, *all* this was to be taken as one intire act according to the Caſe of 17 Jac. where a fine was levied to the leſſee for years, with intent that he ſhould ſuffer a recovery, which was had the Term following, and reſolved that this Term was not drowned. Vent. 195. in Caſe of Sir Ralph Bovey.

[140] See Chan. Caſes 7. Hill. 13 & 14 Car. 2. in Caſe of GORING v. BICKERSTAFF, where it was held by the Maſter of the Rolls, that two deeds of the ſame date executed at the ſame time, and touching the ſame thing, are to be taken as one aſſurance.

15. A *deed of truſt*, a *jointure deed*, and *articles*, being *all of the ſame date*, were intended to be executed at the ſame time, and to be all as one intire agreement; and therefore a recital in the jointure deed, that it was in conſideration of marriage, and of 4000*l.* paid or ſecured to be paid, as the portion &c. could not be underſtood as any poſitive agreement for 4000*l.* the ſaid articles containing a covenant for payment of 2500*l.* part of the 4000*l.* (the other 1500*l.* being actually paid) and that the ſame ſhould be paid to the huſband (the plaintiff) or his aſſigns, within ſix months next after ſuch purchaſe, and ſettlement as made therein was agreed, and which was to be within four years after; but the wife dying within one month after the marriage, and the huſband exhibiting his bill for the remaining 2500*l.* the Ld. Chancellor, aſſiſted by Rainsford J. diſmiſſed the ſame; for the ſaid recital, as to the 4000*l.* conſideration, muſt be expounded by the articles, to which it does in a manner refer, and conſequently the huſband not intitled to the ſaid 2500*l.* Fin. Rep. 98. to 102. Hill. 25 Car. 2. Cheek v. Ld Liſle and Harvey.

2 Rep. 74. in Lord Cromwell's Caſe.

16. A *condition* or *power* may be *annexed* to an eſtate *by a diſtinct deed* from that which conveys the eſtate, but not unleſs both are ſealed and delivered at the ſame time, and ſo they are but as one deed. Arg. Vent. 279. Hill. 27 & 28 Car. 2. B. R. in the Earl of Leiceſter's Caſe.

2 Lev. 149. S. C. by the name of Wigton v. Garret.—But had the *fine preceded the deed* which declared the uſes, the fine had extinguiſhed the power, and the deed had come too late. Adjudged by three J. againſt one. Vent. 368. 371. Herring v. Brown.——Cumb. 11. S. C.—But adjudged contra by ſix J. and that judgment reverſed; becauſe the conuſor from whom the eſtate firſt moved was more than an ordinary tenant for life, and had an *authority veſted with an intereſt*, and his conveyance was voluntary, and deeds are to be governed by intention of parties. Carth. 23. S. C.—The deed that comes after ſhall be coupled with it, and be accounted but one act. Mich. 1691. Arg. Ch. Prec. 34. cites it as adjudged.——Parl. Caſes 143. S. C. cited in Caſe of Morley v. Jones.——* Per Hale Ch. J. Vent. 250. in the Earl of Leiceſter's Caſe.

17. A *power* was reſerved *to revoke by indenture ſubſcribed and ſealed* with his hand and ſeal, and witneſſed by three witneſſes. He covenants by a deed ſealed and ſubſcribed as aforeſaid, to levy a fine to other uſes, and after the covenant a fine was levied accordingly; tho' it was inſiſted that the *deed was made in one year*, *and the fine levy'd in another*, yet per tot. Cur. the deed and fine taken together were reſolved to be a good execution of power. Vent. 278. Earl of Leiceſter's Caſe.

18. A *fine and recovery and deed to lead the uſes* are but one conveyance; per Holt Ch. J. 2 Chan. Rep. 434. in Caſe of Ld Montague v. Ld Bath.

Deed of uſes and a fine *by an infant* make but one aſſurance; per Seroggs. Mod. 252. Trin. 29 Car. 2. in Caſe of Addiſon v. Otway.—For otherwiſe he might avoid it as he may a deed by infancy. 2 Mod. 238. in marg. of S. C.

19. *Leaſe and releaſe* are but in nature of one deed; per North Ch. J. 2 Mod. 252. in Caſe of Barker v. Keat.—The releaſe does not merge but enlarges the intereſt granted by the leaſe. Arg. Farr. 74. in Caſe of Shortridge v. Lamplugh.

20. Where an *act* is *wholly imperfect* of itſelf, *but is to receive its perfection from a ſubſequent act*, there of neceſſity they muſt be taken as one intire conveyance; as a covenant to ſuffer a reconveyance, or levy a fine; when it is done it is but one conveyance, ſo is a *covenant for further aſſurance, and aſſurance after made.* And there is no incongruity, that an imperfect thing ſhould wait for its perfection from a ſubſequent act; for *nothing paſſes in the mean time;* and ſo is SEYMOR's Caſe. 10 Rep. Skin. 186. Trin. 36 Car. 2. C. B. Herring v. Brown.

But where the *firſt act is of ſufficient* ability to paſs an eſtate, the law will not expect a future act, tho' to ſome collateral purpoſes it would paſs it ſtronger; as in SEYMOR's Caſe likewiſe. Skin. 186. Herring v. Brown.

21. *Demiſe and re-demiſe* are but one conveyance in the law. Arg. N. Ch. R. 169. Mich. 1690. in Caſe of Baden v. the Earl of Pembroke.

22. A *ſtatute* and a *mortgage* were enter'd into for ſecuring payment of legacies charged on lands, to be ſettled by marriage articles &c. but it was *indorſed on the mortgage*, that the ſame was *to be void unleſs* the wife's eſtate (who was then an infant) was ſettled on the huſband for life. It was held that the *indorſement on the mortgage* was ſufficient to diſcharge the ſtatute and articles alſo, all being *executed at one and the ſame time*, having *the ſame witneſſes*, and being *part of the ſame agreement*, and all to be look'd upon as but one conveyance. 2 Vern. 457. Hill. 1703. Laurence v. Blatchford. [141]

23. A *bond* was enter'd into *by A. to B.* for his ſon's fidelity as an apprentice, and a *covenant from B. to A.* that the ſon ſhould account monthly. Per Ld. Wright this ought to be taken as one agreement. 2 Vern. 519. Mich. 1705. Mountague executor of Ewer v. Tidcombe and Hoſkins.

24. *Fine and recovery* to the uſe of himſelf for life, remainder to his 1, 2, &c. ſons in tail, remainder to the right heirs of the feoffor. The lands deſcended a parte materna. The fine and recovery are to be taken as one entire conveyance, conſiſting of theſe ſeveral parts, and directed as to the uſe of them by the ſame covenants; and the heir a parte materna ſhall, on the deceaſe of conuſor without iſſue, have the eſtate, being the ancient uſe. 2 Salk. 590. Trin. 7 Ann. C. B. Abbot v. Burton.

[For more of One Entire Conveyance in general, ſee Power (C) pl. 2. and other proper Titles.]

Oppreſſion.

Oppreſſion.

(A) *What is.* How it muſt be ſet forth, and *in what Caſes relieved.*

1. IT was agreed by the Ld. Keeper Coventry and the whole Court, that if a man did exhibit a *bill* againſt another for oppreſſion, and *layeth* in this bill, *that the defendant did oppreſs A. B. and C. particularly, and an hundred men generally*; that the plaintiff by his witneſſes *muſt prove that* the *defendant hath oppreſſed A. B. and C. particularly*, and ſhall not be allowed to proceed againſt the defendant, upon the oppreſſion of the others laid generally, before his particular oppreſſion of A. B. and C. be prov'd. *But if the charge* laid *be general* and not particular, as if the plaintiff in his bill ſaith, that the defendant hath oppreſſed an hundred men generally, there he may proceed and examine the oppreſſion of any of them. Godb. 438. pl. 583. Mich. 4 Car. in the Star-Chamber. Floyd and Sir Tho. Cannon's Caſe.

2. Alſo *in every oppreſſion there ought to be a threatning* of the party; for the voluntary payment of a greater ſum where a leſſer is due, cannot be ſaid extortion. And afterwards the bill was diſmiſs'd for want of proofs ex parte querentis. Ibid.

3. Coſts were taxed at law, upon a judgment to 15*l.* But a rule was made upon motion, that if defendant paid the coſts taxed, no execution ſhould go out; but becauſe the *coſts were not ſpeedily paid* the plaintiff at law took out a Fi. Fa. and levied at one time 23*l.* and afterwards 65*l.* more, which being oppreſſion, the defendant at law, but plaintiff here, exhibited his bill to be relieved; and the Court decreed the defendant to repay whatever he had levied upon the plaintiff more than the 15*l.*
[142] for the coſts taxed by the ſecondary, and that the Maſter tax the plaintiff's coſts to be paid by the defendant. Fin. Rep. 87. Hill. 25 Car. 2. Sowton v. Spry.

[For more of Oppreſſion in general, ſee Extortion, and other proper Titles.]

Other

Other Action pending.

(A) *What* ſhall be ſaid other Action pending.

1. IN attaint the *tenant pleaded, that her baron, party to the writ, died* 27 *September*, judgment of the writ, the plaintiff ſaid that he was alive, and *they had day craſtin' purific'* and *at the day the plaintiff confeſſed that the baron was dead*, by which the *writ abated*, and *meſne between the day of the death* of the baron *and craſtin' purific' the plaintiff brought other attaint againſt this feme ſole*, and ſhe pleaded that it was purchaſed pending the firſt writ, and becauſe the *judgment of the abatement of the firſt writ has relation to the day of the death*, therefore the 2d writ is good, which was purchaſed before the judgment; for the *firſt was abated in law before*. Br. Relation, pl. 9. cites 12 E. 3. 16.

2. Præcipe quod reddat; at Niſi Prius, the * defendant was *nonſuited* and *purchaſed a new writ bearing teſte meſne between the day of Niſi Prius and the day in Bank*, and this was purchaſed pending the firſt writ, and therefore was *abated*, notwithſtanding the *judgment given at the day in Bank*; for it *ſhall not have relation to the Niſi Prius*. Nota. Br. Brief, pl. 44. cites 40 E. 3. 38.

* It ſhould be (plaintiff) —Br. Jours, pl. 13. cites S. C.—Br. Niſi Prius, pl. 5. cites S. C.

3. Formedon *againſt baron and feme and two others* who *pleaded to the writ, that the demandant at another time brought ſcire facias againſt the feme and the* 2 *when the feme was ſole*, and ſo this writ purchaſed pending the other, judgment of the writ; and becauſe by the taking of the baron by the tenant, the firſt writ was not abated any more than by feoffment made by the tenant to another pending the writ, therefore the [ſecond] writ was abated by award, notwithſtanding that the baron was not party to the firſt writ. Quod nota per judicium. Br. Brief, pl. 45. cites 40 E. 3. 44.

4. A man may have *two writs of treſpaſs* pending together. *Contra of debt and præcipe quod reddat.* For one may do divers treſpaſſes in one day; but in action for debt or land it appears to be one and the ſame thing upon the averment &c. Br. Brief, pl. 17. cites 9 H. 6. 52.

5. Formedon *of land*; the *tenant ſaid, that the demandant had brought formedon of* 10*l. rent*, which is *iſſuing out of the ſame land*, judgment of the writ; and a good plea, per Brian Juſtice; for he cannot have the land and rent alſo out of it; by which the demandant ſaid, that the rent was iſſuing out of other land &c. Br. Brief, pl. 311. cites 3 H. 7. 3.

6. In *Caſe* the plaintiff declar'd, that whereas 16 December, at the requeſt of the defendant, he *deliver'd to the defendant* 100*l.*

to

to the use of the defendant's father, the defendant *promis'd to repay it at or before the first day of May* next ensuing. The defendant pleaded in bar, that plaintiff had brought *account against defendant for the same money, and counted of money bail'd* 10 *December, to which defendant tender'd his law*, and defendant averr'd that it was brought for the same money and pray'd judgment, and adjudged no plea in bar. And in error brought in B. R. Popham
[143] was at first against the judgment, but afterwards the judgment was affirmed, because *damages are recoverable in Case, but not in Account*; and Popham mutata opinione agreed to the judgment. Mo. 458. Mich. 38 & 39 in C. B. and Pasch. 39 Eliz. B. R. Bankby v. Foster.

Noy. 131. S. C. 7. A. *leased to B. for* 21 *years*, and afterwards *leased the same to B. for life, by* the words *Dedi, concessi, dimisi, & ad firmam tradidi. B. enter'd*, and *C. ousted him.* B. brought *warrantia chartæ* in C. B and afterwards (the action in C. B. yet pending) he brought an action of *covenant* in B. R. The defendant pleaded this, and the plaintiff demurr'd and had judgment; for these actions *are of several natures*. The first is *real*, and shall bind the land which the lessor had at the time of the judgment; the other is *personal*, and in that he shall have only damages. Yelv. 139. Mich. 6 Jac. B. R. Pincombe v. Rudge.

8. If in action sur case, the plaintiff *lays two considerations where there is but one*, or vice versa, and it is found against him, he can't be barr'd in a new action. Roll R. 392. Trin. 14 Jac. B. R. per Coke and Doderidge, in Case of Paine v. Sell.

9. Two actions were brought at the same time *for shewage*. In one the plaintiff *prescrib'd for* 2*d. per* 100 *to be paid per alienigenas*; and in the other the prescription was laid for payment of the same duty *tam per indigenas quam per alienigenas*, and the *defendant averr'd that both were for the same duty*, and so pleaded the one in abatement of the other mutually; and so they were both abated. Freem. R. 401. Trin. 1675. The Mayor and Commonalty of London v. B.

(B) *Pleadings* of other *Action* pending *of a superiour Nature.*

1. IN *assise* it was agreed that it is a good *plea that the plaintiff has præcipe quod reddat ad terminum qui præteriit in C. B.* of the same land pending against the same tenant *to which he has appeared*, judgment of the writ; by which the *plaintiff said, that he who pleads it is not tenant, but another named in the writ*; upon which they were at issue; and so see it is a *good plea in one Court, that a writ of a higher nature is pending of it between them in another Court*; and he did *not shew the record of it*, and yet admitted for a good plea. Br. Brief, pl. 282. cites 23 Ass. 14.

2. In *assise* it was admitted for a good plea, that the plaintiff in

in the aſſiſe has *writ of entry in the poſt againſt the tenant* of the ſame tenements, *in which he had the view*; judgment of this writ of a baſer nature pending the other of a higher nature. Br. Brief, pl. 298. cites 29 Aſſ. 66.

3. *Writ of entry in nature of aſſiſe*; the tenant demanded judgment of the writ, becauſe this writ *is purchas'd pending an aſſiſe of novel diſſeiſin of the ſame land*; it was held that where the *ſecond writ is of a more high nature than the firſt* is, there the *firſt writ ſhall abate*, by the beſt opinion there: and per Cotteſmore, writ of entry in nature of aſſiſe, is more high than aſſiſe; for releaſe of actions perſonal is a good bar *in aſſiſe*; and aſſiſe lies againſt diſſeiſor and tenant, and writ of entry in nature of aſſiſe lies againſt the tenant of the franktenement only. Br. Brief, pl. 17. cites 9 H. 6. 50. S. P. Ibid. pl. 172. cites 8 H. 6. 37.

4. In formedon the *parties were at iſſue*; the *tenant ſaid that after the laſt continuance, the demandant has brought againſt him writ of entry in nature of aſſiſe of the ſame land, to which writ the tenant is eſſoign'd*; and demanded judgment of this writ of formedon: And per Newton & Fulth. Becauſe the formedon is more high, therefore it is the better plea, to abate the writ of entry, to *ſay that the demandant has formedon pending* &c. by which the tenant waived this plea. Br. Brief, pl. 189. cites 22 H. 6. 35. [144]

(C) Pleadings of other Actions pending *in another Court.*

1. IN aſſiſe, the *tenant ſaid that after the laſt continuance the plaintiff had brought writ of right againſt him of the ſame land in the Court of the Lord, to which he has appeared*; this is a good plea to the writ of aſſiſe, per Birton, which Hill Juſtice denied, unleſs the *miſe be join'd there*. And ſo ſee that by another writ brought *in another Court*, that writ ſhall ceaſe. Br. Brief, pl. 150. cites 21 E. 3. 25.

2. In aſſiſe, the tenant *ſaid that the plaintiff at another time brought aſſiſe againſt him in the King's Bench, which was adjourn'd till now*; and this writ is purchas'd pending the other, judgment of the writ; the *plaintiff ſaid that the King's Bench was removed into another county*, and *ſo this aſſiſe diſcontinued*; and yet becauſe he confeſs'd that this aſſiſe was brought pending the other, the writ was abated. Br. Brief, pl. 284. cites 25 Aſſ. 5.

3. In *treſpaſs in B. R. of beaſts taken* it is a good plea that the plaintiff has * *replevin pending* of the ſame taking in C. B. to which he has appeared; judgment of the writ; quod nota: and ſo ſee that a man may plead to the writ in one Court by record pending in another Court; and ſo ſee that in debt in the one Court, it is a good plea that he has the like action pending in another Court

* S. P. per Newton Ch. J. Br. Brief, pl. 187. cites 22 H. 6. 15. —— *So that he has writ of detinue*

pending of the ſame goods, for thoſe *affirm property* in the plaintiff; contrary of writ of treſpaſs; Per Newton Ch. J. Note the diverſity. Br. ibid.

Court of the ſame debt, to which the plaintiff has appear'd. Br. Brief, pl. 304. cites 40 Aſſ. 32.

Br. Dette, pl. 35. cites S. C.—Upon an *indebitatus*, the defendant pleads in abatement another action depending for the ſame matter in the *Exchequer*, and doth not ſay, that the plaintiff has declared thereupon; this is naught; *becauſe it can't be traverſed, whether it be for the ſame matter or no.* L. P. R. 7. cites M. 7 W. B. R. and Sparrie's Caſe. 5 Rep. 61.

4. *Debt upon a bond* of 20 l. *in Banco*, the *defendant ſaid* that he has *another action of the ſame debt pending* yet *in the Exchequer by bill*, judgment of the writ; and a good plea; per Mowbray and Finch. clearly, tho' it be in another Court. Br. Brief, pl. 65. cites 43 E. 3. 27.

S. C. cited 5 Rep. 62. in Sparrie's Caſe.—To an action of *trover*, or *debt on bond*, 'tis a good plea to ſay there is another action depending *in the Courts at Weſtminſter* for the ſame matter; *but* that there is an action *in an inferiour Court*, is not good, *unleſs judgment be given.* So in an action of treſpaſs, after the plaintiff has declared 'tis a good plea. R. S. L. 7. cites 5 Co. 62.—Indeb. *aſſumpſit* for horſe-meat, defendant pleaded an action *pending in the Sheriff of London's Court for the ſame cauſe*; and held no plea, becauſe an action pending in an inferiour Court is no bar to an action in a ſuperiour Court for the ſame cauſe. 12 Mod. 204. Mich. 10 W. 3. Brinſby v. Gold.

5. *Debt* upon an obligation *in Bank*; the defendant pleaded to the writ that *ſuch another plaint is brought againſt him in London upon the ſame obligation upon which they are at iſſue*, which is yet pending; judgment &c. Thirn. rul'd the defendant to anſwer. Br. Brief, pl. 107. cites 7 H. 4. 8.

S. P. Br. Eſtoppel, pl. 1. cites 3 H. 6. 15 & 39.

6. Debt upon a *bond* in Banco, and counted that it was *made in London*; Paſton pray'd judgment of the writ, for he has a *plaint* upon the ſame bond yet *pending in N. by which he ſuppoſes the bond to be made in N.* Et non allocatur; for it is out of the caſe of *two actions pending together*, for it *ought to be in one and the ſame Court*; and it is no eſtoppel, for *the other action is only ſuppoſal.* Br. Brief, pl. 8. cites 3 H. 6. 15.

S. P. ibid. pl. 534. cites F. N. B. 275.

7. *In aſſiſe*, if the *tenant pleads that plaintiff has writ of a higher nature pending againſt him in C. B. of the ſame land*, there if they *are at iſſue that no ſuch record*, the tenant may have it certified by certiorari into Chancery, and ſent to them by mittimus; and ſo ſee that it is a good plea, tho' it be in another Court. Br. Brief, pl. 416. cites F. N. B. 244.

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S. C. cited Gibb. 314. and Eyre J. ſaid that the general rule is, that the party ſhall not be twice vexed for the ſame cauſe of action; but then it *muſt appear that*

8. A. brought action upon the caſe for *trover* and converſion of &c. *in the Exchequer* againſt B. The defendant *pleaded* that the plaintiff had *other action upon the caſe pending in B. R. for the ſame trover &c.* and that this ſuit was proſecuted pending the other: judgment of the bill. And upon a demurrer it was reſolved per tot. Cur. that the bill ſhall abate, 1ſt, becauſe of the maxim, *Nemo bis vexari debet, ſi conſtet Curiæ quod ſit pro una & eadem cauſa.* 2. That tho' the firſt action was in another Court, viz. in B. R. or vice verſa, yet the plea is good. But a ſuit brought prior in an inferior Court, ſhall not abate the writ

brought in any of the Courts at Weſtminſter. 5 Rep. 61. a. 62. a. Mich. 32 & 33 Eliz. Sparry's Caſe.

the Court, which was first poſſeſſed of the cauſe,

had juriſdiction, and that it will not be ſo intended, unleſs pleaded. (C. B.) Dudfield v. Warden.— *Legatee infant ſu'd in the Eccleſiaſtical Court*, and pending this *ſued in Chancery*, and allow'd; for this is moſt for his ſecurity. 2 Ch. Caſes 85. Hill. 33 & 34 Car. 2. Howell v. Waldron.

9. If two actions are brought *in different Courts upon the ſame promiſe*, tho' *for different ſums*, the one action may be pleaded in bar of the other. 10 Mod. 285, 286. B. R. Aylwood and Woolley's Caſe.

(D) Pleadings of other Actions pending *againſt different Perſons* for the ſame Thing.

1. *TReſpaſs* of taking his horſe; the *defendant ſaid that the plaintiff has replevin pending of the ſame taking againſt the mayor and commonalty of D. and he is one of the commonalty*; judgment, if to the writ of a more baſe nature &c. and no plea without ſaying that he was one of the commonalty the day of the caption &c. Br. Brief, pl. 433. cites 8 H. 6. 27.

In *treſpaſs* where there is a *replevin* depending for the ſame cauſe, it is a good plea, where there are *no more defendants in the replevin than in the treſpaſs*. R. S. L. 7. cites S. C.

2. If a man ſues *ſcire facias in B. R. againſt A. and B. ſuppoſing them to be tenants, and another* ſcire facias *in C. B. againſt C. and D. ſuppoſing them to be tenants of the ſame land*, the ſuing of the one writ ſhall not abate the other. Per Cur. Br. Brief, pl. 412. cites 11 H. 6. 43.

3. *Præcipe* quod reddat *againſt tenant for term of life* of the land, *and another præcipe of the ſame land againſt him in reverſion as pernour* of the profits; and the *tenant for life pray'd aid of him in reverſion, who joined in aid, and pleaded this matter to the writ*, becauſe the demandant has two writs pending againſt him of the ſame land; and it is adjudged in the books, that the vouchee ſhall plead ſuch pleas in abatement of the writ; and yet the opinion of all the Juſtices of Bank was, that the writ is good, for *he is not twice vexed by the act of the demandant, but by his own act by the joining in aid*; for he is at liberty to join or not, *but upon a voucher he is compell'd to join*: but per Keeble, the vouchee ſhall not have ſuch plea, for he is not twice vex'd by the act of the demandant, but *by his collateral covenant*. And ſo of the tenant by reſceit and garniſhee. Br. Brief, pl. 196. cites 15 H. 7. 8, 9.

4. An action of *treſpaſs* was brought *againſt two*, they *both plead* in abatement *another action* of treſpaſs depending *againſt one alone* for the ſame treſpaſs. Holt Ch. J. doubted, but the other three J. inclined that the plea was good as to both the defendants. Carth. 96. Mich. 1 W. & M. B. R. Rawlinſon v. Oriet and Benſon.

(E) In what Cases it is a *good Plea.*

In aſſiſe it is no plea that this *aſſiſe is purchaſed pending a prior aſſiſe of the ſame land*, if the *plaint* be *not made in the firſt aſſiſe*; for a man does not know of what tenements he will make his plaint. Br. Brief, pl. 271. cites 14 Aſſ. 7.——S. P. Ibid. 296. cites 29 Aſſ. 40.——* Orig. is (place.)

1. IF a man *brings aſſiſe*, and makes his plaint, *and after brings another* aſſiſe *of the ſame land*, and *in the one writ is a greater quantity, as* one * plaint contains 40 *foot* &c. *and the other* 100 *foot*; yet the writ ſhall abate; quod nota; and this ſeems to be by appearance to the firſt writ, as appears by the plaint. Br. Brief, pl. 269. cites 12 Aſſ. 1.

2. A man brought *aſſiſe*, and *pending* this the *tenant infeoffed the plaintiff*, and *after the plaintiff brought another aſſiſe againſt the ſame feoffor, who pleaded that this aſſiſe is purchaſed pending the firſt*, & non allocatur; for by the entry of the plaintiff *to take the livery* the firſt aſſiſe was abated; and ſo ſee that an entry ſhall abate a writ in fact, and upon this the writ was awarded good. Br. Brief, pl. 302. cites 35 Aſſ. 4.

3. In *treſpaſs* of taking his ſheep, it is no *plea to the writ, that he has writ of detinue pending of the ſame ſheep, to which he has appeared*, judgment &c. ſed non allocatur; becauſe *they are not of one and the ſame nature.* And ſo ſee that he ſaid that he had appeared to the other writ; for otherwiſe it may be taken in his name by covin; and by action of treſpaſs nothing ſhall be recovered but damages; and by action of detinue, the thing itſelf. Br. Brief, pl. 62. cites 43 E. 3. 23.

But contra of ſcire facias *upon a recovery of land*, &c. Br. Ibid.—*Or where* a man *may be twice damaged.* Br. Ibid.—*But where it is not to recover any thing*, but to repeal a thing, as here, there a man may have two writs pending together; quod quære. Br. Ibid.

4. *Scire facias* in Banco *to repeal letters patents*, the defendant pleaded to the writ, becauſe the plaintiff had another ſcire facias pending there of the ſame matter. Huls ſaid, this is no matter; for a man may have *as many of theſe writs as he will to repeal a patent.* Br. Brief, pl. 103. cites 3 H. 4. 6.

Br. Eſtoppel, pl. 90. cites 22 H. 6. 53. Contra per l'ortington, that if a man brings *an action anceſtrel* againſt me, *and conveys by W. P. his father, and brings other action againſt me, and conveys by T. P. his father*, the uſer of the firſt action ſhall be an eſtoppel.

So, if *J. P. brings an action* againſt me, *and after declaration made he brings another action* againſt me *by name of T. P.* the uſer of the firſt action may be pleaded by way of eſtoppel; per Pole. Br. Eſtoppel, pl. 90. cites 22 H. 6. 53.

5. If I bring *formedon of the gift of N.* and *after bring another writ, and make another conveyance*, the firſt action is no eſtoppel; per Babington; nota. Br. Eſtoppel, pl. 1. cites 3 H. 6. 15. 39.

6. A man may have action *againſt two by ſeveral præcipes, or* action *ſimul & ſemel*; for he cannot recover but once, and he who has not the land may diſclaim or plead nontenure. Br. Maintenance de Brief, pl. 30. cites 4 H. 6. 14. 15.

7. *Debt*

7. *Debt for ſalary* in the art of limner for a year; the *defendant ſaid, that at another time the ſame plaintiff brought another writ of debt of the ſame duty returnable* &c. *and this writ was purchaſed pending the other writ;* judgment of the writ. Per Martin, *this is a good plea in every caſe where the demand is certain;* as in præcipe quod reddat of a carve of land, or the like; but in treſpaſs it is no plea; for the damages are uncertain, & tota Curia concordat. Br. Brief, pl. 211. cites 4 H. 6. 19.

8. In debt, the caſe was that a man *granted an annuity of* 20*l.* per ann. ſolvend' &c. and that *if* it be *arrear* at the day, *that he ſhall forfeit* 10*l. nomine pœnæ;* he brought writ of annuity, and recovered the annuity; the *defendant brought writ of error*, and removed the record, and *pending this the grantee brought writ of* [147] *debt of the penalty* in C. B. and the defendant ſaid, that there is a writ of error pending of the principal annuity; and becauſe the plaintiff had the deed to ſhew, and *this penalty is not any part of that which was adjudged in the firſt action*, therefore per judicium the defendant was awarded to anſwer over. And ſo ſee that tho' no writ of debt lies of the annuity ſo long as the annuity continues, yet writ of debt lies of the penalty; for this is not a thing which ſhall continue, unleſs by laches of the grantor; but where a man recovers land and damages in præcipe quod reddat, and the tenant brings writ of error, the demandant cannot have action of debt of the damages upon the record pending the writ of error; for this action is founded upon the record, but the action upon the principal caſe is founded upon the deed, which cannot be damn'd becauſe the annuity continues; and in the pleading of this matter, the defendant demanded judgment if the Court would take conuſance. Br. Dette, pl. 106. cites 4 H. 6. 31.

9. *Where a man purchaſes two writs of debt* &c. *returnable at one and the ſame day*, and the defendant *appears to both*, both ſhall abate; per tot. Cur. quære inde; but contra if he appears but to one. Br. Brief, pl. 17. cites 9 H. 6. 50.

So of two aſſiſes; per tot. Cur. Br. Ibid.—*But* where a man purchaſes *two writs of one and the ſame nature, the one after the other*, there *the ſecond ſhall abate*; per tot. Cur. Br. Ibid.—*But* if a man purchaſes *two writs*, the *one in one Court*, and the *other in another*, he ſhall not plead the one in abatement of the other; but *if he recovers and ſues execution upon the one*, he ſhall plead it in the other; per Babington. Br. Ibid.

10. If one writ of conſpiracy be *purchaſed pending another writ of the ſame conſpiracy*, yet it ſhall not abate; for ſeveral conſpiracies may be in one and the ſame day; and therefore he pleaded not guilty. Br. Conſpiracy, pl. 18. cites 19 H. 6. 34.

11. In *forger of falſe deeds* the defendant demanded judgment of the writ; becauſe the plaintiff had a like writ of the ſame forgery of deeds, *to which he had appeared*, and this writ purchaſed pending the other; for the writ in this caſe is general, quare diverſa falſa facta fabricavit, or quoddam falſum factum fabricavit, and the *defendant has not pleaded that the plaintiff has counted in the firſt writ, ſo that the certainty may appear*; for which reaſon Newton compared it to the writ of treſpaſs, and awarded

The Reporter, in a nota in 5 Rep. 61. b. in SPARRIE's Caſe, where this Caſe and the Caſe of 5 H. 7. 15. a. b. are cited, ſays,

awarded the defendant to anſwer. 5 Rep. 61. b. cites 20 H. 6. 44. b. 45. a.

that the diverſity between the two caſes is, that in this caſe it is *parcel of the plea to the writ that the plaintiff had declared*, by which he has made the thing certain; but in the Caſe of 5 H. 7. 15. it was not parcel of the plea that the plaintiff had counted. But that the principal Caſe of 5 H. 7. 15. was affirmed to be good law.

12. In *treſpaſs upon* 5 *R.* 2. the defendant *ſaid, that the plaintiff had another writ pending of the ſame entry upon the ſtatute of* 8 *H.* 6. and averr'd that all was one and the ſame entry; and no plea, per Cur. becauſe *nothing is to be recovered but damages*, and no land, as in *præcipe quod reddat*, and diverſe entries may be made in one and the ſame day. Br. Brief, pl. 317. cites 5 H. 7. 15.

This caſe was allow'd; but the reaſon of this caſe, which ſeems to have been miſtaken by the reporter, was plainly ſo ex[illegible] by the Court; it being ſaid that becauſe diverſe treſpaſſes may be done in one and the ſame day, therefore it is no plea (as there it is ſaid) in treſpaſs that other action is pending &c. for the ſame treſpaſs; for by the ſame reaſon, after the plaintiff has recovered in treſpaſs, and brings action for the ſame treſpaſs again, the defendant cannot aver that all is for one and the ſame treſpaſs. 5 Rep. 61. b. in Sparrie's Caſe.

13. In *treſpaſs* it is no plea *that the plaintiff has another writ of treſpaſs of the ſame taking*; per Newton Ch. J. Br. Brief, pl. 187. cites 22 H. 6. 15.

S. P. For ſeveral treſpaſſes may be made upon one day, quod nota; nevertheleſs where he ſays that the plaintiff *has declared in the firſt action*, it is a good plea per 22 H. 6. fo. 52. quod mirum! therefore quære bene. Br. Treſpaſs, pl. 385. cites 19 H. 6. 34.

[148] 14. Where a man *purchaſes two writs, and the defendant appears to both*, there *the ſecond ſhall abate tho' the firſt abates, or that the plaintiff be nonſuited in the firſt*; becauſe a man *ſhall not be* * *twice vexed* for one and the ſame thing *ſimul & ſemel*. Br. Brief, pl. 255. cites 39 H. 6. 12. by Priſot and Danby and the beſt opinion.

Contra if he had not appeared to the firſt. Br. Ibid. per Priſot and Danby, and the beſt opinion.—*And* this is *where the demand is certain*: but *contra* where the *demand is uncertain, as in treſpaſs, aſſiſe &c. before plaint* and count; for thoſe are not certain before plaint or count. Br. Brief, pl. 255, cites 39 H. 6. 12. by Priſot and Danby and the beſt opinion.—5 Rep. 61. Sparrie's Caſe.—* 5 Rep. 61. Mich. 32 & 33 Eliz. in the Exchequer. Sparrie's Caſe.

15. *But* where *a man has two aſſiſes pending*, and is demanded *and is nonſuited in the one, and appears to the other*, now the ſecond ſhall not abate where he is *nonſuited before appearance in the firſt*; for certainty does not appear before the plaint; by Priſot and Danby, and the beſt opinion. Note the diverſity. Br. Ibid.

But if he appears to both and makes plaint, and after is *nonſuited in the firſt*, yet there the ſecond ſhall abate, by Priſot and Danby and the beſt opinion, quod nota. Br. Ibid.—*But* per Aſheton and Moyle, *this is in plea real*, and not in plea perſonal; *and ſo in plea perſonal* it is no plea, if he does not *ſay that the firſt writ is yet pending*; quære inde; for the beſt opinion was, that it ſhall abate, tho' it be not yet pending, for the cauſe aboveſaid. Br. Brief, pl. 255. cites 39 H. 6. 12.—And ſuch another caſe was in the ſame year, fo. 29. where the greater opinion of the Court was clear with Priſot as here; quod nota bene, quia bonus caſus. Ibid.

16 The ancient *difference* in our books is between *writs which comprehend certainty*, as in *debt, detinue &c.* and writs which comprehend *no certainty*, as *aſſiſe, treſpaſs &c.* For in writs certain, (whether real, perſonal, or mixt) it is a good plea to ſay that the writ

writ is purchaſed pending the other. But in writs real or perſonal, where no certainty is contain'd, it is no plea. But *in aſſiſe, treſpaſs &c. after plaint or count* made (which plaint or count reduces the generality of the writ to a certainty) then writ purchaſed after ſuch plaint or count ſhall abate. Mich. 32 & 33 Eliz. in the Exchequer. 5 Rep. 61. Sparry's Caſe.

17. *And* ſo it is, tho' one *action be in C. B. and the other in B. R.* But otherwiſe it is if action of debt be brought in London or Norwich or any other *inferior court, and after in C. B.* In this caſe the ſuit in C. B. which is a more high court, which is purchaſed pending the ſuit by bill in an inferior court ſhall not abate. 5 Rep. 62. Sparry's Caſe.—cites 7 H. 4. 8. a. 3 H. 6. 15. a. b. Vid. 43 E. 3. 22. 27. and 7 H. 4. 44. a b. Bermingham's Case. But it is ſaid, 9 E. 4. 53. b. that all the King's Courts at Weſtminſter have been time out of mind, and ſo no man can know which of them is the moſt ancient. Ibid. in the Exchequer.

18. *Nemo debet bis vexari, ſi conſtet Curiæ, quod ſit pro una & eadem cauſa.* Vid. Maxims.

(F) Pleadings. *How* the Pleading muſt be.

1. *Conſpiracy* againſt 2, eo quod *ceperunt* 20 *impes felonice*, where per Forſcu it ſhould be *cepiſſent*, & non allocatur; but the writ awarded good, for it *agrees with the indictment*; by which they ſaid that it was purchaſed pending another writ of the ſame conſpiracy, judgment of the writ, & non allocatur, no more than in treſpaſs, for 20 treſpaſſes or 20 conſpiracies may be made in one day and place. Br. Brief, pl. 177. cites 19 H. 6. 34.

2. In *treſpaſs* the *defendant ſaid, that the plaintiff had another writ pending againſt him of the ſame treſpaſs, upon which he has declared*, judgment of the writ. Aſhton ſaid, this is no plea if he *does not ſay that he recovered and ſu'd execution.* And the Court awarded that the writ ſhall abate, quod mirum! for the contrary [149] ſeems to be law. Br. Brief, pl. 191. cites 22 H 6. 52.

3. In *appeal* the defendant ſaid, that the plaintiff has *another appeal pending of it, of a prior date*, which is of record here, judgment of the writ; and no plea, *without ſaying that the plaintiff appeared to it*; for it may be done by covin of a ſtranger &c. Br. Brief, pl. 467. cites 7 H. 7. 6.

4. A. *quare impedit* was brought *againſt the biſhop*, and afterwards *another* was brought *againſt the biſhop and incumbent*, who plead the other action againſt the biſhop only, and that the diſturbance in either declaration is one and the ſame. The plaintiff *replied that the firſt writ was brought for another diſturbance, and traverſes*, abſque hoc that they are one and the ſame impediment. But upon demurrer it was adjudged a good plea in abatement; for tho' the preſentation and diſturbance are both in queſtion, yet the *preſentation is the main, and the diſturbance*

only as acceſſory. Brownl. 163. Trin. 14 Jac. Bedford (Earl) v. Biſhop of Exeter.

5. In an action of *debt tam quam* upon a penal ſtatute; the defendant pleaded, that there was another depending for the ſame thing, and becauſe he *did not ſay, that the other was depending before this was brought*, it was held to be no plea; for perhaps after this was brought, the ſame term the defendant might procure ſome fraud covenouſly to proſecute another. Freem. Rep. 400. Trin. 1675. Hutcheſon v. Thomas.

6. *Caſe* againſt B. K. *by a wrong name.* The defendant *pleaded in abatement.* Thereupon the plaintiff, without proceeding further, *brought a new action againſt him by his right name*, to which defendant pleaded another action pending. And per Holt Ch. J. the plaintiff ſhould have diſcontinued the firſt action, but it will be too late to do it now; for the diſcontinuance will relate only to the time of its being enter'd on record; ſo that nul tiel record will be againſt him; for it was pending at the plea pleaded. 1 Salk. 329. Hill. 2 Ann. B. R. Knight's Caſe.

7. In *indebitatus aſſumpſit* for goods ſold and deliver'd the defendant pleaded, *quod ipſe ad narrationem prædictam reſpondere non debet, becauſe* there is *another action pending ex eadem cauſa in C. B.* Per Cur. This is not a demurrer to your declaration, or a plea in bar, but in abatement of the declaration, and *reſpondeat ulterius was awarded.* 6 Mod. 157. Paſch. 3 Ann. B. R. Rowſton v. Combat.

8. In action on the caſe for ſeveral *promiſes for work and labour done in the pariſh of St. Mary le Bow, London*, the defendant pleaded in abatement, that the *plaintiff had libel'ed in the Admiralty* for the ſame cauſe of action. But upon a demurrer it was ruled according to Sparry's Case, that the defendant ſhould anſwer over, the priority of ſuit in an inferior court being no plea to an action brought in any of the Courts at Weſtminſter. And Eyre Ch. J. ſaid, that the general rule is, that a party ſhall not be twice vexed for the ſame cauſe of action; but then it *muſt appear that the Court* which was *firſt poſſeſs'd of the cauſe had juriſdiction*, and that in this caſe the cauſe of action muſt be taken to have aroſe where it is laid, viz. in London, that being not contradicted by the plea; that *nothing ſhall be intended within the juriſdiction of an inferior court but what is averred ſo to be*, and therefore it not being averred that the cauſe of action here aroſe *ſuper altum mare* it muſt be taken that the Admiralty had no juriſdiction thereof; that the plea does *not aver that the plaintiff had declared* in the Admiralty, and therefore it being *in caſe, the demand is not reduced to a certainty*, and then it cannot be ſaid whether it is the ſame cauſe of action or not. And Forteſcue J. ſaid it was within the rule of Sparry's Caſe, which he ſaid was never denied. Gibb. 313, 314. Trin. 5 Geo. 2. C. B. Dudfield v. Warden.

Overſeers of the Poor.

(A) *Appointed who, by whom, and how.*

1. THE Juſtices of the Peace, who have the appointing of overſeers, muſt be careful to chooſe ſuch men as in every town are fitteſt, viz. *ſubſtantial perſons who have competency* of wealth, wiſdom and a good conſcience. And they muſt be *houſholders* and *not ſojourners* however otherwiſe qualified. Dalt. Juſt. 216. chap. 73. ſ. 2.

2. By Stat. 43 *Eliz.* overſeers of the poor muſt be *appointed* by the 2 next Juſtices of Peace; and per Holt Ch. J. an *appeal* will not lie, but Eyre J. doubted. Carth. 161. Mich. 2 W. & M. B. R. The King v. Moor.

3. A *citizen of London*, who had *a country-houſe* at H. and lived in it in the Summer, was choſe overſeer of the poor there; but the Court diſapproved it. Carth. 161. Mich. 2 W. & M. B. R. The King and Queen v. Moor.

4. Two Juſtices made an order for J. S. to take upon him the office of overſeer; exception was taken, 1. That it did not *appear* by the order *that J. S. was an inhabitant or houſekeeper.* 2. That the order *appointed him overſeer of that part of the pariſh that lies in Middleſex, (the pariſh extending into London and Middleſex.)* The Court ſeem'd to think the appointment ought to have been for the whole pariſh, and afterwards they might order him to meddle only with ſuch a diviſion. 6 Mod. 77. Mich. 2 Annæ, B. R. St. Andrew's Pariſh's Caſe.

Nelſ. Juſt. 540. cites S. C.—— Juſt. Caſe-Law 23. cites S. C.—— 2 Shaw's Pract. Juſt. 34. cites S. C.

(B) *Their Power.*

1. THE church-wardens and overſeers may, by and with the conſent of two or more Juſtices of Peace (whereof one to be of the quorum &c.) within their reſpective limits where there are more than one, or if but one, then by his conſent, *ſet up*, uſe and occupy *any trade, myſtery or occupation, for the ſetting on work* only and better relief of the poor of the pariſh, town or place where they are overſeers. Dalt. Juſt. 216. cap. 73. ſ. 6.

2. Churchwardens and overſeers may *make a rate* of themſelves. 2 Salk. 531. Hill. 2 Annæ, B. R. Tawney's Caſe.

So it be confirmed by Juſtices of Peace, and if refuſed to be paid, may be diſtrained for; and there ought to be a *monthly rate*, becauſe of poſſeſſors changing. 6 Mod. 98. Hill. 2 Annæ, B. R. S. C. by name of the Queen v. Littleport.

3. It is *diſcretionary* in overſeer to *provide neceſſaries, or pay weekly rates.* Juſt. Caſe Law 231. cites 2 Shaw 140. and Style 246.—2 Shaw's Pract. Juſt. 32. cites S. C. (but Style is miſcited.)

4. 5 *Geo.* 1. *cap.* 8. *ſ.* 1. enacts, That *it ſhall be lawful for the church-wardens or overſeers, where any wife or children ſhall be left by their huſbands, fathers or mothers, on the charge of ſuch pariſh, by warrant or order from any two Juſtices of Peace, to ſeiſe ſo much of the goods, and receive ſo much of the annual rents and profits of the lands of ſuch huſband, father or mother, as ſuch Juſtices ſhall direct, for the diſcharge of the pariſh for the providing for ſuch wife &c. which order being confirmed at the next quarter-ſeſſions, the Juſtices at ſuch ſeſſions* [151] *may make an order to diſpoſe of ſuch goods by ſale or otherwiſe, and to receive the rents and profits &c. for the purpoſes aforeſaid.*

5. 9 *Geo. cap.* 7. *ſ.* 4. enacts, That *the church-wardens and overſeers, with the conſent of the pariſhioners or inhabitants in veſtry may purchaſe or hire houſes in the pariſh &c. and contract with perſons for the lodging, maintaining and employing ſuch poor in their pariſhes &c. as ſhall deſire relief; and if any poor perſon ſhall refuſe to be lodged in ſuch houſe, he ſhall be put out of the books, and ſhall not be intitled to relief; and two or more ſuch pariſhes &c. with like conſent, with the approbation of a Juſtice of Peace dwelling in or near ſuch pariſh &c. may unite in purchaſing or hiring ſuch a houſe: and the church-wardens and overſeers of any pariſh &c. with the like conſent &c. may contract with the church-wardens and overſeers of any other pariſh &c. for the lodging, maintaining or imploying of any poor perſons, &c. provided that no perſon, his apprentice or children, ſhall acquire a ſettlement in the pariſh &c. to which they are removed by virtue of this act.*

(C) *Orders of Juſtices &c. as to Overſeers.*

1. THE Juſtices, by the general words of the ſtatute, have power to *name overſeers in all pariſhes*, which muſt *extend to extraparochial places*, as well as to pariſhes in general; for where there is the ſame inconvenience, it ſhould be ſubject to the control of the Juſtices, and moſt of the *Foreſts* in England are extra-parochial, but they ought to maintain their own poor. Nelſ. Juſt. 539.

2. Three Juſtices took the account of * overſeers &c. of T. for the year 1697. and adjudged that there was thereupon due from them to the pariſhioners of T. 69 l 8 s. 10 d. *for the repayment* thereof *to the ſucceeding overſeers* for the year 1698, the *Juſtices made an order*; to which it was excepted, that the Juſtices had no power to make ſuch order, but only to iſſue warrants to diſtrain; but the Court ruled the order to be well made, and confirmed the ſame. 2 Salk. 484. Hill. 10 W. 3. B. R. The Church-wardens of Topſham's Caſe.

* Orig. Church-wardens.—Nelſ. Juſt. 538. cites S. C.—Juſt. Caſe-Law 232. cites S. C. and Black. 226.—2 Shaw's Pract. Juſt. 35. cites S. C.

3. 'Twas

3. 'Twas moved to quaſh an order of ſeſſions, which was made *to pay a ſurgeon's bill*, who had cured a poor perſon; and urged that the Juſtices have no power to make ſuch an order, for 'twas trying a quantum meruit. Holt Ch. J. If a ſurgeon cure a ſick perſon that is poor, he muſt have his *action againſt the overſeers* of the pariſh, *and then the Juſtices make an order to reimburſe the overſeers*; but they can't make ſuch an order as this; for an action is the *proper courſe*. Therefore quaſhed. 11 Mod. 178. Trin. 7 Ann. The Queen v. Inhabitants of Belzim St. Paul's.

4. Upon complaint of A. executor of B. overſeer of Thame in the year 1699. and that he had expended the ſum of 16l. in the execution of his office, and is not yet reimburs'd, the Seſſions order'd all parties concern'd to attend three Juſtices. and they to report it to the next ſeſſions, who reported that the ſum of 16l. was actually laid out, and that it has not yet been repaid; and that it ought to be paid to the executor. The Juſtices at the ſeſſions confirm'd the ſaid order; which order was quaſhed in B. R. for, 1. the overſeers are *not bound to lay out money out of their own pockets*; for there is a remedy given by the ſtatute, viz. by weekly taxation; *and no rate can be made to reimburſe them*, and it was adjudged in * *Townly's* Caſe ſome years ago, where a mandamus went; but upon the return it was held ill, and quaſh'd. And the ſtatute gives no proviſional remedy, but ſays if there be any *money left in the hands of the overſeer*, it *ſhall be tranſmitted over to the ſucceſſor*. Beſides, in this caſe there would be a great inconvenience; for the money in this caſe has been due thirteen years; and a perſon who is now become a pariſhioner, would be liable to contribute to a debt, when perhaps he then lived 40 miles off: and per Powis J. thoſe ought only to be contributory who were livers there the year before, and none elſe. Poor's Settlements 48. pl. 71. Mich. 12 Ann. B. R. The Inhabitants of Ware v. Petit Executor of Town.

* Vide (E). Tawney's Caſe, ſeems to be S. C.

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(D) Orders of Juſtices &c. *as to* Overſeers *Accounts.*

1. OVerſeers upon ſummons gave *a general account* of receipts and diſburſements, but refuſing to give a particular account, or to produce the books by which they received the monies on the rates aſſeſs'd &c. two Juſtices *commit them till* they ſhould make a true account &c. Per tot. Cur. The Juſtices have no authority to commit in this manner by the ſtat. 43 El. becauſe an account was confeſſed to have been rendred &c. Show. 395. Paſch. 4 W. & M. The King v. Carrock.

2. Overſeer may be *committed* till he *account*, by the ſtat. 43 El. Arg. Comb. 305. Mich. 6 W. & M. in Clerk's Caſe.

An overſeer was *indicted* at ſeſſions, and Holt Ch. J. ſaid that an indictment at ſeſſions ſeem'd to be within the direction of the ſtatute. Comb. 374. Trin. 8 W. 3. The King v. Hummings.——S. C. argued, but adjornatur. 5 Mod. 179.——2 Shaw's Pract.

Pract. Juſt. 31. cites S. C.—Nelſ. Juſt. 539. cites S. C.—2 Shaw's Pract. Juſt. 35. cites S. C.—Juſt. Caſe Law. 232. cites S. C.

Nelſ. Juſt. 538. cites S. C.—— 2 Shaw's Pract. Juſt. 62. cites S. C.—Juſt. Caſe Law. 232. cites S. C.

3. A *mandamus* was granted to two Juſtices of Peace on 43 Eliz. commanding them *to compel the precedent overſeers* of the poor of the pariſh of A. *to come to an account with the preſent* overſeers; and this writ was quaſh'd, 1. becauſe the account by 43 Eliz. is to be given to two Juſtices, and not to the ſucceeding overſeers. 2. Two of the perſons named in the writ, whom the Juſtices were to compel to come to an account, do not appear to have been overſeers. 2 Salk. 525. Hill. 13 W. 3. B. R. Anon.

4. Juſtices of Peace are not abſolute judges of accounts of overſeers of poor, but an *appeal lies* from them *to the Seſſions*, in caſe of overcharge or other wrong; but Juſtices may audit the account of the overſeers *before the year be out*, in caſe he be not *turned out before that time*. Per Cur. 12 Mod. 560. Mich. 10 W. 3. Anon.

5. The defendant being overſeer of the pariſh of Weſtbury in the county of Wilts, and his *accounts* being *allowed and confirmed*, ſeveral years after the pariſh appealed againſt his accounts. And per Cur. The act of parliament being ſilent as to the time, *the pariſh may appeal at any time*. Poor's Settlements 83. pl. 110. The King v. Bouen.

(E) *Puniſhed or aided.*

* This muſt be within 4 days after the end of the year, and after other overſeers are appointed. Ibid. in the marg.—— S. P. Nelſ. [153] Juſt. 538. — † S. P. 2 Shaw's Pract. Juſt. 32.

1. IF the overſeers and churchwardens, or either of them ſhall *refuſe to* make and yield a true and perfect * *account* to the Juſtices of Peace of all ſuch ſums of money as they have received, and of all ſuch ſtock as they have in their hands, any *two Juſtices may commit them* to the common gaol, there to remain without bail till they have made a true account, and ſatisfied and paid (to the new overſeers) ſo much of the ſaid ſum and ſtock as upon the ſaid account ſhall be remaining in his (or their) hands &c. † And if they make a *falſe account*, they may be bound over to the aſſiſes or ſeſſions, and there an indictment may be preferred againſt them. Dalt. Juſt. 224. cap. 73.

S. P. Nelſ. Juſt. 538.

2. Alſo, if any of the overſeers &c. ſhall *refuſe* or deny *to pay* and deliver over to the new overſeers *the arrearages* (ſums of money or ſtock) which ſhall be in their hands, and due, and behind in their account to be made as aforeſaid, any two ſuch Juſtices of Peace may make their warrant to the preſent or ſubſequent overſeers &c. or any of them, to *levy the ſame by diſtreſs and ſale* of the offenders goods, rendring to the parties the overplus; and in defect of ſuch diſtreſs, any two ſuch Juſtices of Peace may commit him or them to the common gaol, there to remain

remain without bail, until payment or delivery of the ſaid ſum, arrearages, and ſtock be made. Dalt. Juſt. 224. cap. 73.

3. An *indictment of* the overſeers of the poor was taken before the Juſtices of the borough of Reading, *for not gathering ſeveral ſums of money taxed on ſeveral of the inhabitants* therein, being certain; exception was taken thereto, ſed non allocatur, but the parties ordered to plead, having notice of the perſons tax'd. 3 Keb. 49. pl. 24. Trin. 24 Car. 2. B. R. The King v. Brown &c. 2 Shaw's Pract. Juſt. 32. cites S. C.—Ibid. 35. cites S. C.—Juſt. Caſe Law, 231. cites S. C.

4. An overſeer was *indicted* for not obeying an order of ſeſſions concerning the ſettlement of a poor man. Cumb. 213. Trin. 5 W. & M. The King v. Pope.

5. Overſeers and church-wardens were *indicted for not making a rate to reimburſe the conſtables*, according to the *ſtatute* 14 *Car.* 2. *cap.* 12. Exception was taken, that the ſtatute only enables them to do ſo by the word *(may)* but does not require it of them as a duty, ſo that they are puniſhable for the omiſſion; ſed non allocatur; for where a ſtatute directs the doing of a thing for the ſake of juſtice, or the publick good, the word (may) *is the ſame as (ſhall)*. 2 Salk. 609. 5 W. & M. B. R. The King and Queen v. Barlow. Carth. 294. S. C.

6. An overſeer *charged the pariſh falſly* with 3 l. for putting out an apprentice, and his accounts are allowed by two Juſtices, but in truth the apprentice was not put out at all; the pariſh complain to the *Seſſions*, and they order, that the late overſeer ſhould *repay* the 3 l. ſo fraudulently obtain'd, with coſts &c. Per Eyre J. This order cannot be maintained; for the ſeſſions have no juriſdiction, but there may be another remedy by indictment &c. Cumb. 287. Trin. 6 W. & M. B. R. Anon.

7. If overſeers of poor, being convened before two Juſtices to make their *accounts*, do *refuſe*, the remedy is to appeal *to Quarter Seſſions*. Per Cur. 12 Mod. 251. Mich. 10 W. 3. Anon.

8. An overſeer *diſburſed his own money, and was turned out of his office* by the Juſtices *before the end of the year*, ſo that he loſt the opportunity of making a rate to re-imburſe himſelf. A mandamus was granted for making a rate to re-imburſe him; but per Holt Ch. J. a *mandamus does not lie* in this caſe, *but only to raiſe money for the relief of the poor*, nor can they make a rate otherwiſe. The act of parliament is expreſsly ſo, and muſt be purſu'd; and per tot. Cur. the mandamus lies not; and ſo it was quaſhed. 2 Salk. 531. Hill. 2 Ann. B. R. Tawny's Caſe. 6 Mod. 97. Hill. 2 Ann. B. R. The Queen v. Littleport. S. C.—8 Mod. 339. S. C. cited and held accordingly. Mich. 11 Geo. The King v. Rotherhith Pariſh.—Nelſ. Juſt. 538. cites S. C.—2 Shaw's Pract. Juſt. 34. cites S. C.—10 Mod. 104. Mich. 11 Ann. B. R. Ware Pariſh's Caſe.—R. S. L. 5 Vol. 24. cites S. C.

9. An overſeer is *not bound to lay out money till he has it;* but if he does, he muſt *make a new rate* for the relief of the poor, and out of that he *may retain to pay himſelf;* and in the caſe above, the overſeer having truſted where he needed not to have done ſo, Holt ſaid, he had not purſu'd the means the ſtatute gave him, and they could not relieve him. 2 Salk. 531. Tawny's Caſe. Nelſ. Juſt. 538. cites S. C.—2 Shaw's Pract. Juſt. 34. cites S. C.—R. S. L. 5 Vol. 24. cites S. C.

10. On

Nelſ. Juſt. 538. cites S. C.—— 2 Shaw's Pract. Juſt. 33. cites S. C.—— Ibid. 35. cites S. C.—R. S. L. 5 Vol. 25, 26. cites S. C.—Juſt. Caſe Law 232. cites S. C.

10. On appeal from *allowance of overſeers accounts*, Seſſions muſt execute their judgment in the ſame manner as two Juſtices ought to do, viz. by ſending firſt their proceſs to diſtrein, and on return thereof that there is no diſtreſs, then to commit him. 2 Salk. 533. Mich. 4 Ann. B. R. The Queen v. Hedges.

Juſt. Caſe Law, 235. cites S. C.

11. If the overſeers make an *unequal rate*, they may be *indicted* and fined for it. 2 Shaw's Pract. Juſt. 43. cites 1 Keb. 173. [but there is no ſuch point there.]

12. An overſeer not accounting is *to be committed till he does account*, and *not till* he be *delivered by due courſe of law*; ſo he cannot be indicted for it as the other is his fixed puniſhment by ſtatute. Juſt. Caſe Law, 232. cites Black. 225.

[For more of Overſeers of the Poor in general, ſee Rates, Seſſions, and other proper Titles.]

Own Act.

(A) Own Act. Binding, or *relieved againſt*, in what Caſes.

1. *RENT ſuſpended* by an entry was ordered in equity to be paid. Toth. 234. cites 30 or 31 Eliz. Tamworth v. Tamworth.

2. By 21 *H.* 8. 4. that executor that proves the will ſhall ſell the land.—When he ſells, if *he himſelf has any right to the land by him ſold*, his right is not gone by that ſtatute. Arg. Godb. 319. Paſch. 21 Jac. in Caſe of Sheffield v. Ratcliffe.

3. If *commiſſioners of bankrupts ſell* the *bankrupt's land, and one has right* to the land ſold, his right is not extinct. Arg. Godb. 319. in Caſe of Sheffield v. Ratcliffe.

4. Land was mortgaged in fee; the mortgagee enters on the eſtate, and dies ſeiſed. The widow of the mortgagee brought *writ of dower* againſt the heirs, *and* after *claims the mortgage*

mortgage money; and decreed accordingly. 2 Chan. Caſes 220. Mich. 28 Car. 2. Noy v. Ellis.

5. Land legatees and money legatees decreed to *abate in proportion*, notwithſtanding an *agreement to the contrary*. 2 Chan. Rep. 155. 31 Car. 2. Bois v. Marſh.

6. The heir apparent, and one who afterwards became *heir ſells in the life of the anceſtor*, and receives the money; the anceſtor dies, the heir is decreed to convey. 2 Chan. Caſes 112. Trin. 34 Car. 2. Clayton v. Duke of Newcaſtle.

7. A. on marriage of his ſon *articled to ſettle an eſtate tail, where he intended only an eſtate for life*, with remainder to his ſons in tail, and A. inſiſting in his anſwer on a clauſe in the articles, that his ſon *ſhould do no waſt*, which would have been repugnant to an eſtate of inheritance. Maſter of the Rolls decreed a ſettlement accordingly, and the articles to be delivered up. 2 Vern. 13. Mich. 1686. Griffith v. Buckle.

8. A man of weak underſtanding was prevailed on to give bond to one of his relations to *ſettle his eſtate to the uſe of* himſelf in tail male, remainder to his next brother in tail male &c. He afterwards *marries, and made a ſettlement* of the eſtate on the marriage, and prayed to have *the bond delivered up*; and it had been decreed accordingly, had he not offered by his bill to ſettle part of the eſtate on his brother. 2 Vern. 189. Mich. 1690. Portington v. Earl of Eglinton. [155] 2 Chan. Caſes 103. Paſch. 34 Car. 2. White v. Small.

9. Tho' a *charter party* is ſo penn'd that no freight can be recovered upon it at law, yet if the owners of the ſhip have a juſt demand, equity will relieve. 2 Vern. 210. Hill. 1690. Edwin v. the Eaſt India Company.

10. A. ſeiſed of Black-acre and White-acre in fee *granted a water-courſe thro' Black-acre and White-acre to B. and his heirs*; *A. covenanted for himſelf, his heirs and aſſigns to cleanſe the ſame*, and that all fines and *recoveries* levied &c. or to be levied &c. of the grounds, *ſhould be and enure to confirm &c.* the ſaid water-courſe; a recovery was afterwards had, and a deed executed declaring the uſes. The water-courſe by meſne aſſignments came to the plaintiff, and Black-acre and White-acre to the defendant. The *plaintiff*, tho' not bound ſo to do, *cleanſed the water-courſe for* 40 *years*, when the defendant built upon the land, and made the cleanſing more difficult and chargeable by the obſtruction occaſioned by the buildings. Plaintiff by his bill prayed an eſtabliſhment of the water-courſe, and that defendant and all claiming under him, might from time to time cleanſe the ſame according to the covenant; it was objected that this was only a perſonal covenant, and not ſtrengthened by the recovery, and that plaintiff, and thoſe under whom he claimed, being ſenſible of it, had ſo long done it at their own charge; but the Court held that it was a covenant running with the land and made good by the recovery, and tho' plaintiff had cleanſed the ſame *at his own charge while the expence was little*, yet ſince the right was plain upon the deed, and the cleanſing made chargeable by the building, it was decreed that defendant Ch. Prec. 39. Hill. 1691. S. C.

ſhould

ſhould do it, and that plaintiff have his coſts. Abr. Equ. Caſes 27. Holms v. Buckley.

11. Where a *deliberate act* is done, tho' it attains not the end deſigned, and ſhould in conſequence prove quite contrary, it is not relievable in equity. 2 Vern. 615. Mich. 1708. Hodges v. Hodges.

[For more of Own Act in general, ſee Agreement, Fraud, and other proper Titles.]

Own Oath.

(A) *Allowed, in what Caſes.*

Chan. Caſes 127. Paſch. 21 Car. 2. Holſcomb v. Rivers S. P.

1. IN regard the *account* in queſtion is *of* 20 *years ſtanding*, the defendant ſhall prove his account by his own oath for what he cannot prove by books and cancelled bonds; for that after ſo many years his own oath muſt be accepted as a proof in this caſe. Chan. Rep. 146. 16 Car. 1. Peyton v. Green.

2. A *conveyance* was made in conſideration of 250*l.* bill ſuggeſts that it was in truſt for the plaintiff, and *no money paid*, but that it was to ſkreen the plaintiff from other creditors, and
[156] therefore prays a *re-conveyance.* Defendant pleaded that the plaintiff was indebted to him by bond 250*l.* which *bond defendant delivered up to the plaintiff*, and thereupon plaintiff gave defendant a *releaſe of all his right &c.* It was ordered that if defendant would poſitively ſwear that plaintiff was indebted to him 250*l.* for money really lent, and paid before the bond given, and that all was due when the conveyance was executed, then the plea ſhould be allow'd. Fin. R. 335. Hill. 30 Car. 2. Hart v. Hergard.

3. A decree whereby the defendant was to be concluded by the *plaintiff's own oath* was for that reaſon reverſed; per Ld. North. Vern. 272. Mich. 1684. Plampin v. Betts.

4. If one *brought in in contempt deny all upon oath*, he is of courſe diſcharged of the contempt; but if he forſwears himſelf, he may be proſecuted for perjury; per Cur. 12 Mod. 511. Paſch. 13 W. 3. The King v. Simms.

5. *Order to pay wages in huſbandry was made* upon the oath of the *ſervant*; it was objected as contrary to the rule of evidence, that the ſervant's oath ſhould be taken in his own cauſe; and as to its being ſet forth, that it is upon hearing of counſel, that does

does not alter the caſe. Beſides there may be other evidence; for tho' perhaps others cannot prove the contract, yet they may prove the ſervice; but it was quaſhed; Holt abſente. 11 Mod. 266. Hill. Ann. B. R. The Queen v. Cecill.

6. *In odium ſpoliatoris* the oath of the injured party ſhall be a good charge on the wrong doer; per Ld. North in confirmation of an order made by Finch C. Vern. 207. Mich. 1683. Childerns v. Saxby.

7. *Sums under* 40*s.* are to be allowed the party on his oath; but then he muſt in his affidavit mention unto whom, for what, and when paid. Vern. 283. Anon.

8. The rule that an accountant ſhall be allowed on his own oath all ſums *not above* 40*s. ſo that the total is not above* 100*l.* was thought unreaſonable by the Court, and would conſider how to rectify it. Vern. 470. Wicherly v. Wicherly.

9. The *defendant* on account *ſhall be diſcharged by his oath* of ſums *under* 40*s.* but a party ſhall not by way of charge *charge* another perſon ſo. 2 Chan. Caſes 249. Everard v. Warren. In account between a gardiner plaintiff, and a ſeedſman defendant, tho' defendant be allowed ſums under 40 s. on his oath as to his ſeeds ſold and delivered &c. yet plaintiff ſhall not be allowed any thing on his oath as to trees that he ſold and delivered to the defendant, or the like. 2 Vern. 176. Mich. 1690. Marchfield v. Weſton.

(B) In what Caſes one may be *relieved*, tho' *againſt his own Oath.*

1. BILL to compel the defendant to perform a *truſt* and to redeem the premiſſes; defendant denies the truſt, and inſiſts that the premiſſes were conveyed to him abſolutely for valuable conſideration, and that the *plaintiff had denied the ſame to be a truſt in ſeveral anſwers*; yet decreed the defendant to come to an account with the plaintiff touching the premiſſes. Chan. Rep. 173. 1656. Whitehorn v. Edwards. S. P. Chan. Caſes 133. Mich. 21 Car. 2. Smith v. Palmer.— S. P. Ch. R. 270. 18 & 19 Car. 2. Walker v. Sidenham.

2. A. was indebted by bond to B. and B. *to avoid a ſequeſtration* of the debt in his anſwer to a former bill, *ſwore the debt was fully ſatisfy'd to him*; tho' that anſwer was ſet forth in the defendant's anſwer in this cauſe, yet the Maſter of the Rolls would not ſuffer that anſwer to be read againſt the plaintiff, and decreed defendants to ſatisfy the debt. Chan. Caſes 154. Mich. 21 Car. 2. Jones v. Lenthall & Ux.

* Oyer of Records, Deeds, &c.

* Oyer of a deed &c. *is when* a man brings an action upon a deed, bond &c. and the *defendant appears and prays, that he may hear the bond &c. wherewith he is charg'd*; and the ſame ſhall be allowed him. And he is † not bound to plead till he has it, paying for the copy of it. L. P. R. tit. Oyer of a deed &c.—To demand oyer of an obligation, is not only for the defendant's attorney to deſire the plaintiff's attorney to read the obligation to him, as the word ſeems only to import, or to have a ſight of it, but *that he may have a copy* of it, that his client may conſider by it what to plead to the action. Ibid.—† 6 Mod. 28. per Powell J.

(A) *Given, in what Caſes.*

1. IN *ſcire facias againſt the ſucceſſor of a parſon, upon recovery of an annuity againſt the predeceſſor*, the defendant had *oyer of the record.* Br. Oyer de Records, pl. 38. cites 46 E. 3. 6.

2. *Debt*, the *plaintiff declared upon a recovery* of 10*l.* by him *againſt the defendant in Court of Record at Kingſton upon Hull*; the *defendant demanded oyer of the record*; and per Thirn. and Hill J. he ought to ſhew the record; as where he declares upon obligation; but per Hank. contra, and that he may ſay no ſuch record; and therefore defendant durſt not demur upon it, but pleaded other matter in bar. Brook ſays, the reaſon ſeems to be, that *the record remains in the Court* and *not in the cuſtody of the party*, as obligation [does.] Br. Oyer de Records, pl. 8. cites 11 H. 4. 11 & 44.

3. *Fieri facias upon a recovery againſt executors*, the *ſheriff returned devaſtaverunt*, by which *ſcire iſſued de bonis propriis*, and it was cum A. & B. had recovered againſt &c. and did not ſay in what action, nor if it was by default or verdict; and yet good; for the defendant may have oyer of the record, and then it will appear &c. Br. Oyer de Records, pl. 12. cites 19 H. 6. 49.

4. *Falſe judgment* by the defendant *in debt* againſt him before the ſheriff, *all was removed by recordare* in Bank, and there the *plaintiff in* the writ of *falſe judgment* who was defendant in the firſt action *was nonſuited*, and *ſcire facias* to have execution *iſſued againſt him*, upon which he came and *demanded oyer of the record.* Per Newton, You ſhall not have it; for you yourſelves have removed it, which was not much denied. Br. Oyer de Records, pl. 4. cites 20 H. 6. 18.

5. *Debt upon a recovery* by the plaintiff againſt this defendant *in writ of entry of* 10*l. damages.* Moyle demanded oyer of the record. Per Browne, In diverſe times have been diverſe judgments; for in the time of Thirne the defendant ſhould have oyer of *record* in this caſe, and in time of Babbington, and all times after he could not have oyer of the record; and by Browne, He

who is *party to the recovery ſhall not have* oyer of the record *when he pleads it by way of bar, otherwiſe it is when the recovery is to be executed againſt him who is party.* Br. Oyer de Records, pl. 14. cites 22 H. 6. 38.

6. In *ſcire facias upon a recovery of an annuity*, in an action *in the ſame Court where the record remained*, the defendant ſhall have oyer of the record; for he cannot ſay that nul tiel record. *But* if it be of records *of another Court*, he may plead that nul tiel record; and therefore there he ſhall not have oyer of the record; per Brian; quod nota. Br. Monſtrans, pl. 158. cites 32 H. 6. 29. & * 5 H. 7. 24.

* Br. Oyer de Records, pl. 26. cites S. C.—— Antiently *nul tiel record* could not be *pleaded* in the ſame Court; and not elſe.

but lately it has been us'd to plead it, but then it *muſt be without demanding oyer* 3 Keb. 76. Mich. 24 Car. 2. B. R. in Caſe of Downs v. Duckworth.

7. And in *debt in C. B.* brought *upon a record removed into B. R. by writ of error*, the defendant ſhall not have oyer of the record, but may ſay that nul tiel record, and the plaintiff ſhall certify it in at his peril, ſub pede ſigilli. Br. Monſtrans, pl. 158. cites 18 E. 4. 7. [158]

8. *And* in *debt in Bank upon tenor of a record of a foreign court* where the tenor was *certified in by certiorari and mittimus;* the defendant demurr'd becauſe he did not ſhew the record itſelf; this demurrer is peremptory per judicium; and the beſt opinion was that he ſhall ſhew the record itſelf. Br. Monſtrans, pl. 158. cites 7 H. 6. 18, 19.

9. *And* upon a *recovery of damages in aſſiſe*, the *plaintiff removed the tenor of the record into Bank by certiorari and mittimus*, and there brought *ſcire facias*, and by award it *does not lie upon the tenor of the record*; for it may be that execution is alſo ſued in the court, where the record itſelf remained; but *e contra of ſuch certificate out of the treaſury;* for the treaſury cannot award execution. Br. Monſtrans, pl. 158. cites 7 H. 6. 18, 19.

10. *But* it is agreed there, that *upon an action of debt brought upon ſuch record, which remained in another court*, if the *defendant pleads* that *nul tiel record*, and the *tenor of the record is certified*, it ſuffices; quod nota diverſity between ſcire facias and writ of debt. Br. Monſtrans, pl. 158. cites 39 H. 6. 4.

11. *And* note, that J. S. brought ſuch writ of *debt upon a record which remained in another court*; and per Priſot Ch. J. and Nideſtate prothonotary, it well *lies* without ſhewing the record, and if the defendant pleads nul tiel record, it *ſhall be certified by certiorari and mittimus*, and if the defendant be in execution in the other court he may plead it. Br. Monſtrans, pl. 158. cites 32 H. 6. 29.

12. *But* per Brown and the Juſtices of B. R. *the record ought firſt to come in by certiorari and mittimus, and then to declare upon the record*, by reaſon of the double execution ut ſupra. And at laſt the plaintiff ſhewed the record, therefore quære if it be of neceſſity. Br. Monſtrans, pl. 158.

13. In *quod ei deforceat* the tenant ſhall not have oyer *of the record;*

record; for the *writ nor the count do not make mention of any record;* quod nota. Br. Oyer de Records, pl. 28. cites 2 E. 4. 11.

14. In *treſpaſs* the *iſſue was, whether the plaintiff was villein to the defendant? and found for the plaintiff;* and the *defendant brought writ of error in B. R.* and after the *plaintiff brought* action of *debt of the damages recovered in C. B.* and the defendant demanded oyer *of the record,* and was ouſted; for it *does not now remain in C. B. and alſo the defendant himſelf is party to it, and has removed the record.* Br. Oyer de Records, pl. 31. cites 18 E. 4. 7.

15. In replevin defendant avow'd for rent granted him by a *private act of parliament.*——The plaintiff demanded oyer of the act. Per Cur. He ought to have oyer; for oyer of no record ſhall be denied to any perſon, in caſe he will *demur.* And the record of the act ſhall be enter'd in hæc verba. Godb. 186. Paſch. 10 Jac. C. B. Cook v. Fiſher.

16. When a deed, will, or letters of adminiſtration are to be ſhewn in a declaration, the attorney of the plaintiff delivering a *declaration with a ſubſcription, that the defendant ſhall not be compelled to plead till the ſame be ſhewn,* no judgment by nihil dicit ſhall be entered againſt the defendant till the ſame ſhewn; nor any nonſuit upon the plaintiff, if he ſhew the ſame before the end of the next term. Rules and Orders in C. B. Mich. 1654. f. 15.

17. Wherever the plaintiff declares upon a writing, the Court, on affidavit that he hath no part, will let him have a copy; but where the declaration is on an agreement generally, and the writing is but evidence, they will not grant oyer. 2 Keb. 430. Mich. 20 Car. 2. B. R. Suſter v. Cowell.

[159] 18. In *replevin,* the *defendant avow'd* for a rent-charge, *and made title by a will, and pleaded it with a profert;* and the plaintiff inſiſted to have oyer, alledging it was the avowant's folly to make a profert of it, and he ought to take advantage of it. Et per Cur. He was not bound to plead it ſo; it is but ſurpluſage, and we will not compel him to give oyer of it. 2 Salk. 497. Trin. 7 W. 3. B. R. Morris's Caſe.

S. P. Sid. 308. Mich. 18 Car. 2. B. R. Jevons v. Harridge.

19. When a *deed is not in Court,* no oyer can be granted; therefore when oyer is pray'd, 'tis always intended that the deed is in Court, and the words Et legitur in hæc verba &c. are the act of the Court. 3 Salk. 119. Paſch. 9 W. 3. Anon.

20. To *deny oyer* where it ought to be granted, is error, but not e contra; therefore we ought either to grant, or to enter the denial upon record, that they may aſſign it for error. If the plaintiff will conteſt it, he may ſtrike out the reſt of the pleading and demur, in order to obſtruct the oyer. 2 Salk. 498. per Holt Ch. J. Mich. 2 Annæ, B. R. Longavill v. Iſleworth.

S. P. Where a record of the ſame Court is pleaded in abatement, and the plaintiff demands oyer of the record, and 'tis not given him in convenient time, the plea ought not to be received, but the plaintiff may ſign his judgment; and ruled accordingly per Holt Ch. J. Carth. 454. Trin. 10 W. 3. B. R. Theobald v. Long.——S. P. per Cur. ibid. 517. Hill.

21. If *releaſe* be pleaded, and the plaintiff crave oyer of it, and the *defendant will not grant* it, plaintiff may *ſign judgment* for want of a plea. 6 Mod. 122. Hill. 2 Ann. B. R. Anon.

Hill. 11 W. 3. B. R. Creamer v Wicket.——But per Cur. on oyer demanded, unleſs the record is ſhewn, the Court will ſet aſide the judgment as irregular. 2 Keb. 275. Mich. 19 Car. 2. B. R. Bradley v. Breach.

22. The declaration was filed the 3*d November*, and *notice* thereof, *and rule to plead* given the ſame day; on the 12*th* the *defendant pleaded a releaſe*, with a profert in Cur. and the *ſame day* the plaintiff *demanded oyer* in writing, and on the 14*th in the afternoon ſigned judgment for want of oyer;* the queſtion was, whether the plaintiff could ſign his judgment on the defendant's not giving oyer according to the demand, notwithſtanding the plea? Upon this point the Court were unanimouſly of opinion, that in caſe a defendant pleads with a profert, and *oyer* is demanded, and *not given in a reaſonable time*, the plaintiff may ſign his judgment *, it being eſteemed as no plea till verified by oyer; and they held the judgment to be regular. Rep. of Pract. in C. B. 95. Mich. 7 Geo. 2. Blaxland v. Burgeſs widow.

* Without applying to the Court to ſet aſide the plea. Barnes's notes in C. B. 167. S. C.

(B) *Given, of what Thing.*

1. *ATtaint*, the defendant demanded oyer of the *original writ*, upon which &c. Herle ſaid, he ſhall have oyer of the record, but not of the original, no more than in writ of error, for he himſelf was party to it. Br. Oyer de Records, pl. 19. cites 7 Aſſ. 5. and 12 Aſſ. 2. accordingly.

Defendant *pleaded a tender ante diem impetration. brevis originalis. Plaintiff* in his replication *ſet forth an original purchaſed before* the time of *the tender* pleaded. It was moved for defendant for oyer of the original; but the motion was denied. The Court never makes any rules for oyer of originals which are matters of record. Barns's Notes 247. Trin. 11 & 12 Geo. 2. Ford v. Burnham.

2. In *aſſiſe*, after the aſſiſe is awarded, the defendant ſhall not have oyer of the *deed by which the plaintiff made his title to the office;* quod nota bene. Br. Oyer de Records, pl. 20. cites 7 Aſſ. 12.

3. *Petition was ſued* by the Earl of Kent, *becauſe the King had granted* 40*l. rent of the ſame plaintiff his ward, and yet within age, to J. M. in fee, upon falſe ſuggeſtion*, that the land came into the King's hands by the attainder of R. F. *and had ſcire facias againſt J. M. who* came and *demanded oyer* of the original, viz. *of the petition;* & non allocatur; quod nota. Br. Oyer de Records, pl. 9. cites 21 E. 3. 47. [160]

4. *Warranty of charters*, the *plaintiff counted of a feoffment with warranty by deed*, the defendant demanded *oyer of the deed*, and had it. Quod nota. Br. Oyer de Records, pl. 35. cites 24 Ed. 3. 35. 74.

5. *Scire facias upon an office* found for the King, *to ſay why the land ſhall not be ſeiſed into the King's hands, and livery made to the heir now plaintiff.* The defendant demanded oyer of the *office*, and was ouſted; becauſe the *effect of it was compriſed in th writ.* Br. Oyer de Records, pl. 22. cites 30 Aſſ. 27. [Arundel v. Uſſord.]

6. *Rediſſeiſin is returned ſerved* by the Sheriff, and *writ iſſued* againſt the defendant *to have execution*; the defendant demanded oyer of the *record of aſſiſe*; & non allocatur. Br. Oyer de Records, pl. 23. cites 30 Aſſ. 35.

7. A man *leaſed for* 8 *years*, and he in *reverſion granted the tenements by fine*, and the *conuſee brought quid juris clamat*; the *defendant ſaid that a ſtranger, and not the conuſor leaſed to him for* 8 *years, and died, and the tenements deſcended to J. and S. who releaſed to the tenant in fee, abſque hoc, that the conuſor had any thing* in the tenements at the day of the note levied; and the *plaintiff demanded oyer of the releaſe*, and had it not; becauſe he *was a ſtranger to it*. Quod nota. Br. Oyer de Records, pl. 5. cites 3 H. 4. 3.

8. *Raviſhment of ward by three executors*; the defendant ſhall not have oyer of the *teſtament*; and the reaſon ſeems to be, becauſe *treſpaſs is ſuppoſed* to be *of his own poſſeſſion*. Br. Oyer de Records, pl. 7. cites 7 H. 4. 2.

S. P. Ibid. pl. 32. cites 20 E. 4. 8.

9. A man brought *ſcire facias upon a recovery of an annuity*, and the defendant demanded *oyer of the deed* of annuity upon which he recover'd; and becauſe the *action is founded upon the record*, and not upon the deed, therefore he could not have oyer of the deed. Per Cur. nota. Br. Oyer de Records, pl. 1. cites 3 H. 6. 40.

10. Cui in vita, the *defendant alleged that he was in by deſcent*, and prayed his age; the *demandant alleged deviſe by the father to his ſon, now tenant, to hold in tail*, the *remainder over in fee*, judgment, &c. and the *tenant demanded oyer of the teſtament*. And per tot. Cur. he ſhall not have it; for it belongs rather to the tenant who is in by the deviſe, than to the demandant. Br. Oyer de Records, pl. 2. cites 3 H. 6. 46.

Mortdancester; the *tenant made default* and *reſummons is awarded* returnable &c. there; per Cur. the tenant ſhall not have oyer of the *reſummons*; for it is only meſne proceſs.

11. In *debt*, they were at iſſue, and *at Niſi Prius the parel was put without day by protection*; and after *within the year, by a repeal, the plaintiff brought reſummons*, with habeas corpora, and the *defendant prayed oyer of the reſummons*, and could not have it; per tot. Cur. for the *reſummons is only to re-deliver the plea in the ſame plight as 'twas before the parol was put without day*, and therefore attend the iſſue; for he ſhall not plead a-new, unleſs in a ſpecial caſe: but if he had had releaſed after the laſt continuance, it ſeems that he ſhall plead it; and ſo he may without oyer of reſummons. Br. Oyer de Records, pl. 3. cites 3 H. 6. 56.

Br. Oyer de Records, pl. 18. cites 2 Aſſ. 11.—*Contra* of *reſummons to revive the plea, which is without day, or re-attachment*. Br. Ibid.

12. In replevin, the defendant *avowed for rent deviſed to him in mortmain by the cuſtom of London by teſtament*. Fulthorp demanded oyer of the teſtament. Per Strange, It belongs to the executor; as a feme who demands dower of the rent granted to her baron, ſhall not ſhew the deed; for it belongs to the heir. Br. Oyer de Records, pl. 10. cites 7 H. 6. 1.

13. Quare

13. Quare imp. the plaintiff made *title by gift in tail of a manor, and advowſon appendant, and deſcent, and compoſition, between him, iſſue in tail, and his younger brother, to preſent by turn*: and the defendant demanded oyer of the *compoſition*, and could not have it; becauſe 'twas only a conveyance. Br. Oyer de Records, pl. 15. cites 14 H. 6. 15.

14. *Falſe impriſonment*: the *defendant juſtified by precept of Juſtices of Peace* to him directed *to impriſon the defendant for forcible entry*, and for retaining of certain land; the defendant prayed oyer of the *precept*, & non allocatur: by which the defendant paſſed over. Br. Oyer de Records, pl. 13. cites 21 H. 6. 5.

15. Debt by executor of executor, viz. *D. brought action as executor of C.* who was *executor of B.* who was *executor of one A.* and 'twas *of a debt due to the firſt teſtator*; and the defendant demanded oyer *of all the teſtaments*, and 'twas ſaid that he ſhould have it. Br. Oyer de Records, pl. 27. cites 5 E. 4. 35. S. P. ibid. pl. 34 (bis) cites 14 H. 6. 5.

16. *Debt upon eſcape againſt wardens of the Fleet upon a recovery*, and the body in execution and eſcaped. Young demanded oyer of the *record of the recovery*; & non allocatur; for 'tis *only a conveyance*; for *the action is not founded upon that, but upon the eſcape*. Br. Oyer de Records, pl. 29. cites 7 E. 4. 18. So of Maintenance. Ibid.

17. Formedon in remainder, the tenant demanded *oyer of the deed of remainder*, who ſhewed the *deed*, which *proved the remainder to be entailed upon condition*; and exception thereof taken, becauſe the *demandant ſaid nothing of the condition, nor alleg'd it to be performed*; & non allocatur; for the deed of remainder is ſhewn, and 'tis of no other effect but to make demandant to be anſwered; whereupon it was order'd that he ſhould anſwer; and the tenant demanded a copy of the deed; & non allocatur. Br. Done &c. pl. 23. cites 3 H. 7. 13.

18. Qu. imp. and declar'd of the *grant of the next avoidance*. The defendant demanded oyer of the deed, and plaintiff ſhews a letter wrote to his father by the patron, in which he wrote that he had given him the next avoidance, and on this 'twas demurr'd; and rul'd clearly, without argument, againſt the plaintiff; for 'twas a meer mockery, and the grant cannot be granted without deed. Cro. E. 163. Mich. 31 and 32 Eliz. C. B. Criſp's Caſe.

(C) Given, *How, and the Effect thereof.*

1. SCIRE Facias upon *record of an annuity*, the defendant ſhall not have oyer of the deed; for the action is founded upon the record; quod nota. Br. Monſtrans, pl. 145. cites 20 E. 4. 8.

2. In *aſſiſe*, the *tenant pleaded a gift to him, remainder to the King by deed inrolled*; the plaintiff prayed oyer of it, and had it; and he prayed that it might be *inrolled de verbo in verbum*, and ſo it was. Br. Oyer de Records, pl. 24. cites 1 H. 7. 28.

3. The tenant demanded oyer of the *deed in formedon in remainder*, which was ſhewn; and *'twas upon condition*, and yet

well; and *no copy granted* of the deed to the tenant. Br. Oyer de Records, pl. 25. (bis) cites 3 H. 7. 13.

Keb. 304. pl. 14. S. C. says, the prisoner desired to hear it read in Latin, and it was refused; and cited 36 E. 3. that records must be entered in Latin, but discuss'd in English.

4. Tho' *indictments* are in Latin, yet they shall be read to the prisoners in English, or in such language as they understand. Sid. 85. pl. 13. Trin. 14 Car. 2. B. R. The King v. Vane and Lambert.

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5. In *debt upon an obligation* conditioned *to deliver up goods in a schedule annexed*, the defendant demanded oyer of the condition, and thereupon *pleaded, that no schedule was ever delivered*, to which the plaintiff demurred. The Court conceived, that *on demand of oyer of the condition they shall have oyer also of the schedule*, they being all as one deed. 2 Keb. 4. pl. 8. Pasch. 18 Car. 2. B. R. Waterman v. Adams.

* So where one pray'd delivery of a *copy* of indenture set forth in debt on obligation, and oyer demanded, the Court granted it as usual, *on oath that he hath not any indenture*, though it was opposed, because he had *pleaded the indenture specially*. 2 Keb. 82. pl. 72. Trin. 18 Car. 2. B. R. Anon.

6. *But* on oyer of *indenture for performance of covenants, he shall not have oyer of the covenants, but yet must set them forth*; and if he have no counterpart, he * may move the Court, and so obtain it. 2 Keb. 4. pl. 8. in Case of Waterman v. Adams.

7. In debt for *scavage*, the plaintiff pleaded the *patent of E. 4. and shewed only an exemplification* according to 13 Eliz. cap. 6. which the Court held ill, and should at least be pleaded as an exemplification only, or prout per exemplificationem patentium apparet. 3 Keb. 491, 492. pl. 34. Trin. 27 Car. 2. B. R. London (City) v. Decosta.

8. There *may be a demurrer to the writ for any insufficiency* in the writ after oyer thereof, and that it is entered of record as well as for variance between the count and the deed whereon it is founded. 2 Lutw. 1644. in a nota there, in the Case of Simpson v. Cartside cites Pl. C. 73. b. Wimbish v. Ld. Willoughby, and D. 341. pl. 51. and Thelwal's Digests, where the forms of demurrers in such cases are mentioned.

9. If upon pleading a deed a profert be made of it, it shall *remain in Court all the Term*, and no longer, if it be not controverted; *but letters of administration* shall not be kept in Court all the Term; because the administrator may have other actions pending, and it would be a prejudice to him. See 36 H. 6. 30. And giving of oyer is the act of the Court, and therefore to be done by *the prothonotary in his office*, where now the course is to do such things as were done in Court, when the pleadings were ore tenus at the bar; and an attorney ought not to do it; per Cur. 12 Mod. 598. Mich. 13 W. 3. Roberts v. Arthur.

10. Formerly all demands of oyer were *in Court*, as it is now *in case of appeals*; but *now it is demanded* and granted *between the attornies*, and where there ought to be oyer, one is not bound to plead without it; and if one attorney in time demands oyer

of

of the other, and he tells him the writ is filed, and that he may take it, it is well; but ſure he cannot without ſuch conſent enter a demand and a giving of oyer; for if attornies are admitted ſo to do, they will ſet forth the matter falſly; which though it could not enſnare the other ſide, becauſe they may produce the right writ &c. and have it entered, yet it would be very tedious and inconvenient; as if a deed be pleaded, it remains in Court all that Term, yet one cannot go to the officer and take oyer of it without leave of Court, or of the attorney; and the very form of pleading ſhews it muſt be upon demand; and oyer of writ is in order to object to it; per Powel J. 6 Mod. 28. Mich. 2 Ann. B. R. Longvill v. Hundred of Thiſtleworth.

11. If *A. gives bond by the name of B.* he may plead miſnoſmer, and the other may reply, that he made the bond by the name of B. and eſtop him by demanding judgment, if againſt his own deed he ſhall be admitted to ſay his name is A. and then he may rejoin and ſay, that he made no ſuch deed; but this he muſt do without oyer; for if he prays *oyer*, he *admits his name to be B.* 1 Salk. 7. Mich. 3 Ann. B. R. Linch v. Hooke.

12. In debt upon a *bond*, the defendant demanded oyer of the *condition*, which was *to perform covenants* in an indenture, and [163] then demanded oyer of the indenture; and the plaintiff gave it him, *omitting an indorſement*, which was *made before the execution of the deed*; upon this oyer the defendant pleaded performance; the *plaintiff replied, and ſet forth the indorſement*, and pray'd judgment for the variance; and per Cur. the plaintiff was not obliged to give oyer of the indenture, and though he did, yet being what he need not do, the ſetting it forth is not at his peril, as where he is obliged to ſet it forth; nor is he concluded to ſay, that there is more contain'd in the indenture, but is at liberty, as well as if the defendant himſelf had ſet it forth; and the Court held, that *as the defendant was bound to ſet it forth, ſo he was* bound *to ſupply this omiſſion*, and make his plea compleat; and for this judgment was given for the plaintiff. 2 Salk. 498, 499. Mich. 3 Ann. B. R. Cook v. Remmington.

(D) *Demanded. In what Caſes* it may or muſt be demanded; *and how.*

1. DEBT upon *recognizance acknowledged in Canc.* or in any other Court, defendant cannot demand oyer of the condition; for the recognizance is not in Court as an obligation is when debt is brought upon it. But if debt be brought upon a recognizance acknowledged in this Court, then the defendant may demand oyer of the recognizance. Poph. 202. Mich. 2 Car. B. R. Chambers's Caſe.

2. Defendant may plead without oyer if he pleaſes; for he *may take upon himſelf to remember it without* hearing it. L. P. R. tit. Oyer &c. cites 18 April, 1654. B. S.

In debt on obligation the defendant pleaded, that the condition was to pay a leſs ſum by a day, and that before the day he paid it in ſatisfaction; but per Cur.

Cur. this is an ill plea, having not demanded oyer of the condition. 3 Keb. 708. pl. 43. Mich. 28 Car. 2. B. R. ..... v. Clatch.

Keb. 937. pl. 54. Trin. 17 Car. 2. S. P. Coxall v. Sharp.

3. In *debt* upon an *obligation* for neceſſaries, no oyer being demanded, it is *intended a ſingle bill.* Keb. 182. pl. 91. Mich. 14 Car. 2. B. R. Ruſſel v. Lea.

4. In *covenant* the defendant demanded no oyer, but *pleaded quod in articulis illis ulterius continetur &c.* The Court held this to be ill, and his *ſhewing the counterpart is not ſufficient*, but the whole indenture ought to be in Court; and the plaintiff had judgment niſi. Keb. 513. pl. 88. Paſch. 15 Car. 2. B. R. Priſland v. Cooper.

5. Debt on bond conditioned to perform covenants; if the defendant *pleads performance without demanding oyer*, it is a good cauſe of demurrer. Vent. 37. Trin. 21 Car. 2. B. R. Tapſcot v. Wooldridge.

6. One cannot take advantage of an *original*, though never ſo *vicious* in recital, without craving oyer of it; per Holt. 12 Mod. 35. Paſch. 5 W. & M. Anon.

7. *Caſe* on ſeveral promiſes on original; defendant, without craving oyer of the writ, pleaded a *variance between the writ and the count*, ſhewing particularly wherein; whereupon plaintiff demurred; for tho' the writ be in Court, yet is on a diſtinct roll from the count; and no advantage can be taken of it, without craving oyer; quod Cur. conceſſit, and a reſpond. ouſter awarded. 12 Mod. 189. Paſch. 10 W. 3. Brag v. Digby.

8. In *covenant* by an apprentice for not teaching him four ſeveral trades in an indenture of apprenticeſhip mentioned. The *defendant, inſtead of craving oyer of the plaintiff's indenture ſets forth an indenture of his own*, and pleads a performance of the
[164] covenants therein. Upon demurrer, the plaintiff had judgment; for the defendant cannot ſhew any other indenture, but crave oyer of the indenture declared on. 6 Mod. 154, 155. Paſch. 3 Annæ B. R. Foxon v. Moſely.

9. Declarations, pleas, replications, and other pleadings; and alſo oyer of writs, bonds, and other deeds, ſhall be demanded *by a note in writing*. Rules and Orders in C. B. Mich. 2 Geo. 1, 1727.

(E) Demanded, by whom.

But where T. brought *attaint of falſe oath in aſſiſe againſt two baron and feme and A.* and the *baron and A. made default*; and the *feme was received*, and demanded *oyer of the writ and of the record*, and had it. Br. Ibid. cites 50 Aſſ. 4.

1. *ATTAINT againſt the ſame perſon who recover'd*; he *himſelf ſhall not have oyer of the record*, and yet he ſhall have advantage of the variance. Br. Oyer de Records, pl. 36. cites 12 Aſſ. 2. and M. 6. E. 3 accordingly.

2. *Quare non admiſit* lies againſt the biſhop after recovery, and yet the *biſhop ſhall not have oyer of the record*; for he is a *ſtranger*

ſtranger to it, *and cannot anſwer to it.* Br. Oyer de Records, pl. 40. cites 16 E. 3. and 4 E. 3.

3. In *detinue*, the defendant prayed garniſhment, and had it; and the* *garniſhee* appeared and prayed oyer of the writ, and had it. Br. Oyer de Records, pl. 11. cites 8 H. 16.

S. P. Br. Count, pl. 35. cites S. C. But 'twas ſaid that the plaintiff ſhall not count a-new againſt him. Nota.

(F) Demanded or given, *at what Time.*

1. *IN ſcire facias in Chancery the defendant had oyer of the record,* and they are at iſſue, and the *record ſent into Bank to be tried;* and after the *plaintiff is nonſuited, and* then *brings another ſcire facias*, the defendant ſhall have *oyer* of the record *again*; for *nonſuit was the act of the plaintiff.* Br. Oyer de Records, pl. 41. cites 24 E. 3. 35.

2. *Debt upon recovery* by the plaintiff againſt this defendant *in writ of entry of* 10*l. damages;* Moyle demanded oyer of the record; and becauſe the *declaration was the firſt day of the term, and the defendant imparled till the end of the term*, therefore he was ouſted to have oyer of the record; becauſe *he demanded oyer* of the record *at this day, and not at the commencement of the term.* But Newton in a manner affirmed, that if he had demanded oyer of the record the firſt day, he ſhould have had oyer of the record. Br. Oyer de Records, pl. 14. cites 22 H. 6. 38.

3. *Debt upon obligation;* the *defendant imparled;* he ſhall not have oyer of the obligation nor condition at the next day, by reaſon of the imparlance; wherefore the defendant, by policy alleged variance, viz. that the *obligation was yeoman*, and the *writ malt-man*, and well; for the obligation remains always in Court, and therefore he may plead *variance* after imparlance, and in another term. Contra of teſtament, this ſhall be but once ſhewn; and by this means the plaintiff ſhewed the obligation again, and then the defendant ſaw it, and pleaded the condition performed, which cannot be without ſeeing it; and ſo policy to ſee it. Br. Oyer de Records, pl. 16. cites 38 H. 6. 2.

S. P. Ibid. pl. 29. cites 19 H. 6. 7. ——When any deed is ſhewn to the Court, it remains by judgment of law in Court all that term, but at the end of the term (if it be not deny'd) the law adjudges it in cuſtody of the party; for all the term in law is but one day. But when the term is ended, (there being no officer to whom the cuſtody and charge of it belongs) the party ſhall have the cuſtody. And where it appears by 38 H. 6. 2. a. b. that becauſe the deed *in another term* is in the cuſtody of the party, and not in Court, the defendant ſhall not have oyer of it; and with this agrees 4 H. 7. 18. and 21 H. 7. 30. b. This was the firſt reſolution 5 Rep. 74. b. Mich. 35 and 36 Eliz. B. R. in Wymark's Caſe.

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4. *Debt upon arrearages of annuity*, the defendant demanded oyer of the deed, and could not have it, becauſe 'twas *after imparlance.* Br. Oyer de Records, pl. 17. cites 39 H. 6. 21.

So in *debt for ſcavage duty*, over of the letters patents, by which it was granted, cannot be demanded after imparlance. Freem. Rep. 400. pl. 524. Mayor &c. of London v. Bre [als. Goree.]

5. Debt upon a leaſe of a corody; the *defendant imparled* to another term; there he ſhall not have oyer of the deed *in the other*

other term, by reaſon of the continuance. Br. Monſtrans, pl. 142. cites 20 E. 4. 10.

6. Note, 'twas held that in *debt upon obligation*, if the *defendant imparles*, he *ſhall not ſay after, that the obligation has a condition, and plead the condition* &c. becauſe he did not demand oyer of the obligation and condition before imparlance. Br. Oyer de Records, pl. 25. (bis) cites 4 H. 7. 10.

7. Tho' a man may *plead without oyer* of the bond &c. if he pleaſes, yet if he does ſo, *he cannot after wave his plea, and demand oyer* of it. L. P. R. tit. Oyer of a deed &c. cites 18 Ap. 1654. B. R.

S. P. agreed by Holt Ch. J. becauſe imparlance is always to

8. Oyer ought not to be granted *after imparlance*. 2 Lev. 142. Trin. 27 Car. 2. B. R. In Caſe of Mayor &c. of London v. Gorree.

to another term. 6 Mod. 28. Mich. 2 Annæ. B. R. In Caſe of Longville v. Thiſtleworth Hundred.——Oyer of deeds muſt be demanded the ſame term that they are Curiæ prolat: but if after, by the courſe of the Court, the plaintiff may bring in his bond when he will. Keb. 32. pl. 85. Paſch. 13 Car. 2. B. R. Anon. ——But by Hale Ch. J. on *aſſignment of variance between the patent ſhewn, and the declaration*, in the name of the corporation, or any other ſmall variance, the defendant may have oyer at any time; but elſe not after imparlance. But adjornatur, this being ſaid the courſe in B. R. &c. 3 Keb. 480. pl. 10. London (City) v. Goree.—Ibid. 491. pl. 33. S. C. And there Hale Ch. J. ſaid, that oyer in B. R. after imparlance is too late; nor is *exemplification* ſufficient, where the patent itſelf is pleaded.—See (G) S. C.

If the defendant in a plea of land, would have oyer of the deed, he muſt demand it before imparlance; for by imparling, he undertakes to defend the land mentioned in the plaintiff's count, and it would be abſurd in him to defend what he does not know. G. Hiſt. C. B. 148.

In B. R. oyer of a deed may be demanded *after imparlance*. 12 Mod. 99. Trin. 8. W. 3. Anon.

9. One can't demand oyer of a deed but *during the time that 'tis in Court*; and this is for all the term in which it was produc'd in Court, in Caſe of Simpſon v. Garſide. 2 Lutw. 1644. in a nota there, cites 5 Rep. 74. Wimark's Caſe.

10. Where a *record of the ſame Court is pleaded in abatement*, and the plaintiff demands oyer of that record, and it is *not given in convenient time*, the plea ought not to be receiv'd, but the plaintiff may ſign his judgment; and the rule was, that unleſs the defendant gave oyer of the record *the next day*, judgment ſhould be for the plaintiff. Carth. 454. Trin. 10 W. 3. B. R. Theobald v. Long.

S. P. 2 Salk. 498. per Holt Ch. J. in S. C.

11. There ſhall be no oyer *after a plea in abatement*, per tot. Cur. for the true reaſon of oyer is, that the defendant may demur and ſhew ſome cauſe; as a variance between it and the regiſter &c. and that amounts to a plea in abatement, or to plead ſome matter in abatement, and cited Co. Ent. 320. that after plea in abatement over-rul'd, the defendant has no more to do with the original. 6 Mod. 28. Mich. 2 Ann. B. R. Longvill v. Thiſtleworth Hundred.

* S. P. ibid. pl. 96. Hill. 7 Geo. 2.

12. A motion to ſet aſide a judgment, becauſe ſigned too ſoon after oyer demanded; the Court ſaid, that the defendant is to demand oyer * *before rule to plead is out*, and that he hath one day after to plead. Rules in C. B. 74. Eaſt. 5 Geo. 2. Littlehales v. Smith.

[166] Hartly v. Varny.—— Barnes's Notes 230. S. C. acc.

(G) *Plead-*

(G) *Pleadings.*

1. IN *debt on a bond for performance of covenants*, the defendant cannot now pray oyer as heretofore, but *muſt plead to the indenture*, which ſhall be produc'd to the Court. Keb. 104. pl. 111. Trin. 13 Car. 2. B. R. Anon.

2. In *debt againſt an adminiſtrator* upon a bond of his inteſtate the defendant *demanded oyer of the bond and condition* & ei legitur; the condition was *for performance of covenants in an indenture* made between the plaintiff and the inteſtate; then the *defendant pray'd oyer of the indenture* mentioned in the condition, *though it was not in Court* & ei legitur, and then he pleaded, and the plaintiff demurred [generally] ſo that the indenture was not in Court; it ſhould have been produced by the defendant under the hand and ſeal of the * plaintiff, and where it was made, and the ſubſtance thereof, that if it ſhould be miſ-recited, or a wrong deed ſet forth, the plaintiff might plead non eſt factum; now in this caſe he cannot plead that plea, becauſe the defendant hath not alleged that it was the plaintiff's deed, and for that reaſon he cannot crave oyer of it, and get it truly entered, if it ſhould be miſ-recited; but adjudged, that *upon a general demurrer, it ſhall be intended* to be *the true indenture, and that it was in Court*, and that if the defendant had endeavour'd to trick the plaintiff, he might have complain'd to the Court. 3 Salk. 119, 120. Anon.

It was adjudged, that upon general demurrer the plea was good in ſubſtance, tho' it was not formal, and that this manner of pleading was aided by the ſtatute 27 Eliz. cap. 5. upon the general demurrer. But that otherwiſe it ſhould be upon ſpecial demurrer; but the Court agreed, that the defendant in this caſe ought to have ſhewn the deed, and not the plaintiff by the law; nevertheleſs, judgment was given for the defendant, quod querens nil capiat per billam. 1 Saund. 9. Mich. 18 Car 2. Jevens v. Harridge.—* Inteſtate. 1 Saund. 9.—Saunders at the end of the caſe cites 7 E. 4. 1. that the plaintiff in ſuch caſe ought to ſhew the indenture, but ſays, it ſeems this is not law at this day.

3. In debt on condition to perform covenants in an indenture, to pay 300l. and to repair as three ſhall award; the breach aſſign'd was, that award was made, but defendant had not repair'd; defendant pray'd *oyer of the indenture and alſo of the award*; the indenture was ſet forth truly, but the *award was ſet forth untruly*; whereupon there was a demurrer. Then it was mov'd for the plaintiff to ſet aſide this oyer, which per Cur. is irregular; and if the award be not truly ſet forth at firſt, the *defendant might traverſe it, but cannot pray oyer of any thing not in Curia prolat.* and the Court ſet it aſide. 3 Keb. 716. pl. 1. Hill. 28 Car. 2. B. R. Sands v. Thomlinſon.

4. In action for a duty called *ſhewage* [ſcavage] the plaintiffs *declared upon the grant of E. 4. by letters patent*; the *defendants demanded oyer*, and the plaintiffs in their *replication demurred, quia placitum prædictum minus ſufficiens &c.* and per Cur. the replication is naught; for he ſays, placitum prædictum eſt minus &c. and there *was no plea pleaded*; for the *demanding of oyer is no plea*, and therefore a *repleader was awarded*. Freem. Rep. 400. Trin. 1675. Mayor and Commonalty of London v. Bre.

2 Lev. 142. S. C. by the name of the MAYOR OF LONDON v. GORREY, that this was no plea, and therefore does not warrant the demurrer in ſuch form; and therefore judgment was given for the defendant, and did not award a repleader

repleader as was desired.——3 Keb. 480. pl. 19. 491. pl. 33. S. C. by name of London (City) v. Goree says, a repleader was awarded giving oyer.

* 5. In *debt on bond*, the defendant demanded oyer of the obligation, and the *condition* which was *for performance of articles*, and then pleaded the articles, and that he had performed them; plaintiff pray'd that the articles be inrolled in hæc verba, which being done, the *plaintiff demurred generally, and shew'd, that defendant in pleading the articles had omitted part of them*; and thereupon the opinion of all the Court was against the defendant; for perhaps the plaintiff would have assigned breach upon the things omitted, which now he cannot do; judgment for the plaintiff; and North Ch. J. remember'd a Case in B. R. accordingly. 3 Lev. 50. Pasch. 34. Car. 2. C. B. Hudson v. Spier.

S. P. Sand. 316. 317. Mich. 21 Car. 2. Smith v. Yeomans.

6. In *debt upon bond* condition'd *for performance* of covenants in an indenture; the *defendant prayed oyer of the condition*, and *pleads, that he hath the indenture in Court, and that there are no covenants therein* to be perform'd, et hoc &c. The plaintiff pray'd oyer of the indenture, which was entered in hæc verba; and *it appearing that there were several covenants* therein to be perform'd, *he demurred* to the defendant's plea, and adjudged good; for upon oyer of the indenture it is * made part of the defendant's plea, so that it appearing judicially to the Court, that he did plead a false plea, and averred against the truth of what appeared by the indenture; therefore the plaintiff needs not shew any matter of fact in his replication to maintain his action, but it is more proper for him to demur. 3 Salk. 120. Pasch. 9 W. 3. Anon.

* Show. Parl. Cases 221. in Case of the King v. Chester (Bishop) and Pierce.

7. In *debt on bond, dated* 27 *April*, 2 *Ann.* defendant pray'd oyer of the original, which bore *teste* 16 *April*, 2 *Annæ*, whereupon defendant pleaded, that the original was sued out before the date of the bond. The plaintiff *replied*, that the writ upon which he declared was *another writ*, and then sets it forth; the defendant rejoin'd by way of estoppel because of the oyer aforesaid; the plaintiff demurred, and concluded in bar, and defendant join'd in demurrer. Trevor Ch. J. and Nevil and Blencow J. held the replication good; for the writ being fil'd, the reading of it is the act and office of the Court, and shall not conclude the plaintiff from shewing the true writ; and that this *is not like to oyer of a deed, the reading of which is the act of the plaintiff himself*, and therefore shall not be admitted to say, that the deed so read to the defendant is not the deed upon which he counted; but Tracy J. held, that when the defendant pray'd oyer of the writ, and it was read to him, this was the act of the Court, and when it is entered upon the record, the plaintiff shall not be admitted to say, that this is not the true writ, and so falsify the act of the Court; but had the writ been mistaken, the plaintiff's attorney, upon delivery of the paper book, ought to have rectify'd it, or have applied to the Court to rectify it; but after it is recorded, he is estopped to say, that it is not the true writ. 2 Lutw. 1641. 1644. Trin. 2 Annæ. Simpson v. Garside.

8. Where

8. Where there is a *variance* between the original and the count, or the bond, and an oyer prayed, there the variance may be pleaded. G. Hiſt. C. B. 42.

(H) Pleadings. *At what Time after Oyer* given.

1. A Motion to ſet aſide a judgment, for that the defendant's attorney *demanded oyer of the bail-bond*, and the *plaintiff ſigned judgment the ſame day*; the plaintiff's council inſiſted, that there was a rule given, a plea demanded in writing, and *oyer not demanded till the rule was out, and judgment ſigned eight hours after oyer given.* The Court ſet aſide the judgment, and held, that the defendant ought to have a reaſonable time, after oyer, to plead, but did not ſettle the time. Rep. of Pract. in C. B. 72. Eaſt. 5 Geo. 2. Hammond v. Horner.

2. In this Caſe the ſingle queſtion was, whether the defendant ſhould have the *ſame time to plead after oyer given, as he had at the time oyer was demanded?* The Court held he ſhould, and ſet aſide the judgment, which was ſigned the next day after oyer given, the oyer being demanded two days before the rule was out. Rep. of Pract. in C. B. 81, 82. Mich. 6 Geo. 2. Theedham v. Jackſon. [168] Notes in C. B. 155. 156. S. C.

3. *So* a rule to ſhew cauſe why judgment ſhould not be ſet aſide; it appeared, the *rule to plead was given on Monday* the 24th of October, *and was out the Thurſday* after: *oyer was demanded on the Wedneſday, and given on the Thurſday*, and *judgment was ſigned on the Friday* in the afternoon: Curia; the plaintiff's attorney ſhould have ſtaid, and not ſigned it till Saturday in the afternoon, for the defendant ſhall have the ſame time to plead after oyer given, as he had when oyer was demanded. Rep. of Pract. in C. B. 143. Mich. 11 Geo. 2. Simpſon v. Duffield and his wife, adminiſtrators.

[For more of Oyer of Records, Deeds &c. ſee Faits, and other proper Titles.]

Parceners.

(A) *Of what Thing* there may be Parceners.

There is an ancient book caſe in 23 H. 3. tit. Partition 18. in theſe words, viz. Note, if the *earldom of Cheſter* deſcend to coparceners, it ſhall be divided between them as well as other lands, and the eldeſt ſhall not have this ſeigniory and earldom entirely to herſelf; quod nota; adjudg'd per tot. Cur. By this it appears that the earldom, i. e. the *poſſeſſions* of the earldom *ſhall be divided, and* that where there are more daughters than one, the eldeſt ſhall not have the dignity and power of the earl, i. e. to be a counteſs; in that caſe the *King*, who is the ſovereign of honour and dignity, may for the incertainty *confer the dignity on which of the daughters he pleaſe*, and this has been the uſage ſince the Conqueſt, as it is ſaid. Co. Litt. 165.

[1. IF an *Earl* in fee dies, having iſſue two daughters, they ſhall be coparceners *of the dignity, and ſhall be as one Counteſs*, and the dignity does not ceaſe till a new creation. 23 H. 3. Partition. 28. Adjudged. Co. Da. 1. County Palatine, 61. b. Bracton de acquirendis rerum dominiis, 76. b.]

In Ireland three palatinates were created in the time of H. 2. the firſt in Leimſter, which was granted to the Earl Strongbow thro' all this province; the ſecond in Meth, granted to Sir Hugh de Lacy the elder; the third in Ulſter, granted to Sir Hugh de Lacy the younger; but after, when William the Marſhal of England, having married the daughter and heir of Strongbow, had iſſue five ſons and five daughters, and the five ſons being dead without iſſue, the ſeigniory of Leimſter deſcended to the five daughters, upon partition made between them, each had an entire county allotted to her, viz. the county of Catherlaugh was allotted to the eldeſt, the county of Wexford to the ſecond, the county of Kilkenny to the third, the county of Kildare to the fourth, and the territory of Leix, which is now the Queen's County, to the fifth; and upon this each of them had a ſeveral county palatine, and all the liberties and prerogatives in her ſeveral purparty, as Strongbow and the Marſhal had in the intire ſeigniory of Leimſter. As if three parceners are of a manor, who make partition, each of them ſhall have a manor and court-baron within her purparty. 26 H. 8. 4. Dav. 61. b. Trin. 9 Jac. in Caſe of the County Palatine.

[2. The ſame is of a *barony*. Bracton 76. b.]

3. If a man have *reaſonable eſtovers*, as houſeboote, heyboote, &c. appendant to his freehold, they are ſo intire as they ſhan't be divided or parted between coparceners. Co. Litt. 164. b.

4. If a *corodie incertain* be granted to a man and his heirs, and he has iſſue divers daughters, this corodie ſhan't be divided between them. But of a *corodie* certain partition may be made. Co. Litt. 164. b.

[169] 5. A *piſcary incertain*, or a *common ſauns nombre*, can't be divided between coparceners; for that would be a charge to the tenant of the ſoil. *Homage and fealty* could not be divided &c. Co. Litt 164. b.

Godb. 17. Ld. Mountjoy v. Ld. Huntingdon. 6. The Lord Mountjoy ſeiſed of the manor of Canford in fee, did by deed indented and inrolled, *bargain and ſell* the ſame to Brown in fee, in which indenture this clauſe was contained: Provided always, and the ſaid Brown did *covenant and grant to and with* the ſaid Lord Mountjoy his heirs and aſſigns, that the

Lord Mountjoy, his heirs and aſſigns, *might dig for ore in the lands* (which were great waſts) parcel of the ſaid manor, *and to dig turf alſo, for the making of allom.* And in this caſe three points were reſolved, 1. That this did amount to a grant of an intereſt and inheritance to the Lord Mountjoy, to dig &c. 2. That notwithſtanding this grant, Brown and his heirs and aſſigns might dig alſo, and like to the caſe of common ſauns nombre. 3. That the Lord Mountjoy might aſſign his whole intereſt to one, two or more; but then if there be two or more, they could make no *diviſion* of it, but work together with one ſtock: neither could the Lord Mountjoy &c. aſſign his intereſt in any part of the waſte to one or more; for it might work a prejudice and a ſurcharge to the tenant of the land; and therefore if ſuch an *uncertain inheritance* deſcend to two coparceners, it can't be divided between them. Co. Litt. 164. b. Lord Mountjoy's Caſe.

7. The dignity of the *Crown of England* is without all queſtion deſcendible to the eldeſt daughter alone, and to her poſterity; and ſo it has been declared by act of parliament; for regnum non eſt diviſibile. And ſo was the deſcent of Troy:

Præterea ſceptrum, Ilione quod geſſerat olim
Maxima natarum Priami. VIRG. ÆNEID. I. 657.

Co. Litt. 165.

8. A *rent-charge* is entire and againſt common right, yet may it be divided between coparceners; and by act in law the tenant of the land is ſubject to ſeveral diſtreſſes, and partition may be made before ſeiſin of the rent. Co. Litt. 164. b.

9. *Caſtles* of habitation *for private uſe*, that are not for the neceſſary defence of the realm, ought to be parted between coparceners as well as other houſes, and wives may be thereof endowed. Co. Litt. 165.

(A. 2) *Who* are.

1. PArceners are where a man ſeiſed in fee or tail has iſſue only daughters, or dies without iſſue, and leaves ſiſters &c. and the tenements deſcend to ſuch daughters or ſiſters &c. and they enter, they are called parceners, becauſe they are compellable by writ *de partitione facienda*, to make partition; and all of them are but one heir to their anceſtor, and yet they have moieties &c. in the land deſcended. Hawk. Co. Litt. 248. (163.)

2. *Men deſcending of daughters* may be coparceners as well as women, and ſhall jointly implead and be impleaded. Co. Litt. 164. b.

3. If two *coparceners* are *of a uſe* before 27 H. 8. and they continue the uſe *by ſix deſcents*; and after the ſtatute 27 H. 8. is made, there is no doubt but that they have ſeveral moieties as they had before. Mo. 92. pl. 228. Trin. 10 Eliz. in Symonds's Caſe.

(B) Par-

(B) Parceners. [*Entry by* the *one*. In what Caſes it ſhall *enure ſo as* that the *other may enter with her*.]

Tenant in tail alien'd in fee, and *had iſſue two daughters*, and *dy'd*, and the *one enter'd upon the feoffee, claiming to herſelf and to her ſiſter*; the feoffee ouſted her, and *ſhe brought aſſiſe and recover'd*, by which *her ſiſter enter'd with her, and ſhe ouſted her*, and the *ſiſter brought aſſiſe*, and recovered by award quod mirum! for by reaſon of the *diſcontinuance*, the recovery of the firſt ſiſter was only by concluſion between her and the feoffee, to which record the other ſiſter was a ſtranger; therefore it ſeems it is not law that the other ſiſter may recover the moiety with her, the diſcontinuance not being purg'd. Br. Remitter, pl. 43. cites 21 Aſſ. 19.

[1. IF *one* coparcener *enters upon the diſcontinuee of her father*, and *upon ouſter by the diſcontinuee brings an aſſiſe, and recovers by falſe verdict*, the other may enter and hold in coparceny with her. 21 E. 3. 32. 21 Aſſ. pl. 19. adjudged.]

Br. Entre Cong. pl. 32. cites S. C.—*Contrary where the one* coparcener *releaſes her part or aliens it, and the other recovers her moiety after ſummons and ſeverance.* Br. Coparceners, pl. 2. cites 19 H. 6. 45.—*But where two* coparceners *ſeiſed in tail alien, and have iſſue and die*, the iſſue of the one ſhall have action alone, and the iſſue of the other the like; and there where the one recovers, the other cannot enter with him. Br. Coparceners, pl. 2. cites 19 H. 6. 45.

2. Where *two coparceners* are *heirs after diſcontinuance or abatement, and the one brings an action*, as formedon, or ſuch like, *in the name of both*, the *one is ſummon'd and ſever'd*, the *other recovers one moiety*, and *enters by execution*, the other may enter with her into it. Br. Coparceners, pl. 2. cites 19 H. 6. 45.

Br. Remitter, pl. 12. cites S. C.—S. P. Per Martin, Br. Judgment, pl. 144. cites 10 H. 6. 9 & 10. And then the *other may have a new action in name of both.*—*And* ſo ſee that *where no poſſeſſion is but in the one only*, then *right only does not remit* without lawful poſſeſſion alſo. Br. Entre Cong. pl. 33. cites 19 H. 6. 59.

3. Where there are *two coparceners*, and they *bring formedon*, and the *one is ſummon'd and ſever'd*, and the *other ſues and recovers the moiety*, the other may enter with her. Br. Entre Cong. pl. 33. cites 19 H. 6. 59.

(B 2) *Entry of the one*, to what Purpoſes it ſhall be ſaid *the Entry of the other*.

1. ENTRY of the one coparcener does *not give ſeiſin to the other, where ſhe enters in her own intereſt* only; quod nota; for the releaſe of the one coparcener of all her right to her ſiſter countervails entry and feoffment, if the one enters in the name of both, but if ſhe enters in her own name only, then it is only an extinguiſhment of the right. Br. Counterple de Voucher, pl. 29. cites 21 E. 3. 27.

2. Where *one coparcener enters claiming to her and her companion, this veſts ſeiſin in both*; per Fiſher. Br. Entre Cong. pl. 37. cites 24 E. 3. 42.

3. *Baron*

3. *Baron and feme ſeiſed in tail*, the *baron made a feoffment* and had *iſſue two daughters who had iſſue two ſons*; the *baron died*; the *feme enter'd upon the feoffee of his aſſent claiming at his will* and *died*; and *the two daughters died*, and *one ſon enter'd* upon the feoffee, *claiming to* the uſe of *him and his companion*; the *feoffee brought aſſiſe againſt him who enter'd only*, and recover'd by award; for the *feme by her entry was no diſſeiſoreſs*, and then ſhe did not die ſeiſed of an eſtate of inheritance, ſo that the heir may be remitted. Quod nota. Br. Entre Cong. pl. 37. cites 24 E. 3. 42.

And where the entry is not lawful, there *the claim to him and his companion does not veſt ſeiſin in his companion*, and *e contrá where* the entry is *lawful*. Br. Entre Cong. pl. 37. cites 24 E. 3. 42.

4. The entry of one coparcener into the whole land is not the entry of both to all intents; for *where* there were *two ſiſters*, and the *one who enter'd had iſſue and died*, and the other died without iſſue, and a ſtranger abated, and the *iſſue of the other had formedon of the one moiety*, and made himſelf heir to his mother, who inſimul tenuit with another ſiſter, *and another writ of the other moiety, and made herſelf thereof heir to his grandfather*; quod nota. Br. Coparceners, pl. 8. cites 40 E. 3. 8.

And yet it is ſaid elſewhere, that [171] *the entry of the one is the entry of both as to the ſtranger*; nevertheleſs *otherwiſe* it is *between themſelves*; for upon the entry of the one the other may have a *nuper obiit* but *not aſſiſe*. Br. Coparceners, pl. 8. cites 40 E. 3. 8.

5. Where lands deſcend to two coparceners, and the one enters, it is the entry of both, and by it *both may have an aſſiſe*. Per Fencote and Kirton; quod non negatur. Br. Coparceners, pl. 1. cites 43 E. 3. 19.

But per Cur. the entry of the one is not the entry of both in reſpect *of making both the ſons in gavelkind to be vouch'd as one heir*, and the reaſon ſeems to be *becauſe* it is *for their diſadvantage* to make them to render in value. Br. Coparceners, pl. 1. cites 43 E. 3. 19.—*So* where they were *diſſeiſors*, and the *diſſeiſee re-enter'd* and the *one enter'd after*, it is not the entry of both; *contrarium* ſupra, where it is for their advantage *to bring aſſiſe upon good title* to gain the land. Br. Coparceners, pl. 1. cites M. 1 H. 6. 5.——When one coparcener *enters generally and takes the profits*, this ſhall be accounted in law the entry of them both. Co. Litt. 243. b.

(C) Of what Things Coparceners may be, and *How, Things indiviſible.*

1. IF a *villein* deſcend to two coparceners, this is an intire inheritance, and albeit the villein himſelf cannot be divided, yet the *profit* of him may be divided; *one* coparcener *may have the ſervice one day*, one week &c. and the *other another day* or week &c. Co. Litt. 164. b.

2. Likewiſe an *advowſon* is an intire inheritance, and yet in effect the ſame may be divided between coparceners; for they may divide it to preſent by turns. Co. Litt. 164. b.

3. Regularly the eldeſt ſhall have the *reaſonable eſtovers, common, piſcary, corodie uncertain &c.* and the reſt ſhall have a contribution, i. e. an *allowance* of the value in ſome other of the inheritance &c. Co. Litt. 165.

But if the common anceſtor left no other inheritance to give any thing in allowance, if the eſtovers, piſcary &c. be uncertain, then ſhall one coparcener have the eſtovers &c. *for a time*, and the *other for the like time*; as the one for one year and the other for another,

another, or more or leſs time, whereby no prejudice can grow to the owner of the ſoil. Co. Litt. 165.—*Or* in caſe of the *piſcary* one may have one fiſh and the other a ſecond &c. or the one may have the firſt *draught*, and the ſecond the ſecond draught &c. Co. Litt. 165.

4. *And* if it be a *park*, one may have the firſt beaſt, and the ſecond the ſecond &c. Co. Litt. 165.

5. *And* if of a *mill*, one to have the mill for a time, and the other the like time, or the one one *toll diſh*, and the other the ſecond &c. Co. Litt. 165.

6. There is a difference between *a dignity* or *name of nobility*, and *an office of honour*; for if a man *hold* a manor of the King *to be High Conſtable of England*, and he dies having iſſue 2 daughters, and the eldeſt daughter takes *huſband*, he ſhall execute the office ſolely; and before marriage it ſhall be exerciſed by ſome ſufficient *deputy*; and all this was reſolved by all the Judges of England, in the Caſe of the D. of Buckingham. Co. Litt. 165.

[172] (D) Age. *Where one ſhall have the Privileges of her Age*, and that, tho' the other be above Age.

1. IF one of them be of full age and the other within age, ſhe ſhall have her age and other privileges and advantages that an heir within age ſhall have; and when they are demandants *for the homage* of the one, the parol ſhall demur againſt them both. Sunt autem plures participes quaſi unum corpus in eo, quod unum jus habent, & oportet quod corpus ſit integrum, & quod in nulla parte ſit defectus. Co. Litt. 164.

2. If a man have a *judgment* given againſt him for debt or damages, or be bound in a recognizance and dies, his heir within age, or having 2 daughters, and the one within age, no *execution* ſhall be ſued of lands *by elegit* during the minority, *albeit the heir is not ſpecially bound, but charged as tertenant*. Co. Litt. 290.

3. In quare impedit it was held, that if an *advowſon deſcend to* 4 *coparceners*, and after the death of their anceſtor the church is void; if *they cannot agree in preſentment*, the *incumbent of the eldeſt* ſiſter *ſhall be received* and inducted; and ſo at the 2d time the incumbent of the 2d ſiſter, & ſic de ſingulis. Keilw. 1. Mich. 12 H. 7. Anon.

(E) *What Privilege the Eldeſt*, or her Iſſue, *ſhall have* in Partition.

1. *ENITIA pars* is *perſonal* to the eldeſt, and this prerogative or privilege *deſcends not* to her iſſue, *but the next eldeſt* ſiſter ſhall *have it*. Co. Litt. 166. b.

2. *If* the parceners agree that the *eldeſt* ſiſter ſhall *make partition* of the tenements in manner aforeſaid, and if ſhe does this, then

then it is ſaid that the eldeſt ſiſter *ſhall chuſe laſt* for her part, and after every one of her ſiſters &c. Co Litt. ſ. 245.

3. *So* a diverſity is to be obſerved between this caſe of a *partition in deed* by the act of the parties, (for there the privilege of *election* of the eldeſt daughter *ſhan't deſcend* to her iſſue) *and* between the caſe *where the law gives* the eldeſt *any privilege without her act*, for there that privilege ſhall deſcend: as if there are diverſe coparceners of an *advowſon*, and they *can't agree to preſent*, the law gives the firſt preſentment to the eldeſt; and this privilege ſhall deſcend to her iſſue, nay her aſſignee ſhall have it, and ſo ſhall her huſband that is tenant by the courteſy have it alſo. *Cujus eſt diviſio alterus eſt electio.* Co. Litt. 166. b. Kelw. 1.

4. Littleton rightly collects upon the form of the judgment, that the ſheriff ſhall deliver to them ſuch parts as he thinks good, and that the eldeſt coparcener ſhall have *election*, *when* the *partition is made by the ſheriff.* Co. Litt. 168.

(F) Where they ſhall be *deem'd in Law as one Heir*, and to what Purpoſes they are ſaid *to have* ſeveral Freeholds.

1. AN advowſon deſcends to *three coparceners infants, and before preſentment by any of them, a ſtranger uſurps*; it ſeem'd to the Court that uſurpation ſhould be *upon all*; for one right [173] deſcended to them, and they may join in the preſentment. 21 E. 3. 31.—And tho' upon a diſagreement between them, the eldeſt may preſent, yet it is but a privilege which the eldeſt daughter may waive. Tr. 20. Car. 1. C. B. Rot. 1849. Hoy v. Blevy.

2. Albeit where there are two coparceners, they have *two moieties* in the lands deſcended to them, *yet* are they both *but one heir*, and one of them is not the moiety of an heir, but both of them are but unus hæres. Co. Litt. 163. b.

3. If a man makes a *leaſe for life*, the *remainder to the right heirs of A. being dead*, who has *iſſue two daughters*, whereof the *one is attainted of* felony, in this caſe ſome have ſaid that the remainder is not good for a moiety, but void for the whole; for that both the daughters ſhould have been (as Littleton ſays) but one heir. Co. Litt. 163. b.

4. As they be but one heir and yet ſeveral perſons, ſo they have one entire freehold in the land, as long as it *remains undivided* in reſpect of any *ſtranger's præcipe*; but *between themſelves* in judgment of law they have to many purpoſes ſeveral freeholds; for the *one* of them *may infeoff the other* of them of her part, and make livery. Co. Litt. 164.

(G) Where they ſhall be ſaid *ſeiſed in Coparcenary of Rent.*

1. *IF three coparceners make partition*, and the *one grants* 20 *s. rent to the two for equality* of partition, this rent ſhall be of the nature of coparcenary; and if the one of them dies, the rent ſhall not ſurvive, but go by moieties in nature of coparcenary. Br. Rents, pl. 8. cites 15 H. 7. 14. per Frowike & Vaviſor J.

Br Coparceners, pl. 6. cites S. C.—— D. 153. pl. 14. in Caſe of Hunt v. Elliſden.

Mich. 4 & 5 Ph. & M. cites S. C.—S. P. Becauſe the rent *comes in recompence of the land*, and therefore ſhall enſue the nature thereof. And if the grant had been made to them two of a rent of 20s. viz. *to the one* 10s. and *to the other* 10s. yet ſhall they have the rent in courſe of coparcenary, and join in action for the ſame. Co. Litt. 169. b.—The coparcener that has a rent *granted* to her *for equelty of partition*, ſhall be ſaid to have it in the ſame manner as if it deſcended to her from the common anceſtor. Co. Litt. 177. b.——5 Rep. 8. a. in Juſtice Windham's Caſe, cites 38 E. 3. 26. b. per Knivet Chief Juſtice and Chancellor.—S. P. And tho' the words are joint, yet the cauſe of the grant ſhall be reſpected, and the rent ſhall be of the quality of the land. 5 Rep. 8. a. per Curiam, in Juſtice Windham's Caſe. Mich. 31 & 32 Eliz. B. R. cites 15 H. 7. 14. a.—— S. P. 29 Aſſ. 23.—Hob. 172. in Caſe of Stukely v. Butler, cites S. C.

2. If two coparceners, by deed indented, *alien* both their parts to another in fee, *rendering to them two and their heirs a rent in fee* out of the land, they are not jointenants of this rent, but ſhall have the rent in courſe of coparcenary, becauſe the right of the land out which the rent is reſerved, was in coparcenary. Co. Litt. 169. b.

3. Two coparceners make a *leaſe reſerving rent*, they ſhall have this rent in common, as they have the reverſion; but if afterwards they *grant the reverſion excepting the rent*, then they ſhall be jointenants of the rent. Fin. Law 8vo. 9.

[174] (H) *Severance. What* is; and *Reviv'd, in what Caſes.*

1. IF two coparceners are in fee, and the *one makes a leaſe for life*, this is no ſeverance of the coparcenary; for notwithſtanding, the Lord ſhall make one avowry upon them both: otherwiſe of jointenants. Co. Litt. 192.

2. If land deſcends to two coparceners who *enter*, and after the *one aliens her part, and* then *retakes an eſtate in fee*, the coparcenary between them is determined, for ſhe is now in of other eſtate. Br. Coparceners, pl. 5. cites 11 H. 4. 21.

S. P. Br. Coparceners, pl. 3. cites 37 H. 6. 8.—— S. P. per Knivet, Br. Joinder in Action, pl. 59. cites 34 Aſſ. 15.——S. P. Co. Litt. 164.——S. P. If no partition be between them before; but

3. Where *two coparceners are diſſeiſed*, and the *one has iſſue, and dies*, there the *one ſhall have action of the one moiety*, and the *iſſue of the other* ſhall have *writ of entry ſur diſſeiſin of the other moiety*; and when they have recover'd and had execution, they ſhall be coparceners as before. Br. Joinder in Action, pl. 43. cites * 39 H. 6. 8. per Cur.

but contra *where partition is made, or if she alone aliens her part, tho' she retakes it again by purchase.* Br. Several Præcipe, pl. 1. cites S. C.——* So it is in all the editions of Brook; but it seems to be misprinted, and should be 37 H. 6. 8. a. pl. 16.

(I) Acts. *What Acts they may do the one to the other.*

1. IT was doubted if one coparcener might *enfeoff* her companion: but per Brian, she may. Br. Feoffment de Terres, pl. 45. cites 10 E. 4. 3. Ibid. pl. 75 S. P.

(K) What *Act of one* shall go in *Benefit* of *the others.*

1. IN quare impedit an *advowson descended to four coparceners*, and when it came to the *second* sister's turn to present, she *suffered an usurpation*; and it was moved for a question whether this usurpation suffer'd shall put the third coparcener to any prejudice; and by the opinion of the Court and of the Bar, it shall not be any prejudice to the third sister, but that she shall present when it comes to her turn, and so of the fourth: and it was said that *by the presentment of the third or fourth after the usurpation had* to the turn of the second, *the usurpation is avoided*, and the second sister, when it comes to her turn, may present; and the reason of Wood J. was, because all of them have but one joint title; so that upon any disturbance made to the turn of any of them, they are to join in an action, then when an usurpation is had at one time to the turn of one of them, and after at the turn of another a presentation and induction is had; and by another of the sisters at her turn, this induction is the restitution to all; because their title is joint for the cause aforesaid, and so the usurpation before had, clearly avoided; and the same coparcener, who was at one time out of the possession of her presentment by the said usurpation, when it came again to her turn, was clearly remitted. *But if* * *partition be made* by composition between the said coparceners, otherwise it would be, per Wood; for then tho' the third coparcener presents †, as well she may, notwithstanding the usurpation suffered by the second sister, now by her presentment the second shall *not* be *remitted*, but is put to her writ of right of advowson in her own name only, by reason of the partition. Keilw. 1. a. b. Mich. 12 H. 7.

* 4 Le. 222, 223. cites 24 E. 4. Contra per Brian, That if an advowson descends to 4 coparceners, and they make partition to present by turns, and the *third presents when the second ought*, for that time the presentment is gone; but when it comes to his turn again, he shall present.—

† See 2 Vent. 39. Pasch. 35 Car. 2. C. B. Anon. where the Court [175] inclined to an opinion that such usurpation put all out of possession, and would not permit a special verdict, but a case was made of it for the consideration of the Judges.

2. If two jointenants be disseised, and the one of them makes *continual claim*, and dies, the survivor shall take benefit of his continual claim in respect of the privity of their estate. Co. Litt. 252.

(L) Ouſter. *What* ſhall be ſaid *a Diſſeiſin by one of the other.*

Br. Brief, pl. 259. cites S. C.

1. LAND ſometimes meadow and ſometimes paſture deſcended to A. B. C. D. and E. ſiſters in coparcenary, and upon a partition a *moiety was allotted to E.* who died ſeiſed thereof, and it deſcended to W. her heir, who was likewiſe ſeiſed. J. S. purchaſed the part of the other four ſiſters, and claiming four parts in five of the land, *cut the graſs leaving one fifth part of the hay on the land, and carrying away the other four parts*, which W. refuſed to take. And in aſſiſe brought by W. it was held that the *taking more of the profits of the land than belonged to J. S.* was a diſſeiſin. Br. Aſſiſe, pl. 121. cites 7 Aſſ. 10. per Herle.

2. In aſſiſe, it was *found* by verdict *that two coparceners of a moor made purparty*, and *one leaſed his part to A. B. for life, who leaſed his part to three at will, who paſtured the ſoil of the other coparcener, and cut wood*, and mow'd ruſhes, and the *other parcener voided the poſſeſſion, and brought aſſiſe againſt the leſſee for life, and againſt two tenants at will*, and *found alſo that the tenant at will manured the ſoil to the uſe of the leſſor, but leſſee for life had nothing of the profits, and that the other parcener might have taken the profits if he would*; and *that the leſſee for life did not command his tenants to take the profits, neither did he know any thing of it, but he agreed to what they did as the jury thought, inaſmuch as after he knew the tenants at will had occupied by the manner he did not cauſe them to make gree*; and per Cur. this is no agreement; and therefore the leſſee for life is no diſſeiſor, and alſo one of the tenants at will is not named, who by his act is diſſeiſor and tenant with the others, therefore by award the plaintiff took nothing by his writ. Br. Aſſiſe, pl. 345. cites 37 Aſſ. 8.

3. If *one* coparcener *enters into the whole and makes a feoffment* of the whole, this diveſts the freehold in law out of the other coparcener. Cart. 176. Hill. 18 & 19 Car. 2. C. B. cites Co. Litt. 374, a.

4. When one coparcener *enters ſpecially, claiming the whole land, and taking the whole profits*, ſhe gains the one moiety by abatement. Cart. 176. cites Co. Litt. 243. b.

Twotenants in common of an *advowſon*;

5. A man cannot be diſſeiſed of an *undivided moiety*. 2 Salk. 423. Hill. 1 Ann. B. R. Reading v. Royſton.

one alone preſents; yet at the next avoidance they may join, and if they are diſturbed, quare impedit lies as in the caſe of coparceners. Quære. And. 63. Mich. 24 & 25 Eliz. Harris v. Nichols.—Cro. E. 18 Paſch. 25 Eliz. C. B. S. C. makes a difference between grantees of coparceners, and meer tenants in common, that in the firſt caſe an uſurpation of one ſhall not put the others out of poſſeſſion, but that perhaps it would be otherwiſe in the laſt, unleſs they were ſuch as derived their eſtates from coparceners; and yet 22 E. 3. 9. is, That between ſtrangers in blood, or where two make compoſition to preſent by turn, if one uſurp upon the turn of the other, this ſhall not put him out of poſſeſſion; per three Juſtices, but Anderſon doubted.

(M) *Grants*

(M) *Grants by one.*

1. TWO coparceners were *of a reverſion*, one granted his intereſt *by fine* to J. S. It was held that the conuſee ſhall have *quid juris clamat* for a moiety of the ſaid reverſion. 3 Le. 6. 3 Eliz. Anon.

2. Two parceners of a houſe, one entered generally, and made a *leaſe for life*, by the name of *all that his houſe* &c. Per two Juſtices, the entire houſe *paſſed*, and ſo the words intend, and by his *livery* he gained and granted the entire, tho' his general entry intends his entry into no more than what he had right to; but per Gawdy J. as the entry *prima facie* gains no more than what he had a right to demand, no more ſhall this leaſe: and Foſter at the Bar ſaid it was adjudged in this Court in REYNOLD'S CASE, according to the opinion of the two Juſtices. Cro. E. 615. Gerry v. Holford.

S. P. Ibid. 641. Arg. per Popham in Caſe of Hemſley v. Price.

(N) What *Offence of one* ſhall *bind her Companion.*

1. IT is to be obſerved, that there is a diverſity between a *deſcent* which is an act of the law, and a *purchaſe*, which is an act of the party; for if a man be ſeiſed of lands in fee, and has iſſue two daughters, and *one* of the daughters *is attainted of felony*, the father dies, both daughters being alive, the *one moiety* ſhall deſcend to the one daughter, and the other ſhall *eſcheat*. Co. Litt. 163. b.

But if a man makes a *leaſe for life*, the *remainder to the right heirs of A. being dead*, who has *iſſue two daughters*, whereof the *one is attainted of* felony, in this caſe ſome have ſaid the remainder is not good for a moiety, but void for the whole; for that both the daughters ſhould have been (as Littleton ſays) but one heir. Co. Litt. 163. b.

(O) Where *Feoffee of one* ſhall have *Aid of the other.*

1. IF one parcener makes a *feoffment in fee*, and after her feoffee is impleaded, and *vouches* the feoffor, ſhe may have aid of her coparcener *to dereign a warranty* paramount; *but never to recover pro rata* againſt her by force of the warranty in law upon the partition. Co. Litt. 174.

2. In ſome caſes the feoffee of one coparcener ſhall have aid of the other parceners to *dereign the warranty* paramount, and therefore if there are two coparceners, and they *make partition*, and the *one* of them *infeoffs her ſon and heir apparent*, and dies, the *ſon is impleaded*; albeit he be in by the feoffment of his mother, yet ſhall he pray in aid of the other coparcener to have the warranty paramount; and the reaſon of the granting this aid is, becauſe the *warranty between the mother and the ſon is by law annull'd*, and therefore the law gives the ſon (tho' he is in

by feoffment) to pray in aid of the other parcener to dereign the warranty paramount. Co. Litt. 174.

3. If a *man* be ſeiſed of lands in fee, and has *iſſue two daughters*, and *makes a gift in tail to one of them*, and dies ſeiſed of the reverſion in fee, which deſcends to both ſiſters, and the donee or her iſſue is impleaded; ſhe ſhall not pray in aid of the other coparcener, either to *recover pro rata*, or to dereign the *warranty paramount*: becauſe the other is a ſtranger to the eſtate tail, whereof the eldeſt was ſole tenant, and partition never was or could be thereof made. Co. Litt. 174. b.

[177]

(P) *Actions by one againſt the other.*

1. WHERE there are *three parceners* who *make partition*, and *one has an equal part*, and *another has too much*, and the *third too little*, he who has too little ſhall ſue alone againſt him who has too much only, and the firſt who has equal ſhall not be party; for he did no wrong. Br. Error, pl. 131. cites 42 Aſſ. 22.

2. An aſſiſe of *darrain preſentment* doth not lie between parceners when one of them *uſurps in the turn of another*; becauſe of the *privity* which is between them, and the words of the writ are againſt him that deforces the advowſon. Jenk. 2. pl. 1. cites 20 E. 3. 15 E. 3. Fitzh. Darrain Preſentment.

3. *But* one parcener may have a quare impedit *againſt another*, when her turn is diſturb'd by the other parcener. Jenk. 2. pl. 1. cites F. N. B. 34.

4. One cannot have *mortdanceſtor* againſt the other. See F. N. B. 196. (L)—But may have a *nuper obiit*. See F. N. B. 197 (A) &c.—And ſo of a *rationabili parte*. F. N. B. 9. (B) &c.

(Q) Actions againſt others. *In what Actions they ſhall join.*

Br. Aſſiſe, pl. 259. cites S. C.—— * Orig. (matter.)

1. WHERE *two daughters* are *heirs*, and the *one enters*, and *one who has no right ouſts her*, and *ſhe brings aſſiſe in her name alone*, and all this matter found by * verdict; and becauſe ſhe hath right againſt all who hath not right, therefore ſhe recovered by award. Br. Entre Cong. pl. 59. cites 26 Aſſ. 2.

S. P. And the tenant ſhall not be charged to both; quod nota. Br. Prief, pl. 303. cites S. C.

2. *Aſſiſe of rent by E.* the *defendant ſaid that the plaintiff had nothing unleſs in common with J. S. daughter of A. ſiſter of the plaintiff who is alive, not named*, judgment of the writ; and if &c. nul tort. *It was found that M. was ſeiſed in fee of the rent, and died ſeiſed, and the rent deſcended to A. and E.* which *A. had iſſue J. S. and died*; and *J. S. was within age*, and *E. took her in ward, and received the whole rent to her own uſe*, and none to the uſe of J. S. nor was any thing aſſigned to J. S. in allowance, nor had the anceſtor any other land; and by award the writ was

was abated, by the not naming J. S. quod nota. And ſo ſee the * ſeiſin of one is the ſeiſin of both; quod nota bene. Br. Joinder in Action, pl. 60. cites 36 Aſſ. 1. * Orig. (ſine.)

3. If land in *fee ſimple and* fee *tail deſcend to two ſiſters*, and they *make partition*, ſo that the *one has the fee ſimple* land, *and the other the land tailed*, and *ſhe who has the land tailed aliens* and dies, and her iſſue brings formedon, and the *tenant ſhews this matter, the iſſue and his aunt ſhall join*, and the one ſhall recover the whole. But Brook makes a quære thereof, and ſays that the *other ſiſter who has the land, cannot join* in the formedon, for ſhe has her portion. *But if ſhe had alien'd the fee ſimple land alſo, before the iſſue of the other had brought the formedon*, then it ſeems that both ſhall well join. Br. Formedon, pl. 2. cites 20 H. 6. 2. 13.

4. After partition the one heir ſhall have *formedon* alone. Per Brook. Br. Formedon, pl. 2.

5. Parceners ſhall join in *quare impedit* when a ſtranger preſents; for he claims the whole advowſon againſt them both. Jenk. 2. pl. 1. Contra. For if they cannot agree, the eldeſt ſhall have

the preſentation. Br. Joinder in Action, cites 5 H. 7. 8.—But if two coparceners join in quare impedit and *one by covin with defendant counts falſely*, and will not agree with her companion in a true count; the other may *have a ſubpœna* againſt her, *to compel her to join* and agree in the count. Br. Conſcience, pl. 12. cites 6 E. 4. 10.

6. *But* if four coparceners of an advowſon are, who preſent *by turns*, and one ſuffers an uſurpation, they ſhall all join while the coparcenary continues, but *not after partition* made. Keilw. 1. Mich. 12 H. 7. Anon. [178] See Preſentment (M. b.) pl. 8. contra.——*After compoſition* to preſent by turns, they may join in qua. imp. 2 Inſt. 365.

7. Coparcenary is *not ſevered* or divided by law *by the death of any of them*; for if one die, her part ſhall deſcend to her iſſue, and *one præcipe* ſhall be againſt them; for they ſhall never join as heirs to ſeveral anceſtors in any action anceſtrel: but *when one right deſcends from one anceſtor*, and then propter unitatem juris, *tho'* they be *in ſeveral degrees* from the common anceſtor, yet ſhall they join. Co. Litt. 164. *But* the *iſſues of ſeveral coparceners* (becauſe ſeveral rights deſcend) ſhall never join as heirs to their mothers, and yet when they have recovered, a writ of partition lies between them. Co. Litt. 164.

8. If a man has *iſſue two daughters* and *is diſſeiſed*, and the *daughters have iſſue and die*, the iſſues ſhall join in a *præcipe*; becauſe one right deſcends from the anceſtor: and it makes *no difference* whether the common anceſtor being out of poſſeſſion *died before the daughters, or after*; for that in both caſes they muſt make themſelves heirs to the grandfather, which was laſt ſeiſed, and when the iſſues have recover'd they are coparceners, and one præcipe ſhall lie againſt them. And likewiſe if the *iſſues* of two coparceners which are *in by ſeveral deſcents, be diſſeiſed*, they ſhall join in *aſſiſe*. C. L. 164. *But* in the ſame caſe, *if* the two daughters *had been actually ſeiſed*, and had been diſſeiſed, after their deceaſes the iſſue ſhall not join; becauſe *ſeveral rights deſcended* to them *from ſeveral anceſtors*. Co. Litt. 164.—*And yet when they have ſeverally recovered they are coparceners*, and one præcipe lies againſt them. A *releaſe* made by one of them

them to the other is good. Co. Litt. 164.——So note a diverſity inter *deſcenſum in capita*, and in *ſtirpes*. Co. Litt. 164.

9. Two parceners ſhall have a *writ of ayel*, and by their count ſuppoſe the common anceſtor to be *grandfather to the one*, and *great-grandfather to the other*. Co. Litt. 164.

10. They muſt join in *debt for rent*. 3 Mod. 109. Paſch. 2 Jac. 2. B. R. Anon. Obiter.

12 Mod. 86. S. C.—— Comb. 347. S. C.—— 5 Mod. 141. S. C.—Carth. 364. Page v. Stedman. S. C. and held that if one diſtrains, ſhe ought to make *conuſance in her own right, and as bailiff to her ſiſter for the intire rent.*

11. They muſt join in an *avowry*. 1 Salk. 390. Mich. 7 W. 3. B. R. Stedman v. Bates.

S. P. 12 Mod. 86. in S. C.

12. Coparceners make but *one tenant to a præcipe*. Per Holt Ch. J. Comb. 347. Mich. 7 W. 3. B. R. Stedman v. Page.

* S. P. So in *writ of entry* &c. Comb. 347. S. C.

13. They muſt join in one action of *treſpaſs*, and ſo in a * *mortdanceſtor*, where only the right is concerned, and therefore much more in replevin, which goes to the right and to the poſſeſſion. 12 Mod. 86. Stedman v. Page.

(R) Actions. Joinder by them, *tho' in ſeveral Degrees.*

1. *TWO brought* writ of *coſinage of the ſeiſin of W. who was great grandfather to the one*, and *great great grandfather to the other*, and yet well. And yet the *ſtatute of Glouceſter, cap.* 6. *wills, that where the one is of a longer degree than the other, there they ſhall have recovery by writ of mortdanceſtor*. But ſee the ſtatute is *in the affirmative*, and therefore it ſeems they may have this action alſo: and the ſame law, that two coparceners, and the heir of the third coparcener, may join in writ of entry ſur diſſeiſin. Br. Joinder in Action, pl. 117. cites 19 E. 2.

[179] 2. *Fine* was levied *to A. for life*, the *remainder to two barons, and their femes in tail*; the *tenant for life died*, the two *barons and their femes had iſſue and dy'd before entry*, the *one iſſue and a ſtranger enter'd*, and the *other iſſue brought ſcire facias upon the fine of the moiety*, and good, for it was agreed that the iſſues in tail ought to ſever in action, and not join in action; for it is a *joint gift, but ſeveral inheritance*. Br. Joinder in Action, pl. 38. cites 24 E. 3. 29.

If a man ſeiſed of certain land in fee, has iſſue 2 daughters and dies, and the daughters enter &c. and each of them has iſſue a ſon, and die without partition made between them, by which the one moiety deſcends to the ſon of the one parcener, and the other moiety deſcends to the ſon of the other parcener, and they enter and occupy in common and are diſſeiſed, in this caſe they ſhall have in their two names *one aſſiſe* and not two aſſiſes. And the cauſe is, for that albeit they come in by divers deſcents &c. yet they are parceners, and a writ of partition lies between them. And they are not parceners, having regard or reſpect only to the ſeiſin and poſſeſſion of their mothers, but they are parceners rather, having reſpect to the eſtate which deſcended from their grandfather to their mothers; for they cannot be parceners if their mothers

3. *And* where *coparceners* are *diſſeiſed* they *may join* in action, *but their heirs ſhall ſever* in action; per Cur. Ibid.

ghers were not parceners before &c. And ſo in this reſpect and conſideration, viz. as to the firſt deſcent which was to their mothers, they have a title in parcenary, the which makes them parceners. And alſo they are but as one heir to their common anceſtor, viz. to their grandfather, from whom the land deſcended to their mothers. And for theſe cauſes before partition between them &c. they ſhall have an aſſiſe although they come in by ſeveral deſcents. Co. Litt. S. 313.

4. If *abatement or waſt be made againſt two coparceners*, and the *one has iſſue and dies*, the iſſue and the other ſhall join and recover the land, but the damages ſhall be ſever'd. Br. Joinder in Action, pl. 98. cites 11 H. 4. 16.

The *aunt and the niece, of diſſeiſin done to the aunt* and

ſiſter, ought to ſever in action. Br. Several Præcipe, pl. 9. cites 24 E. 3.—*Aunt and niece* ſhall have *waſt* jointly, for waſt *done after the deceaſe of the other ſiſter*, and for waſt done before, the aunt may count of waſt done to her own diſherſon only and all in one writ. Vid. Kelw. 105. b. pl. 17. cites 45 E. 3. 3. pl. 11. 35 H. 6. 23. per Forteſcue, & 11 H. 4. fol. 16.

5. The *aunt and the niece may* join *in ſur cui in vita upon alienation made by the baron, their common anceſtor*, or *upon recovery had againſt the baron and his feme.* Br. Joinder in Action, pl. 105. cites F. N. B. Cui in vita.

6. If there are 2 coparceners of a reverſion, and *waſt* is committed, and *one dies*, the aunt and niece ſhall join in an action of waſt. Co. Litt. 53. b.

This point of Co. Litt. was much doubted of by 3 J. For

they ſaid, that the books cited do not warrant the opinion, and that other authorities are contra. 1 Salk. 186. 10 W. 3. C. B.—and cited * Mo. 34, 110, 40, 127.

* Mo. 34. pl. 110. is generally that two parceners may join in waſt againſt their leſſee. Trin. 3 Eliz. Anon. and Ibid. 40. pl. 127. is agreeable to Co. Litt. 53. b.

7. Where *two coparceners* are, and the *one has iſſue and dies*, if the *iſſue and the other enter and are diſſeiſed*, they may join in aſſiſe, becauſe the coparcenary *continues*; and ſo if there were 20 *deſcents* where the coparcenary continues and no partition had. Br. Joinder in Action, pl. 40. cites 9 E. 4. 14.

8. *Where two tenants are in, the one as heir to his mother, in the one moiety, and the other as heir to his mother, of the other moiety*, and they are to demand, they *ſhall demand by ſeveral præcipes.* Br. Several Præcipe, pl. 1. cites 37 H. 6. 8.

(S) *Where Damages* recover'd jointly *ſhall* enure in Severalty and not *ſurvive.* [180]

1. IF *three coparceners* recover land and damages in an *aſſiſe of mortdanceſtor*, albeit the judgment is joint, that they ſhall recover the land and damages, yet the damages being *acceſſory*, tho' they be perſonal, do in judgment of law *depend upon* the freehold, being *the principal*, which is ſeveral; and tho' the *words* of the judgment be *joint*, yet *ſhall it be taken for diſtributive*, and therefore if *two of them die*, the intire damages do not ſurvive, but the third ſhall have *execution according to her portion.* Co. Litt. 198.

But if all *three had ſued execution by* force of an *elegit*, and two of them had died, the third ſhould have had the whole by ſurvivor till the whole damages be paid. Co. Litt. 198.

(T) Actions

(T) Actions *ſurvive, in what Caſes*, or by whom to be brought after the Death of one.

1. IF two coparceners have cauſe to have *ceſſavit*, and one dies, the action is gone, for there is no ſurvivor, and the *action is real*; otherwiſe it ſeems of *treſpaſs and things perſonal.* Br. Jointenants, pl. 51. cites 33 E. 3. & Fitzh. ceſſavit 42.

2. In *waſt* exception was taken to the writ, becauſe two coparceners and the heir of the 3d join'd in the writ, whereas the huſband of the 3d ſiſter, being *tenant by the curteſy, was living*, and for this was cited 22 H. 6. 21, 22. But it was anſwer'd, that his joining would be to no purpoſe; for he is not to have damages, becauſe the waſt was not to his diſheriſon, and the land he ſhall not recover againſt the defendant, the term* being determined; and the Court were of the ſame opinion. 4 Le. 164. pl. 269. Mich. 29 Eliz. C. B. Sir Richard Lewkner's Caſe.

* The word (not) is in the original, but it ſeems ſhou'd be omitted.— By the term being expired, the land is in the tenant by the curteſy, and ſo he has no cauſe to complain.

And the whole Court was of opinion, that becauſe the term was ended, the writ was good notwithſtanding the exception. Godb. 115. pl. 136. S. C. by name of Lewknor v. Ford.——S. C. and S. P. 4 Le. 226, 227.——Le. 48. pl. 62. S. C.

(U) *Againſt them.* In what Caſes they muſt *be join'd.*

1. ENTRY in the Quibus againſt two of diſſeiſin done to the demandant. The defendant demanded judgment of the writ; for the *grandfather of the tenants was ſeiſed* &c. *and died ſeiſed, and the land deſcended to two daughters, who entered and died ſeiſed, and the two now tenants are in, the one as heir to his mother in the one moiety, and the other as heir to his mother of the other moiety*, and ſo ought to have ſeveral writs or *ſeveral præcipes*, but the opinion of the Court e contra;* for as long as they are in as coparceners, and in caſe of coparcenary, and *no partition made*, writ of partitione faciend' lies between them, and therefore joint præcipe lies againſt them. Br. Several Præcipe, pl. 1. cites 37 H. 6. 8.

* S. P. *tho' it be after ſeveral deſcents*; for they are as one tenant, and one præcipe quod reddat lies againſt them all. Br. Coparceners, pl. 1. cites S. C.—— S. P. *Contra* where they are *in by ſeveral titles, or by partition.* Br. Joinder in Action, pl. 43. cites 39 H. 6. 8.—[but is miſcited, and ſhould be 37 H. 6. 8.]

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(W) *Pleadings, Count* &c.

1. ASSISE *by* 7 *femes* and 5 *did not ſue*, by which they were *ſummon'd and ſever'd*, and the 2 received to ſue alone, who made their *plaint of two parts of ſeven parts of two meſuages, two carves of land*, 4 *l.* 1 *s.* 2 *d. rent, and of the moiety of ſeven parts*

And note that *five parceners brought a writ and*

of

of the ſame tenements cum pertinentiis, and the plaint was challenged, becauſe they *did not ſhew if the ſeven parts are the whole tenements or not*; by which the plaintiff ſaid that they were, and the plaint adjudged good. Br. Plaint, pl. 11. cites 10 Aſſ. 12. *demanded a houſe, two were non-ſuited, and the three demanded three parts of a houſe divided into five parts* and well. Br. Plaint, pl. 11. cites M. 17 E. 3.

2. Aſſiſe *againſt two coparceners*: the *one made default* and the aſſiſe was awarded againſt her by default, and the *other pleaded a deed of the anceſtor of the plaintiff made to the anceſtor of the tenant with warranty*. And it was awarded that ſhe may plead this for her *moiety* well enough, and for no more; quod nota. Br. Aſſiſe, pl. 469. cites 13 E. 3.

3. *Four coparceners* are *of an advowſon*, and *three of them grant and confirm that which to them belongs therein to the fourth*, and it is no title without ſhewing deed; by the opinion of the Court. Br. Monſtrans, pl. 47. cites 21 E. 3. 37.

4. *But* in replevin, the defendant avowed for a *rent for equality of partition* between 3 ſiſters reſerved, and did not ſhew any deed of the reſervation; quod nota. Br. Monſtrans, pl. 3. cites 2 H. 6. 14.

5. Where avowry is *for rent reſerved upon equality of partition*, upon partition made *between two parceners*, it is a good *plea that they were three parceners, and that the third at the time of the partition was out of the country, and came back within age and re-enter'd*, and the *other ſaid that the third after releaſed her eſtate, abſque hoc that ſhe enter'd; Priſt*; and the others e contra. Br. Avowry, pl. 68. cites 24 E. 3. 51. 58.

6. In *præcipe quod* reddat, if the *tenant ſays, that he has nothing but in coparcenary with W. N. not named*, judgment of the writ, the *other ſhall ſay, that ſole tenant as the writ ſuppoſes, abſque hoc that W. N. any thing has*, and *not abſque hoc that he holds in coparcenary with W. N.* And ſo upon jointenancy. Br. Iſſues Joines, pl. 59. cites 22 H. 6. 17. Br. Maintenance de Brief, pl. 11. cites 22 H. 6. 16. accordingly. —Br. Traverſe, pl. 295. cites S. C.—*So* where they *are in ſeverally*, the *one ſhall ſay, that he is tenant of the moiety abſque hoc that the other any thing has*, and the other ſhall ſay the like for the other Danby, quod Curia conceſſit. Br. Several Præcipe, pl. 1. cites 37 H. 6. 8. *in ſeveralty*, moiety; per

7. It is good *iſſue that they hold in common by deſcent* &c. and therefore it ſeems that it is not pregnant; quod nota. Br. Negativa &c. pl. 36. cites 36 H. 6. 19. Br. Partition, pl. 15. cites S. C.

8. He who *pleads that the plaintiff has nothing but only in coparcenary with J. N.* ought to *ſhew how, viz.* That *A. was ſeiſed and died ſeiſed, and they as daughters and heirs entered*. Br. Coparceners, pl. 7. cites 2 E. 4. 7. *So* where the *defendant pleads coparcenary in himſelf*. Ibid.

9. In *ejectment* brought upon a *leaſe made by two coparceners*, the declaration was *quod dimiſerunt*; exception was taken, that the leaſe is the ſeveral leaſe of each of them for her moiety, and it was rul'd a good exception. Mo. 682. pl. 939. Mich. 42 & 43 Eliz. Milliner v. Robinſon.

10. In

1 Salk. 390. STEDMAN v. BATES, S. C. adjudg'd accordingly; for by Littleton himself, both ſiſters muſt join; they both take as heir by deſcent, and make but one heir, to whom the rent deſcends as one intire inheritance.—Carth. 364. S. C. PAGE v. STEDMAN. The defendant ought to have made conuſance for the whole rent as bailiff to both ſiſters.—*So* where *one ſiſter diſtreins*, ſhe muſt *avow in her own right, and alſo as bailiff to her ſiſter for the intire rent*, and not for a moiety only in her own right. Ibid.—Comb. 347. S. C.—S. C. cited by the Reporter. 2 Lutw. 1210. in the Caſe of Oſmer v. Sheaf.

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10. In *replevin* the plaintiff declared for taking bricks &c. The defendant made *cognizance as bailiff of one J. B. and G. his wife*, ſetting forth, that one S. B. was ſeiſed in fee of the lands in which &c. and being ſo ſeiſed, made a leaſe thereof to Griffith for 44 years, rendring rent; that S. B. died, and the lands deſcended to his daughters coheireſſes, one whereof married the ſaid J. B. and the other was the preſent Counteſs of Saliſbury, and ſo made cognizance *for a moiety of the rent*; and upon demurrer, judgment was given for the plaintiff; becauſe one coparcener cannot make ſuch an avowry for a moiety of the rent *before partition*, though they have ſeveral inheritances. 5 Mod. 141. Mich. 7 W. 3. Stedman v. Page.

See Partition (E. 2).

(X) *Where* in a real Action by one Parcener againſt another *Judgment ſhall be given in Severalty.*

1. IF two coparceners be, and *one diſſeiſe the other*, and the diſſeiſee brings an *aſſiſe* and recovers, it has been ſaid, that ſhe ſhall have judgment to hold her moiety in ſeveralty; and this ſeems (ſay they) very ancient, and thereupon vouch Bracton. (L. 4. fo. 216. b.) Si res fuerit communis locum habere potuit communi dividendo judicium; and ſo (ſay they) if one coparcener recover againſt another in a *nuper obiit*, or a *rationabili parte*, the judgment ſhall be, that the defendant ſhall recover and hold in ſeveralty. Co. Litt. 167. b.

2. *But* Britton is to the contrary; for he ſays, Et ſi aſcun des parceners ſoit *enget* ou diſturbe de ſa ſeiſin per ces autres parceners un, ou, pluſors, al diſſeiſee viendra aſſiſe per ſeveral pleint ſur les parceners & recovera, mes nemy tener en ſeveralty, mes en common, ſolonque ceo que avant le fiſt &c. and this ſeems reaſonable; for he muſt have his *judgment according to his plaint*, and that was of a moiety, and not of any thing in ſeveralty; and the ſheriff cannot have any warrant to make any partition in ſeveralty, or metes and bounds. Co. Litt. 167. b.

(Y) Equity.

1. IF *two coparceners bring quare impedit*, and the *one counts a falſe count by covin had with the defendant, and will not agree with his companion in the true count*, there his companion may have *ſubpœna againſt him to make him agree with him*; per Moyle Br. Conſcience, pl. 12. cites 6 E. 4. 10.

[For more of Parceners in general, ſee Aid of a common Perſon, (A. a) &c. Partition, and other proper Titles.]

* Pariſh.

(A) *What is* or ſhall be intended *a Pariſh or a Vill only in a Pariſh.*

† 1. WHERE a pariſh is *alleged generally*, this ſhall be intended to be a vill, and to be the ſame with the vill, and not to contain more vills unleſs it be ſpecially alleged; but a vill and a pariſh is all one, and it is ſufficient to allege a pariſh where a vill is required, as appears by diverſe caſes, upon *act of parliament, called the ſtatute of additions*, which requires that the vill be named, yet it being alleged that he was of ſuch a pariſh ſuffices; and for this purpoſe the long quinto of Ed. 4. 141. and diverſe other books were cited, and 2 Inſt. 669. per Holt; and therefore the alleging it at a pariſh ſuffices; for the pariſh of St. Giles's is a vill. Skin. 554. Mich. 6 W. & M. B. R. in Caſe of Wilſon v. Laws.

* Before the *council of Lateran* there were no pariſhes. Per Hobert Ch. J. Hob. 296.—Contra by Richardſon. Litt. Rep. 75.—But ſee Godolph. Rep. 354, 355. cap. 32. ſ. 8. where pariſhes are argued to have been before that council.—Originally the kingdom, in reference to civil matters, was divided into vills only, and pariſhes were diviſions only in reference only to eccleſiaſtical affairs, and the *common law took no notice of them*, inſomuch as a fine was not admitted of lands in a pariſh; but in proceſs of time pariſhes became diviſions taken notice of in reference to civil matters, and are now uſed in fines; and though a place ſpoken of ſimply is intended a vill, yet ſtabitur præſumptioni donec probetur in contrarium. Per Atkins. Freem. Rep. 228. Trin. 1677. in Caſe of Addiſon v. Otway.

† Adjudg'd. Mich. 6 W. 3. 2 Salk. 501. cites S. C.——Ibid. cites S. P. Adjudg'd. Mich. 10 W. 3. B. R. Vinkeſton v. Ebden.—It ſhall *not* be *intended* that there is *more than one pariſh in a city*, unleſs the contrary be made to appear. L. P. R. tit. Pariſh, cites Trin. 23 Car. B. R. For ſome cities have but one pariſh. Ibid.

2. A pariſh *may contain a whole hundred*; as the pariſh of *Taunton Dean* contains the whole hundred of Taunton Dean. Arg. Skin. 560. Mich. 6 W. & M. B. R. in Caſe of Hicks v. Woodſon.

[For more of Pariſh in general, ſee Churchwardens, Diſmes, Poor, and other proper Titles.]

Pariſhioners.

(A) *Their Power* &c. And compellable to do what.

1. PAriſhioners may *pull down a wall* that hinders them in their *way to church*. Arg. Ow. 72. cites F. N. B. 185. b.

2. In things of *intereſt*, as in common, pariſhioners cannot *preſcribe*; but in things of *eaſement*, as a way, a man may preſcribe; per Owen; and per Anderſon, none may preſcribe but thoſe that have perpetual continuance, and therefore tenant for years or for life cannot preſcribe, but muſt be *aided by cuſtom*;
[184] Walmſley accordingly; for there is no deſcent or ſucceſſion in pariſhioners. Owen 72. Hill. 37 Eliz. Goodway v. Michel.

3. They are compellable to *put things in decent order*; but the judgment of the *majority* is the only rule for the degrees of that decency; and the Court inclined, that a rate for that purpoſe is binding; as for moving the *communion table* out of the body of the church into the chancel, or raiſing it higher &c. Farr. 70. Mich. 1 Ann. B. R. Newſon v. Bauldry.

4. Pariſhioners have right to view *pariſh books*. 11 Mod. 134. Trin. 6 Ann. B. R. Love v. Dr. Bentley.

5 Rep. 66. Chamberlain of London's Caſe. —1 Mod. 194.

5. Pariſhioners *are a body politic* to many purpoſes, as to vote at a *veſtry* if they pay ſcot and lot; they have a ſole right to *raiſe taxes* for their own relief, without the interpoſition of any ſuperior court; may make *by-laws to mend the highways*, and to make *banks to keep out the ſea*, and for *repairing the church*, and making a *bridge* &c. or any ſuch thing for the public good, and by the 3 & 4 *W.* 3. and 7 *Annæ*, to tax and levy *poor rates*, and to make and maintain *fire engines*, and by 9 *Geo.* for purchaſing *work-houſes* for the poor. Arg. 8 Mod. 354. Paſch. 11 Geo. 1. Phillybrown v. Ryland.

(B) *Major-Part. How far binding* to the reſt.

1. A RULE was obtained by ſurprize, for leave to file an *information* againſt E. and ſeveral other pariſhioners of the pariſh of ..... in Eſſex, for *laying a tax upon themſelves for carrying on a ſuit* againſt their vicar in the Spiritual Court for *incontinency*. And the Court held they might *lawfully* tax themſelves by conſent, to carry on a ſuit *for the public good of the pariſh*; but in that caſe the majority could not bind the reſt without their conſent, as in caſe of other rates. But the information being

being filed, it was referred to the Maſter of the office. 12 Mod. 440. Hill. 12 W. 3. The King v. Sir Hugh Everard.

2. Whether a *majority* of pariſhioners may make a *rate* to bind the reſt for the repairing or *adorning* the *chancel*? for that is the ſpecial freehold of the parſon; Cheſhire here quoted the Caſe of Rose v. Hawkins, 9 W. 3. B. R. where a libel was for a pariſh-rate to repair a church and chancel; and a prohibition granted for two reaſons: 1. becauſe the chancel ought to be repaired by the parſon; 2. becauſe 'twas ſuggeſted the rate was not made by a majority. Yet becauſe they had not gone to try that point, the Court ſaid it was no cauſe for a prohibition. Far. 70. Mich. 1 Annæ, B. R. Newſon v. Bauldry.

[For more of Pariſhioners, ſee Churchwardens, Prohibition, Vestry, and other proper Titles.]

Park. [185]

(A) Matters relating to Parks.

1. A PARK ſignifies a great quantity of *ground incloſed, privileged for wild beaſts of chaſe by preſcription, or by the King's grant.* Co. Litt. 233. a. It conſiſts of vert, veniſon and incloſure, and if it be determined in any of them, it is a total diſparking. Cro. Car. 60. Hill. 2 Car. C. B. Sir Charles Howard's Caſe.—A park muſt be incloſed. Co. Litt. 233. a.

2. In action upon the ſtatute, it was agreed that a man may incloſe his land, but he *ought not to make* thereof *a park for wild beaſts without licence of the King*; for if he does, it ſhall be ſeiſed into the hands of the King; per Cur. Br. Action ſur le ſtatute, pl. 48. cites Itin. Not. Temp. E. 2.

3. 3 *Ed.* 1. *cap.* 20. *ſ.* 1. *provides for* * *treſpaſſers in* † *parks and ponds, that if any be thereof attainted at the* ‡ *ſuit of the party, great and large amends ſhall be awarded, according to the treſpaſs, and ſhall have three years impriſonment, and after ſhall make fine at the King's pleaſure (if he have whereof) and then ſhall find good ſurety, that after he ſhall not commit like treſpaſs.* *The cauſe of making this ſtatute* was, that at the common law the plaintiff in an action of treſpaſs ſhould, as in other caſes, recover no other damages, but according to the quantity of the treſpaſs, which the plaintiff for treſpaſſes in parks and vivaries eſteemed at a high rate; but the country commonly

monly found the damages very ſmall; for the common law gave no way to matters of pleaſure, (wherein moſt men do exceed) for that they brought no profit to the commonwealth; and therefore it is not lawful for any man to erect a park, chaſe or warren, without a licence under the Great Seal of the King, who is pater patriæ, and the head of the commonwealth. 2 Inſt. 199.——

* This ſtatute *extends to no other treſpaſs* in parks *beſides hunting*; ſo that if a man does any other treſpaſs in a park, he is out of the danger of the ſtatute, tho' within the words of it. Per Mountague Ch. J. Pl. C. 88. b. Hill. 6 & 7 E. 6. in Caſe of Partridge v. Strange.—S. P. 30 E. 3. 11. a. b. the Caſe of the Counteſs of Athol v. Walton.—2 Inſt. 199. cites S. C. and ſays, that by the word (treſpaſs) in this act, is underſtood when a man either *chaſeth* in a park, *or by* bow or other *engine endeavours to kill* ſome of the game of the park *againſt the liberty and privilege of the park, and not* when the Lord of a park takes beaſts to agiſtment in his park, and the owner breaks the park, and takes them away without agreement for their paſture; for that is not within theſe words, de malefactoribus in parcis, becauſe the treſpaſs concerneth not the liberty of the park by chaſing of the game thereof, but is a *collateral treſpaſs*, & ſic de ſimilibus.—† By the word (*park*) is underſtood a *lawful park*, whereunto three things are required. 1. A *liberty*, either by grant or by preſcription. 2. *Incloſure* by pale, wall or hedge. And, 3. *Beaſts ſavages* of the park. But this ſtatute extendeth not to a nominal park erected without lawful warrant, albeit it be called a park; for this ſtatute is very penal, and therefore, as hath been ſaid, extendeth only to a lawful park: but he may have an action of treſpaſs at the common law, quare clauſum fregit, & unam damam cepit &c. 2 Inſt. 199.——Treſpaſs de malefactoribus in parks, and *counted of a treſpaſs in the foreſt*, and the opinion of the Court was, that the action did not lie; for *the ſtatute is taken ſtrictly* of parks; but the defendant ſhall be puniſh'd by the ſtatute of charta de foreſta, and not otherwiſe. Br. Action ſur le Statute, pl. 16. cites 21 H. 7. 21.——Br. Parliament, pl. 72. cites S. C.——It extends not to a foreſt in the hands of a ſubject; for the law is ſo penal, that it ſhall not be taken by equity. 2 Inſt. 199.—Neither does it extend to a *chaſe*. Ibid.——‡ A man *ſhall not recover double damages, and have impriſonment of the party for three years* for hunting in his park *by general writ of treſpaſs*, but by writ of treſpaſs which makes mention of the ſtatute. Br. Action ſur le Statute, pl. 10. cites 47 E. 3. 10.——S. P. 2 Inſt. 200. For it is a maxim in the common law, that a ſtatute in the affirmative, without any negative expreſs'd or implied, doth not take away the common law; and therefore in this caſe the *plaintiff may either have his remedy by the common law, or upon the ſtatute*: if he bring his action of treſpaſs generally, without grounding the ſame upon the ſtatute, then he waives the benefit of the ſtatute, and takes his remedy by the common law.

See pl. 6. in the notes there.

S. 2. *And if he have not whereof to make fine, after three years impriſonment, he ſhall find like ſurety; and if he cannot find like ſurety, he ſhall abjure the realm.*

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S. 3. *And if any being guilty thereof be fugitive, and have no land nor tenement ſufficient (whereby he may be juſtified) ſo ſoon as the King ſhall find it by inqueſt, he ſhall be proclaimed from county to county; and if he come not, he ſhall be outlawed.*

* The King ſhall have the ſuit either *by indictment, information or* action of *treſpaſs* upon this act. 2 Inſt. 201.

S. 4. *It is provided alſo and agreed, that if none do ſue within a year and a day for the treſpaſs done, the* * *King ſhall have the ſuit.*

S. 5. *And ſuch as be found guilty thereof by inqueſt, ſhall be puniſhed in like manner in all points as above is ſaid.*

* This underſtood of *kine, oxen, ſheep*, and other domeſtick beaſts within the park.

S. 6. *And if any ſuch treſpaſſer be attainted, that he hath taken* * *tame beaſts, or other thing in his parks by manner of robbery, in coming, tarrying or returning, let the common law be executed upon him, as upon him that is attainted of open theft and* † *robbery, as well at the ſuit of the King as of the party.*

If there are within the park *tame deer*, and miſdoers come to hunt and kill veniſon, and they kill a tame deer, and carry it away, *not knowing the ſame to be ſo*, this is no felony; for the intent maketh the felony, and ſo are the books to be underſtood. 2 Inſt. 201.——† Robbery in this act is taken in a large ſenſe. 2 Inſt. 201.

Br. Action ſur le Statute, pl. 11.

4. Treſpaſs *againſt three* of breaking his park, and [chaſing and killing] his ſavages, and the *one appeared and the other did not;*

not; and the plaintiff counted that he broke his park, and chaſed and killed his ſavages; the *defendant pleaded not guilty*; and there it is agreed that the *day is not material*, but if he did it at another day, it is ſufficient; and the Jury *found that he came* into the park *to chaſe and kill* ſavages *(but did not kill any of them)* to the damage of *two marks, viz.* 13 *s.* 4*d. for the treſpaſs, and* 13 *s.* 4*d. for coſts*; and the plaintiff *prayed his judgment againſt him* who is found guilty, *and releaſed his ſuit againſt the others*; by which the Court awarded that the plaintiff recover againſt the defendant 40 s. viz. 13 s. 4 d. for the damages, and 13 s. 4d. for coſts aſſeſs'd by the Jury, and 13 s. 4 d. more for *coſts* * *increaſed by the Court*, and that the defendant be taken and *impriſoned for three years*, and that he make *fine to the King*, and at the end of the three years that he *find ſurety* for his good behaviour, and that if he cannot find ſurety, that he *ſhall abjure the realm*. Br. Treſpaſs, pl. 106. cites 5 H. 5. 1.

cites S. C. Br. Coſts, pl. 19. cites S. C.

* By the words in the ſtatute, viz. (*large amends ſhall be awarded*) if the damages are too ſmall, the Court has power to increaſe them; for the word (*award*) belongs properly to the Court. 2 Inſt. 200.

5. In an action upon the ſtatute for *hunting in a park*, the defendant pleaded *that the plaintiff had no park there*; Brudnell thought the plea good; but Shelley J. held it *no plea*, becauſe an iſſue could not be taken thereon; for it could only be tried between the King and the plaintiff; and if land be imparked without licence, the King only can take advantage thereof; and therefore the defendant ſhould have pleaded *not guilty*. Brook J. held that the plea was good; for if the plaintiff had no park there, then the action did not lie, and it would be dangerous to plead not guilty, ſince the Jury muſt find againſt the defendant, if it appeared that he was guilty of the hunting, which yet might be in a place not impark'd: Ingleſield thought either that plea or not guilty good. Spilman for the defendant ſaid, that if he pleaded not guilty, it would lie upon the plaintiff to prove it to be done in a place imparked; to which Shelley agreed: ſed adjornatur. Afterwards Shelley held, that for the killing only of the ſavages, no damages ſhould be recovered by the plaintiff in this caſe; but tota Curia contra. Kelw. 202. b. pl. 1. 21 H. 8. Anon.

6. In *treſpaſs upon this ſtatute*, it was held that notwithſtanding the *Queen pardoned the offence*, yet this *does not tell the plaintiff of his remedy by the ſtatute* to have recompence for the treſpaſs done him; and no action lies upon this ſtatute but for the chaſing, as it ſeems by the words of it, by the better opinion of the Juſtices at this time. Mo. 58. pl. 165. Paſch. 6 Eliz. Anon.

Dal. 60. pl. 13. is the S. C. reported in [187] the ſame words, but after the words (for the chaſing) follow theſe words, viz. (*in the ancient parks*) which are omitted in Mo. 58.——By a general * pardon, the ranſom, the finding ſurety that he will not commit the like treſpaſs for the future, and the abjuring the realm for nonability of payment, is pardon'd; and then judgment is to be given for the damages, and impriſonment for three years. But quære if upon finding ſurety not to offend any more, he ſhall be diſcharged of finding the other ſurety directed afterwards. And quære if the bond not to offend any more, ſhall not extend to all parks, and to whom it ſhall be made, whether

ther to the Queen or the plaintiff? But the Reporter says, Nota, that he saw several precedents in this action, all which were † *ad respondendum tam domino regi quam parti querenti, and* also *double recital of finding surety*, according to the words of the statute; and because this action was in the plaintiff's own name only, and the surety but once recited in the writ. Curia advisare vult. D 238. a. pl. 34. Pasch. 7 Eliz. Lord Shandois v. Wye.——The Reporter cites a precedent H. 24. H. 7. in B. R. where the defendant a prisoner in the Marshalsea was compelled to find sureties of London and Southwark, two of London and two of Southwark in 10l. each, and himself in 40l. to the King not to offend any more &c. in any parks and vivaries, contra formam statuti; and the plaintiff acknowledged satisfaction of the damages, and defendant ibat quietus. Ibid.—And Ld Coke says, that the recognizance, sureties and condition must be in this manner. 2 Inst. 201.

† Tho' the precedents in this action are ad respondendum tam domino regi quam parti querenti, yet by the register he may have the action in his own name, as may be gathered from some of the books. 2 Inst. 200.

* It was held in B. R. that the fine and imprisonment is for the King, and not for the party, and the prisoner shall not be discharged without the King's warrant to the same Justices. Kelw. 39. a. b. Trin. 12 H. 7.—Lord Coke says, both *damages and imprisonment concern the plaintiff*, and therefore the King's pardon cannot dispense with them; but the *ransom*, the *finding of surety*, and the *forejuring the realm*, are punishments exemplary and concern the King, for which reason he may pardon the same. 2 Inst. 200.

7. The difference is, when the *prescription* is to pay money for all the *tithes* of such a park, there perhaps if it be *disparked*, he shall not pay any tithes; and where 'tis to pay the shoulder of every buck or doe at Christmas for all tithes of the park; there, if it be disparked, tithes shall be paid as of other land. Per Popham. Cro. E. 457. Pasch. 38 Eliz. B. R. in Case of Bedingfield v. Feake.

8. No subject can make a park, chase or warren within his own land for his recreation or pleasure, *without grant or licence of the King*; and if he does it of his own head, in a *quo warranto* they shall be seised into the King's hands. 11 Rep. 86. Trin. 44 Eliz. in the Case of Monopolies.———87. b. ibid.

9. The *beasts of park* or chase properly extend to the buck, the doe, the fox, the martin and the roe, but in a common and legal sense to all the beasts of the forest. Co. Litt. 233. a.

And Cook Ch. J. cited one Shibden's Case, that such a modus decimandi *generally for the park* is not good, if it be disparked. But it shall be *particularly for all acres contained* in the park. Noy. 148. Sharpe v. Sharpe.

10. A *prohibition* was prayed upon a suit in the Spiritual Court for *tithes* in kind of a park now *converted into tillage*, upon a surmise *de modo decimandi, to pay a buck and a doe for all tithes*. And allowed by the Court, and agreed, 1. *tho'* they are *feræ naturæ*, yet they may be given for tithes. So to pay pheasants, &c. 2. Tho' they are *not tithable of themselves*, yet they may be given for modus decimandi, as a great tree may be given for tithe of trees tithable. 3. That that *is a discharge to the very soil*, and the park is only a liberty, and the owner may furnish it with game when he pleaseth. Noy 148. Sharpe v. Sharpe.

Cro. Car. 60. Sir Charles Howard's Case, S. C. but not S. P.

11. If office of keeper of a park be granted to one, and after the park is *dispark'd*, he shall not have the lodge for his life, for this belongs meerly to his office, and he has it meerly in respect of it; but the *herbage* and *pawnage* he shall have for his life, as the rest of his *fees*; for they are distinct things granted to him &c. He shall have it in case of the King, if he dispark. Per Walters Ch. B. Litt. R. 139. Mich. 4 Car.

12. None

12. None can have a park but by *grant* or *preſcription*. 6 Mod. 151. The Queen v. Dutcheſs of Buccleugh.

[For more of Park, ſee Deer-ſtealers, Diſmes, Treſpaſs, and other proper Titles.]

Parliament.

(A) Of the *Word* Parliament, and *what* will make a *Seſſions*.

1. MY Lord Coke in his Littleton tells us, that it is called Parliament, becauſe every member of that Court ſhould ſincerely and diſcreetly parler le * ment for the general good of the commonwealth; and that this name before the Conqueſt was uſed in the time of Edward the Confeſſor, and after of William the Conqueror &c. That for the antiquity of this High Court of Parliament, it appears that diverſe parliaments have been holden long before, and until the time of the Conqueror &c. Co. Litt. 110. a.—Dr. Brady in his anſwer to Mr. Petit's book intitled, The right of the Commons &c. ſays that this word Parliament came in uſe here inſtead of magnum concilium, or commune concilium & colloquium, about the middle of the reign of H. 3. and in time became of more frequent uſe. Sir H. Spelman too, in his Gloſſ. Verbo Parliamentum 452. ſpeaking of King John ſays, Hoc nomen Parliamentum non tum emicuit: but in pag. 449. that great antiquary ſays, Reperitur (fateor) vox antique in Canuti legibus, ſed e recentiore interprete Anglo-Normanno, Latine data; Danis enim & Saxonibus peregrina vox.———And Mr. Prynne, in his animadverſions on the 4th Inſt. is very elaborate on this head, and queſtions very much the antiquity of the treatiſe ſo much depended upon and extolled by Lord Coke, called the Modus tenendi Parliamentum, and ſays it muſt in all probability be compiled after the reign of King H. 3. when the word Parliamentum was grown into common uſe, being not to be found in Glanvil or Bracton.

* It ſeems that this is only a termination uſed in the Engliſh language, as in the words hereditament, veſtment, &c.

2. If a parliament be aſſembled, and *divers orders made*, and a writ of *error brought, and the record delivered* to the higher houſe; and *divers bills agreed, but* no bills ſign'd, this is but a convention, and no parliament or ſeſſion, as it was Ann. 12 Jac.

in which (as it was affirmed by them which had ſeen the roll) it is entered, that it is not any ſeſſion or parliament, becauſe *no bill was ſigned*. See 33 H. 6. Brook Parliament 86. that every ſeſſion in which the King ſigns bills is a parliament. Hut. 61. Hill. Vac. 20 Jac. Anon.

(B) *Who may ſit and have Privilege* in the Houſe of Commons.

Dal. 58. pl. 7. S. P.— Jenk. 118. pl. 35.

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1. PER Dier, if a man be *condemn'd in debt or treſpaſs*, and is choſen one of the burgeſſes or knights of parliament, and after is taken in execution, he cannot have the privilege of parliament; and ſo was it held by the ſages of the law in the caſe of one FERRERS, in the time of H. 8. And tho' the privilege at this time was allowed to him, it was minus juſte. Mo. 57. pl. 163. Paſch. 6 Eliz. Anon.

2. Agreed by the lower houſe, that a perſon *arreſted before he was choſen burgeſs* ought not to have the privilege of the houſe. March 12. 1592. Mo. 340. Fitzherbert's Caſe.

3. In the Caſe above, Cooke ſpeaker cited the Caſe of THORP ſpeaker, who was in the time of adjournment taken in execution at the ſuit of the Duke of York, and reſolved, on the meeting of the parliament, that *the ſpeaker ſhould not have his privilege*; but they *elected another ſpeaker*. Mo. 340.

4. Per all the Judges about the 35 Q. Eliz. *Perſons outlawed* ought not to be knights and burgeſſes of parliament, and ſuch perſons outlaw'd may be *arreſted* by cap. utlag. privilege of parliament notwithſtanding, and upon this the Queen commanded that no ſuch ſhall be permitted in the parliament houſe. And. 293. Anon.

(C) *Privilege. Extent* thereof.

1. DEfendant being burgeſs of parliament brought a letter from the ſpeaker to the King's Bench to ſtay &c. and it was diſallowed by the Court; for it ought to have been a *writ of privilege*; and it was ſaid, when Thorp was ſpeaker, he had a *general ſuperſedeas* for all actions againſt him &c. and it was held ill; for he ought to have had a ſpecial ſuperſedeas for every action. And that the parliament *only priviledges the perſon* of the members of it, and ſtays not the proceedings of the King's Court. And ſo in the Caſe of CURTESIE v. WESTCOTT, that if A. had recovered againſt B. in two ſeveral actions, and had judgment &c. that B. might not have one audita querela, but ought to have ſeveral writs. Noy. 83. Hodges v. Moor.

Upon affidavit of a ſubpœna ſerved, and

2. Tho' the Court will not proceed againſt a member that has *priviledge* of parliament; yet if a parliament man ſues at law, and a bill is brought here to be relieved againſt that action, the

Court

Court will make an order to *ſtay proceedings at law* till anſwer or further order. Vern. 329. Trin. 1685. Anon.

no anſwer coming in, an *injunction* was granted

againſt the defendant being a parliament man, but it was ordered not to enter an *attachment* againſt him. 3 Ch. R. 21. per Ld. Keeper Bridgman 1665. Anon.

3. At a trial at bar, wherein mention is made of priviledge of parliament, Holt ſaid, That whereas it is ſaid in our books, that priviledge of parliament was not allowable in *treaſon*, *felony*, or *breach of the peace*, that it muſt be intended where ſecurity of peace is deſired, that it ſhall not protect a man againſt a *ſupplicavit*; but it holds as well in caſe of *indictments* or *informations* for breach of peace, as in caſe of actions. 12 Mod. 108. Mich. 8 W. 3. The King v. Culpepper.

4. 12 & 13 *W.* 3. *cap.* 3. *ſ.* 1. enacts, That *any perſon may proſecute any ſuit in any of his Majeſty's Courts at Weſtminſter, or Chancery, or Exchequer, or the Dutchy Court, or in the Court of Admiralty, and in all cauſes matrimonial and teſtamentary in the Court of Archers, the Prerogative Courts of Canterbury and York, and the Delegates, and all Courts of Appeal, againſt any Lord of Parliament, or any of the knights, citizens and burgeſſes of the Houſe of Commons, or their ſervants, or any other perſon intitled to priviledge of parliament at any time immediately after the diſſolution or prorogation of parliament, untill a new parliament ſhall meet, or the ſame be reaſſembled, and immediately after any adjournment of both Houſes for above* 14 *days, untill both Houſes ſhall meet; and the ſaid Courts may, after ſuch diſſolution, prorogation, or adjournment, proceed to give judgment, and to make final decrees and ſentences, and award execution thereupon, any privilege of parliament notwithſtanding.*

The proceſs againſt any Member of the Houſe of Commons during the time in this act mentioned out of the ſaid Courts, being in a ſpecial manner directed by this ſtatute by ſummons, by

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diſtreſs infinite, or by original bill, ſummons, attachment and diſtreſs infinite, till the defendant ſhall appear and file common bail &c. And this being againſt privileged perſons, the *uſual practice is*, when an action is brought againſt ſuch privileged perſon, *to file a bill in nature of a ſpecial capias, and then to ſummons him, and if he appears*

S. 2. *Provided that this act ſhall not ſubject the perſon of any of the knights, citizens, and burgeſſes, or any other perſon intitled to priviledge of parliament, to be arreſted during the time of priviledge; nevertheleſs if any perſon having cauſe of action or complaint againſt any Peer, ſuch perſon after any diſſolution, prorogation, or adjournment as aforeſaid, or before any Seſſions of Parliament, may have ſuch proceſs out of his Majeſty's Courts of King's Bench, Common Pleas and Exchequer, againſt ſuch Peer, as he might have had out of time of priviledge; and if any perſon have cauſe of action againſt any of the knights, citizens, or burgeſſes, or any other perſon intitled to priviledge of parliament, after any diſſolution, prorogation, or ſuch adjournment &c. ſuch perſon may proſecute ſuch knight, citizen, or burgeſs, or other perſon intituled to priviledge, in his Majeſty's Courts of King's Bench, Common Pleas, or Exchequer, by ſummons and diſtreſs infinite, or by original bill and ſummons, attachment and diſtreſs infinite, which the ſaid reſpective Courts are impowered to iſſue untill they enter a common appearance or file common bail; and any perſon having cauſe of ſuit or complaint, may, in the times aforeſaid, exhibit any bill or complaint againſt any Peer, or againſt any of the ſaid knights, citizens, or burgeſſes, or other perſon intituled to priviledge, in the Chancery, Exchequer, or Dutchy Court, and proceed thereupon by letter or ſubpœna as uſual, and upon leaving a copy of the bill*

upon ſuch ſummons, then the plaintiff may *declare againſt him, as in cuſtodia mareſchalli*, to

bill with the defendant, or at his laſt place of abode, may proceed thereon; and for want of an appearance or anſwer, or for non-performance of any order or decree, may ſequeſter the eſtate of the party, as is uſed where the defendant is a Peer; but ſhall not arreſt the body of any of the ſaid knights, citizens, and burgeſſes, or other priviledged perſon, during the continuance of priviledge of parliament.

which declaration he ought to *anſwer without any imparlance*. And in the principal caſe, the defendant having appeared upon the ſummons, and filed common bail, it was now moved, that he might have no *imparlance over to the next term*. It is admitted, that this ſuit was againſt a member of parliament, and that if he was not a privileged perſon, he might have an imparlance of courſe to the next term, ſince the declaration againſt him was not delivered before craſtino animarum. That if a ſpecial original is brought againſt a perſon who has no priviledge, he muſt likewiſe have an imparlance of courſe; and it would be a very proper method to leave thoſe who had no privilege, and thoſe who were privileged, upon the ſame footing. As to the act of parliament mentioned on the other ſide, it has no manner of influence on the practice of the Court, it only appoints a method to bring privileged perſons to appear. But admitting that the plaintiff might proceed in this caſe, as by ſpecial original, yet that would not be a reaſon againſt granting an imparlance; becauſe the ſummons is ſtill general, and ſo is the capias; and it is not the ſpecial original, but the ſpecial capias which haſtens the proceedings; and it would be very hard to take this as a caſe, where a ſpecial capias is allowed to be the firſt ſummons, therefore it was inſiſted for the defendant, that he might have leave to imparl. The Court was of opinion, that the proceedings in this caſe ſhould be like thoſe in moſt other caſes, and not to be influenced by the ſtate of either party; and that if they are founded on a ſpecial original, then there lies an imparlance of courſe till the next term. 8 Mod. 228, 229. Hill. 10 Geo. 1724. Wadſworth v. Handyſide.

S. 3. Where any plaintiff ſhall by reaſon of priviledge of parliament be ſtayed from proſecuting any ſuit commenced, ſuch plaintiff ſhall not be barred by any ſtatute of limitation, or nonſuited, diſmiſſed, or his ſuit diſcontinued for want of proſecution, but ſhall upon the riſing of the parliament be at liberty to proceed.

S. 4. No ſuit or proceeding in law or equity againſt the King's original and immediate debtor for the recovery of any debt originally and immediately due unto his Majeſty, or againſt any perſon liable to render account unto his Majeſty for any part of his revenues, or other original or immediate duty, or the execution of any ſuch proceſs, ſhall be impeached or delayed by priviledge of parliament; yet ſo that the perſon of ſuch debtor or accountant, being a Peer, ſhall not be liable to be arreſted, or being a member of the Houſe of Commons, ſhall not, during the continuance of privilege, be arreſted by any ſuch proceedings.

[191] *S. 5. This act ſhall not give any juriſdiction to any court to hold plea in any real or mixt action, in other manner than ſuch court might have done before.*

5. 2 & 3 *Ann. cap.* 18. *ſ.* 1. enacts, That *any ſuit may be commenced and proſecuted in any of her Majeſty's Courts of Weſtminſter againſt any officer or perſon employed in the revenue, or any other place of public truſt, for any miſdemeanor or breach of truſt relating to ſuch office of truſt, or any penalty impoſed by law to inforce the due execution thereof; and no ſuch ſuit or execution thereupon, altho' ſuch officer be a Peer, or of the Houſe of Commons, or otherwiſe intituled to priviledge of parliament, ſhall be ſtayed by privilege.*

S. 2. Nothing in this act ſhall ſubject the perſon of ſuch officer, being a Peer, to be arreſted; nor ſubject the perſon of ſuch officer, being of the Houſe of Commons, to be arreſted during the time of privilege;

lege; and againſt ſuch perſon being of the Houſe of Commons, ſhall be iſſued ſummons and diſtreſs infinite, or original bill, ſummons, attachment and diſtreſs infinite, which the reſpective courts are impowered to iſſue untill the party appear.

6. The *Roman Senators* had a priviledge of being *ſued only in their ſuperior courts.* But if a Senator had committed a *baſe crime*, he had then ſo debaſed himſelf, as that he ſhould be ſubject to the juriſdiction which he had offended; per Dr. Floyd. Arg. 11 Mod. 83. Trin. 1706. in Caſe of Willimot v. the Chancellor of Worceſter.

7. It was moved for a *ſequeſtration* Niſi, for want of an anſwer, *againſt a menial ſervant of a Peer* of the realm, as the *firſt proceſs for contempt*, in the ſame manner as in caſe of the Peer himſelf; and tho' the motion was granted by the Maſter of the Rolls, yet the Regiſter refuſed to draw it up; as thinking it againſt the courſe of the Court. Upon which it was moved again before the Ld. Chancellor, who upon reading the ſtatute, granted the motion likewiſe, it appearing to be both within the meaning and words of the ſtatute; and if it were not ſo, as it was plain no attachment would lie againſt their perſons, conſequently there would be no remedy againſt them; and they would have a greater privilege than their Lord, if the proceſs againſt ſuch menial ſervants were to be a ſubpœna. 1 Wms's Rep. 535. Hill. 1718. Anon. 2 Wms's Rep. 385. Lord Clifford's Caſe.

8. 11 *Geo.* 2. *cap.* 24. *ſ.* 1. enacts, That *any perſon may commence and proſecute in Great Britain or Ireland, any ſuit in any Court of Record or of Equity, or of Admiralty, and in all cauſes matrimonial and teſtamentary in any Court having cognizance, againſt any Peer of Great Britain, or againſt any of the knights, citizens, and burgeſſes of the Houſe of Commons of Great Britain, or againſt their menial or other ſervants, or any other perſon intituled to the privilege of the parliament of Great Britain, immediately after the diſſolution or prorogation of any parliament, until a new parliament ſhall meet, or the ſame be re-aſſembled, and immediately after any adjournment of both Houſes for above* 14 *days, until both Houſes ſhall re-aſſemble.*

S. 2. *This act ſhall not ſubject the perſon of any of the Houſe of Commons, or any other perſon intituled to privilege of parliament, to be arreſted during the time of privilege; nevertheleſs it ſhall be lawful for any of the Courts of Great Seſſions of Wales, Courts of Seſſion in the Counties Palatine of Cheſter, Lancaſter, and Durham, Courts of King's Bench, Common Pleas, and Exchequer in Ireland, after any diſſolution, prorogation, or ſuch adjournment, or before any Seſſions of Parliament, or Meeting of both Houſes, to uſe ſuch proceedings, and to iſſue the like proceſs againſt any ſuch Peer, or againſt any of the ſaid knights, citizens, and burgeſſes, or other perſons intituled to the privilege of the Parliament of Great Britain, as the Courts of King's Bench, Common Pleas, and Exchequer in England, are by* 12 & 13 *Will.* 3. *cap.* 3. *impowered to uſe, and it ſhall be lawful for the Chancery of Ireland, and the Court of Equity in the Exchequer there, to uſe ſuch proceeding, and to iſſue the like proceſs againſt the*

the perſons aforeſaid, as the Chancery of Great Britain, and the Exchequer in England, are by the ſaid act impowered to uſe; and it ſhall be lawful for any of the other Courts before deſcribed, the proceſs whereof is not particularly directed by the ſaid act, or by this act, after any diſſolution, prorogation, or ſuch adjournment as aforeſaid, or before any Seſſion of Parliament, or Meeting of both Houſes, to iſſue like proceſs againſt any ſuch Peer, or any of the ſaid knights, citizens, or burgeſſes, or other perſon intituled to the privilege of parliament, as ſuch Courts may now lawfully iſſue againſt perſons not liable to be arreſted.

S. 3. Where any plaintiff ſhall by priviledge of parliament be ſtayed from proſecuting any ſuit commenced, ſuch plaintiff ſhall not be barred by any ſtatute of limitation, or nonſuited, diſmiſſed, nor his ſuit diſcontinued for want of proſecution, but ſhall upon the riſing of the parliament be at liberty to proceed to judgment and execution.

S. 4. No proceeding in law or equity againſt the King's original and immediate debtor for the recovery of any debt originally and immediately due unto his Majeſty, or againſt any perſon liable to render account unto his Majeſty for any part of his revenues, or other original and immediate duty, ſhall be ſtayed in any Court in Great Britain or Ireland, by priviledge of the Parliament of Great Britain; yet ſo that the perſon of ſuch debtor or accountant, being a Peer of Great Britain, ſhall not be liable to be arreſted upon ſuch ſuit, or being a Member of the Houſe of Commons of Great Britain, ſhall not, during the continuance of the priviledge of parliament, be arreſted upon any ſuch proceedings.

S. 5. This act ſhall not give juriſdiction to any court to hold plea in any real or mixt action, in other manner than ſuch court might have done before.

(D) *Power* as to impriſoning, and *Effect of Prorogations* &c.

1. THE Queen commanded Egerton her ſolicitor to attend in parliament upon the Lords in their houſe. The parliament began, and after he had attended three days, was choſe burgeſs for Reading, and upon the return of it, the Commons come in the upper houſe, and there demand that he may be diſmiſſed of the attendance there, and be ſent to them into the lower houſe; but there upon conſultation, and defence made by himſelf, he was retained; becauſe not being an inhabitant or free of the borough he may chooſe if he will ſerve at their election or not for the borough, the which he expreſsly *refuſed to do.* And another reaſon; becauſe he was *attendant in the upper houſe* before he was choſe member of the lower. Third reaſon; becauſe the Queen has the option to have him of the upper houſe if ſhe will, as ſhe has commanded him. Mo. 551. Egerton's Caſe.

2. Burgeſs

2. Burgeſs of the lower houſe was, upon prorogation of parliament, *made the Queen's ſolicitor*, and at the day of the re-ſummons was commanded by *writ to attend in the Houſe of Lords*, at which time the lower houſe *choſe him Speaker*, and came into the upper houſe and challenged him, and *demanded to have him*, and it was granted; becauſe he was member of the lower houſe before that he was commanded by the writ to attend in the upper. So diverſity between this caſe and the caſe above. Mo. 551. cited as 5 Eliz. Ouſley's Caſe.

3. Upon a hab. corp. the return was, that *he was taken by order of the Houſe of Peers for contempt*, and now the Houſe of Peers *being prorogu'd*, it was held per Curiam, that *their orders are all at an end*, and every other thing, except * *writs of error and ſcire facias upon them.* Lev. 165. Paſch. 17 Car. 2. Pritchard's Caſe.

In this caſe the party was taken 5 days after the parliament was prorogued, but had it [193] been before, it would make no difference as to the diſcharging him. He was diſcharg'd. Raym. 120. S. C.——* For writs of error and ſcire facias's may be returnable the next parliament. Sid. 245. S. C. by name of LEE v. PRITCHARD, cites 22 E. 3. 3.—2 Hawk. Pl. Cr. 110. cap. 15. ſ. 73. cites S. C.

4. *Commitments by the Peers* in Parliament are *not made void by the prorogation or diſſolution* of the ſame parliament. As in the Lord Stafford's caſe, who, tho' the parliament which committed him was diſſolv'd, was continued a priſoner, and afterwards tried upon the ſame impeachment, and convicted and executed. Cited per Cur. Carth. 132. Paſch. 2 W. & M. B. R. in the Earl of Saliſbury's caſe.

And in the Lord DANBY's caſe, the chief reaſon for bailing him was, becauſe the then parliament was prorogu'd, and the time uncertain for their meeting again, and ſo no proſpect of an opportunity to apply himſelf that way, and was denied by ſeveral Judges of B. R. to be bailed; and when he was *bailed*, it was *to appear at the next Seſſions of Parliament*, which was an affirmance of the commitment, and a plain proof of the opinion of the Court at that time, that the commitment was not avoided or diſcharged by the prorogation of the parliament. Per Cur. Carth. 133. Ibid.—And ſo in the principal caſe of the EARL of SALISBURY, who was impeach'd by the Commons of high treaſon, for being reconciled to the Church of Rome, contrary to the ſtatute in that caſe made, and was thereupon committed to the Tower by the Houſe of Peers, and there continued till the parliament was diſſolved, and a new parliament called; and (after a long ſeſſions) adjourn'd for two months, he was remanded to the Tower. Carth. 131. The Earl of Saliſbury's Caſe.

(E) *Breach of Privilege.* What amounts to it in Law Proceedings.

1. *FILING an original* is no breach of privilege of parliament. Carth. 137. cites a Caſe in time of Bridgman Ch. J. between Sir Geo. Binion and Evelin.

2. In *Caſe againſt the ſheriff for a falſe return* of parliament men, the queſtion was upon a writ of error of a judgment in C. B. if this action lay? Holt Ch. J. ſaid, the cauſe of the ſuit is *a wrong done out of parliament*, and whatever falls under the regulation of law, and is done out of the houſes of parliament, *is ſubject to the law of the land*; for laws are to be executed out of parliament: *but* as for the *rules of the houſe, as ſitting, meeting,*

7 Mod. 13. S. C. in C. B. The jury found all the declaration, and alſo that *the right had not been determined*

in the House of Commons, and adjudg'd for the defendant. Per tot. Cur. But they declared that they did not give their opinions how it would be if the matter had received a determination in the House of Commons for the plaintiff. Lutw. 82 to 89. S. C. and the pleadings.—If a suit be between A. and B. and A. is voted elected, B. cannot bring an action and say that he was duly elected and return'd; because his *name does not appear of record*, and he is estopp'd to say that A. was not duly elected and return'd; *but where the right of election either is determined, or cannot be determined, in parliament, as in the case of a dissolution*, an action lies for the false return; for the courts at law can neither anticipate nor contradict their judgment. Per Holt Ch. J. 2 Salk. 503. In Case of Prideaux v. Morris.

&c. they *are within the house*, and the Judges cannot know them, there being no practice of them out of parliament. *But if the parliament should make a law concerning them*, or they should become necessary to be determined on the account of some other matter cognizable by the Judges, the Judges must take notice and determine them; as in BYNION's case. And he seemed to think, that for a false return the party could have no action, where there might be a determination in the House of Commons; because of the *inconvenience of contrary resolutions*. 2 Salk. 502. Trin. 2. Annæ. B. R. Prideaux v. Morris.

And since the statute of 7 and 8 W. 3. an [194] action lies not, unless it be founded upon the statute, so that an action on the *case lies not*, but ought to be an action *tam quam*. 2 Salk. 504. Hill. 5 Annæ B. R. Coundell v. John.——In the Case of BERNARDISTON v. SOME. 2 Lev. 114. 116. Mich. 26 Car. 2. it was held by Hale, Twisden and Wild, that action of case lay, it being *alleged that the return was made falso & malitiose & ea intentione, to put the plaintiff to charge and expence, and so found by the jury*, and gave judgment for the plaintiff, Rainsford dubitante: whereupon a writ of error was brought in the Exchequer Chamber, and there the judgment was reversed by six Judges against two, upon the matter in law, that the action did not lie.——S. C. Pollex. 470. says, that by the ill endeavour of Ld. Ch. J. North in the Exchequer Chamber, the judgment in B. R. was reversed; and see there the argument of Ellis J. for affirming it.—But this judgment of reversal was affirm'd in the House of Lords. Lutw. 89 —Case for a double return did not lie before the return was determined in parliament. 3 Lev. 29 Mich. 33 Car. 2. C. B. Onslow v. Rapley.—2 Vent. 37. S. C.—S. C. cited Lutw. 89. in Case of Prideaux v. Morrice.

3. Holt Ch. J. seem'd of opinion, that *for a double return* no action lay against the sheriff before the statute of 7 and 8 W. 3. cap. 7. not only because it is the only method the sheriff has to indemnify himself, but *when* the right comes to be *determined in parliament, one indenture returned is taken off the file*, and then there is no double return. 2 Salk. 503. In Case of Prideaux v. Morris.

6 Mod. 45. to 56. S. C. adjudg'd and revers'd accordingly.

4. An action on the *Case* was brought by a burgess of the town of Ailesbury *against the constables* of the said town, for refusing to receive his vote which he offered to give at an election of burgesses to serve in parliament for that borough. Upon not guilty a verdict was found for the plaintiff; and after motion in arrest of judgment, three Judges delivered their opinions, that the action did not lie, and Holt. Ch. J. held that it did. Gould J. held the action not maintainable, because *the Constable acted as a Judge*, and not as an officer; and that it was a parliamentary matter; that the hindring the voting was *damnum absque injuria*; that it would *beget multiplicity of actions*; and that it was out of time; for that it *ought to follow* and not to precede *the adjudication of the House of Commons*. Powis J. That the defendant, tho' not properly a Judge, *is quasi a Judge*; that when this matter comes before the House of Commons the plaintiff's vote will be allowed, and therefore he does not lose his privilege;

privilege; that this injury, if it be one, comes within the rule of De minimis non curat lex; that the judgment here will not bind the Commons, nor be evidence there, the Commons not being bound by the determinations here. Powell J. held, that the Conſtable muſt either be a Judge or not a Judge, and there is no medium that he is an officer, and as ſuch to execute the King's Writ, and *has only a miniſterial power*; but in other matters he agreed with Gould and Powis. Holt Ch. J. contra. That he has a *right to vote*, which being *by reaſon of his freehold is* a *real* right, which is not a minimum in lege; that having a *right* he *muſt have a remedy*; that if a ſtatute gives a right, common law gives a remedy; that this is an injury, and every injury imports a damage; and that *where parliamentary matters come before the Court, as incident to a cauſe of action on the property of the ſubject, which the Court muſt in duty determine, tho' the incident matter be parliamentary, they are bound by their oaths to determine it.* But the defendant had judgment, which was afterwards reverſed in the Houſe of Lords. 1 Salk. 19. Mich. 2 Annæ B. R. Aſhby v. White.

5. Several perſons were *committed to Newgate by the Houſe of Commons* for having commenc'd and proſecuted an action at law againſt the conſtables of A. for refuſing their votes in the election of members of parliament, which, by the warrant of commitment, was ſaid to be in contempt of the juriſdiction, and open breach of the known privileges of the Houſe of Commons. Upon a habeas corpus brought by them, it was held by three Juſtices, that the Houſe of Commons were the proper Judges of their own privileges; and that this Court was now eſtopp'd to ſay, that this was not a breach of the privileges of the ſaid Houſe, or that they had no ſuch privilege. But Holt Ch. J. contra, and ſaid, that this was no breach of their privilege; that the commencing and proſecuting an action did not neceſſarily imply a going further than the bare filing and continuing an original, [195] which is no breach of privilege; that the ſuing was no breach, nor can their judgment make it ſo, nor conclude this Court from determining the contrary. When the Houſe of Commons exceed their legal bounds and authority, *their acts are wrongful*, and cannot be juſtified more than the acts of private men. There is no queſtion but their authority is from the law, and as it is circumſcribed, ſo it may be exceeded; to ſay they are judges of their own authority, and no body elſe, is to make their privileges to be as they would have them. Per Holt Ch. J. 2 Salk. 504. Hill. 3 Annæ. B. R. The Queen v. Paty and al.

(F) *Order of Parliament.*

1. *SIR J. P. was attainted of certain treſpaſs by act of parliament*, whereto the *Commons were aſſenting, that if he came not in by ſuch a day, he ſhould forfeit ſuch a ſum*, and the *Lords gave*

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(F) *Order of Parliament.*

1. *SIR J. P. was attainted of certain treſpaſs by act of parliament*, whereto the *Commons were aſſenting, that if he came not in by ſuch a day, he ſhould forfeit ſuch a ſum*, and the *Lords gave*

gave longer day, and *the bill was redelivered to the Commons again.* And per Kirby, clerk of the rolls of parliament, *the uſage of the parliament is, that if a bill comes firſt to the Commons, and they paſs it, it is uſual to indorſe it in ſuch form (ſoit baile as ſeigniors); and if neither the Lords nor the King alter the bill, then* it is uſual *to deliver it to the clerk of the parliament to be inrolled, without indorſing it*; and *if it be a common bill, it ſhall be inrolled*; if it be a *particular bill, it ſhall not be inrolled, but put upon the files*, and this ſuffices; *but if the party will ſue to have it inrolled, it may be inrolled for better ſecurity.* And *if the Lords will alter a bill, in that which may ſtand with the bill, they may, without remanding it to the Commons: as* if the *Commons grant poundage for four years*, and the *Lords grant only for two years*, this *ſhall not be ſent back* to the Commons; *quære* inde; *but if the Commons grant only for two years, and the Lords for four years*, there *this ſhall be ſent back* to the Commons; and in this caſe the *Lords ought to make a ſchedule of their intent, or indorſe the bill* in this form, *The Lords aſſent that it ſhall continue for four years*; and *when the Commons have the bill again, and will not aſſent to it, this cannot be an act; but if the Commons will aſſent*, then *they indorſe their anſwer upon the margin underneath in the bill* in ſuch form, *The Commons are aſſenting to the ſchedule of the Lords to this bill annexed*; and *then it ſhall be delivered to the clerk of the parliament*, ut ſupra. And *if a bill be firſt delivered to the Lords, and* the bill *paſſes them, they do not uſe to make any indorſement, but ſend it to the Commons*, and *then if the bill paſſes the Commons, it is uſual to be thus indorſed*, The *Commons are aſſenting*; and *this proves that it has paſſed the Lords before, and their aſſent is to paſs it from the Lords*, and therefore this act (ſupra) is not good; becauſe it was not ſent back to the Commons. Per Fawkes clerk of the parliament, *Every bill which paſſes* the parliament *ſhall have relation to the firſt day of the parliament, tho' it be ſent in at the end of the parliament*, and *it is not uſual to make any mention what day the bill is delivered in to the parliament*: and the Juſtices adviſed; for it came into them by writ, as an act of parliament, therefore quære. And the caſe was, that the parliament commenced before Whitſontide, and continued after Whitſontide, and the Commons agreed to the bill after Whitſontide, and gave day to Whitſontide next; and the Lords gave day to Whitſontide next except one, and all was one intent; becauſe the bill ſhall have relation to the firſt day of parliament, and therefore if it be not prevented, it ſhall be taken this Whitſontide which is paſſed at this ſeſſion; and therefore the Lords did well. Quære. Br. Parliament, pl. 4. cites 33 H. 6. 17.

[196] 2. *Several burgeſſes and knights* of counties *were attainted by the parliament*, which act was now to be reverſed. And by all the Juſtices, *thoſe* knights and burgeſſes *ſhall not be in the houſe when this act is to be reverſed, but when this act is reverſed, they ſhall come back into parliament.* Br. Parliament, pl. 37. cites 1 H. 7. 4.

(G) *Fees*

(G) *Fees and Wages* of Members of Parliament.

1. IN replevin, the defendant juſtified as *under-ſheriff* of L. by fieri facias to *levy the expences of knights of parliament*, amounting, &c. and *every hundred was put in certain*, and W. one of the vills of ſuch a hundred was rated at 10 l. and he, as under ſheriff, took the beaſts in the vill at ſuch a place, and the ſame beaſts ſold and paid the knights, and ſo avowed &c. And there, per Cur. he may take the beaſts of one man for the duty of all the vill; and *thoſe, who find burgeſſes of parliament, ſhall not pay to the expences of knights of the county*, and the *tenants of the ancient poſſeſſions of the Lords of Parliament ſhall not pay to the expences of knights of the county*; but if the Lords purchaſe de novo, a thing charged to the expences, there the tenants ſhall pay. Br. Fees, pl. 3. cites 11 H. 4. 2. Br. Avowry, pl. 42. cites S. C. —Br. Diſtreſs, pl. 94. cites S. C.

2. As to the fees, wages, or expences of knights and burgeſſes of parliament, and the manner of levying the ſame, ſee the *Statutes of* 12 *R.* 2. *cap* 4. 23 *H.* 6. *cap.* 11 *and* 35. H. 8. 11.

[For more of Parliament, ſee Election of Members, &c. Peers, Statutes, and other proper Titles.]

Parol.

(A) *What* Things *may be done by Parol*, or without Deed.

1. THO' *dower ad oſtium eccleſiæ* be aſſigned in another county than where the land is, it is good without deed; *but* dower *ex aſſenſu patris* is not good without deed. Br. Monſtrans, pl. 14. cites 4 E. 3. 43.

2. A man cannot *give his emblements growing* upon the land without deed. Quære; for this goes to the executor, and therefore is a chattel. Br. Monſtrans, pl. 154. cites 25 E. 3. 41. and Fitzh. Feoffments 69.

3. Tho'

3. Tho' grant of an advowſon, or rent in groſs, is not good without deed, yet * *partition* of them is good without deed. Per Thirne & Hill. Br. Grants, pl. 27. cites 11 H. 4. 3.

* Br. Monſtrans, pl. 156. S. P. So of an *agreement to preſent by turn* and *rent reſerv'd upon equality of partition*, cites S. C.—— Partition by parol *of two ſeigniories, two advowſons, two villens* &c. and aſſignment of theſe in dower, is good without deed. Per Danby. Br. Partition, pl. 3. cites 28 H. 6. 2.

4. Where a man *makes a feme covert or a monk profeſſed his executor, and deviſes the reverſion to be ſold by them*, they cannot make a deed, and yet their ſale is good without deed, without any attornment. Br. Deviſe, pl. 12. cites 19 H. 6. 23.

5. And Brook ſays, the law ſeems to be *the ſame of an infant executor* as of a feme covert. Ibid.

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6. *Where a thing cannot commence without deed;* as a grant of rent-charge &c. it *cannot paſs* from the grantee to another *but by deed;* per Markham. Br. Grants, pl. 38. cites 19 H. 6. 33.

So that which muſt paſs *by grant by deed cannot be ſurrendered without deed*; quod nota; but if *land* be *leaſed by deed*, it may be ſurrendered without deed; per Markham. Br. Grants, pl. 38. cites 19 H. 6. 23.

7. A man cannot *leaſe his warren for years* without deed, nor grant the *next preſentation* of his church but by deed. But per Choke J. a parſon may *leaſe his tithes* without deed. Br. Monſtrans, pl. 71. cites 9 E. 4. 47.

S. P. But the ſheriff may make his precept to the bailiff by parol to make deliverance as well as by writing. Br. Replevin, pl. 28. cites S. C.

8. *Plaint in replevin* ſhall be in writing and not by parol; for per Littleton a man ſhall not be put to *anſwer* unleſs the matter be in writing. Br. Plaint, pl. 5. cites 9 E. 4. 48.

9. *Juſtices of Bank upon preſence of any in the hall* may ſend their ſervant to arreſt them without writing, *contra in their abſence*; for there it ought to be by warrant in writing. Br. Peace, pl. 7. cites 14 H. 7. 8.

Br. Court Baron, pl. 25. cites S. C. per Cur.

10. A *precept in* the *Court Baron* is good by parol. Br. Treſpaſs, pl. 439. cites 16 H. 7. 14.

11. Note that a *diſcharge by parol* given *by the plaintiff to the ſheriff, who has a priſoner in his ward upon condemnation of debt*, is ſufficient. Br. Barre, pl. 3. cites 27 H. 8. 24.

12. *Command to receive rent* in order to a re-entry on nonpayment may be by parol. Cro. E. 22. Mich. 25 Eliz. C. B. Sir John Zouch's Caſe.

13. *Livery* by parol on a ſale on condition without deed was held good. Cro. E. 25. Paſch. 26 Eliz. B. R. Gilbon v. Cordel.

14. Where a parol *is reduc'd into a deed*, the parol agreement is at an end, and all is reſolv'd into the deed, ſo that an aſſumpſit will not lie now. Sti. 19. Paſch. 23 Car. Curtis v. Columbine.

But a ſheriff cannot *command his bailiff to arreſt* without a warrant in writing. Vid. Vent. 46. Mich. 21 Car. 2. Anon.

15. An *under ſheriff* may be *made by* parol. Jenk. 69. in pl. 31.

But

But any *Juſtice of Peace* may lawfully by word of mouth *authorize* any one *to arreſt* another who ſhall be *guilty of an actual breach of the peace* in his preſence, or ſhall be engaged in a riot in his abſence. Vid. Hawk. Pl. C. 160. cap. 65. ſ. 16. and 2 Hawk. Pl. C. 83. cap. 13. ſ. 14.

16. A parol *ſubmiſſion to an award* does not imply a promiſe to perform it. Lev. 113. Mich. 15 Car. 2. B. R. Tilford v. French. Sid. 166. S. C.

17. *Leaſe by prebendary* or churchman of the poſſeſſions of his prebend is not good without deed, by 13 *Eliz.* 10. Vaugh. 197. Hill. 19 & 20 Car. 2. C. B. in Caſe of Holden v. Smallbrook.

18. *Licence to take a profit in alieno ſolo*, as to put ſheep into a common, in which the licenſor has common for a like number, may be by parol, if it be to take the profit *unica vice*; for no eſtate paſſes by it. Vent. 18. 25. Paſch. 21 Car. 2. Rumſey v. Rawſon. S. P. Vent. 124. Hoskins v. Robbins. Sed adjournatur.—*So* licence *to chaſe in a warren* is good without deed; per tot. Cur. Br. Monſtrans, pl. 59. cites 22 H. 6. 52.

19. A parol *declaration of one's intent* is not good againſt a declaration in writing. 2 Ch. R. 78. 24 Car. 2. Lewis v. Lewis. Yet where a declaration was fully prov'd, and *made before the deed was drawn*, and it appeared plainly to be the deſign of the executing the deed, it may be good, per Reynolds Ch. B. Gibb 213. who cited it as the Caſe of Harvey v. Harvey.—2 Ch. Caſes 180. S. C. Mich. 2 Jac. 2. which was a truſt by parol to avoid a ſequeſtration in the rebellion of 1641.

20. 29 *Car.* 2. 3. *ſ.* 1. enacts, That *all leaſes, eſtates*, intereſts of freehold or terms *of years, or any uncertain intereſts in or out of lands, tenements and hereditaments not put in writing, and ſigned by the parties making them, or their agents authoriſed by writing, ſhall have no greater effect than as eſtates at will.* [198] For the caſes on the ſeveral points in this ſtatute, vid. the proper heads and ſubdiviſions.

S. 2. Except leaſes not exceeding 3 years, *whereof the* rent ſhall be two thirds of the full value.

S. 3. *No ſuch eſtates or intereſts*, not being copyhold *or cuſtomary intereſt, ſhall be aſſigned, granted or ſurrendered, unleſs by deed or note in writing ſigned (ut ſup.) or by operation of law.*

S. 4. *No action ſhall be brought after the 24th of June, to* charge an executor *on a ſpecial promiſe to anſwer damages out of his own eſtate,*

Or to charge the defendant upon any promiſe to anſwer for the debt *or miſcarriage* of another,

Or upon an agreement *or conſideration* of marriage,

Or on any contract of ſale of lands, *tenements or hereditaments, or any intereſt concerning them,*

Or on any agreement not to be performed within a year *after the making,*

Unleſs ſuch agreement or ſome note thereof be in writing, and ſigned by the party to be charged, or ſome other by him authoriſed.

S. 5. *All* deviſes of lands *or tenements ſhall be in writing, and ſigned by the party deviſing, or ſome other in his preſence and by his*

direction, and ſubſcribed in his preſence by three or four witneſſes, or elſe ſhall be void.

S. 6. *No ſuch deviſes in writing ſhall be* revocable, *otherwiſe than by writing or burning, tearing or cancelling the ſame by the teſtator, or in his preſence and by his conſent.*

S. 7. *All* declarations *or creations* of truſts *ſhall be made by ſome writing, ſigned by the party, or by his laſt will in writing, or elſe ſhall be void.*

S. 8. Truſts reſulting *by implication of law, or transferred or extinguiſhed by act of law, ſhall be as if this ſtatute had not been made.*

S. 9. Aſſignments of truſts *ſhall be in writing, ſigned by the party granting or aſſigning by ſuch laſt will, or elſe ſhall be of none effect.*

S. 17. *No* contract for *the ſale of any* goods for 10 l. *or upwards ſhall be good, except the buyer actually receive part of them, or give ſomething in earneſt, or ſome note thereof in writing be made and ſigned by the parties to be charged or their agents.*

S. 22. *No* will *in writing of any perſonal eſtate ſhall be* repealed *by words only, except the ſame be in the life of the teſtator committed to writing and read to him and allowed by him, and that be proved by three witneſſes.*

21. An *uſe* will not paſs by parol without deed; but the Ld. Ch. J. Pemberton ſaid, it would be a *good truſt* or chancery uſe, if *for money*, 2 Show. 158. Paſch. 33 Car. 2. B. R. in Caſe of Berris v. Bowyer.

22. A *parol releaſe* is good to diſcharge a debt by ſimple contract. Arg. 2 Show. 417. Mich. 36 Car. 2. B. R. in Caſe of Howſon v. Denham.

23. A *promiſe merely executory* on both parts; as if I promiſe B. 5 *s.* if he goes to Pauls, before B. goes, I may *diſcharge* him, and ſo ſhall diſcharge myſelf of payment of the 5 *s.* for no debt was yet due, nor any thing executed on either ſide. 3 Lev. 238. Mich. 1 Jac. 2. C. B. Mayor &c. of Scarborough v. Butler.

a Le. 214. Coniers v. Holland.—Raym. 42. Cook v. Newcomb. ——Any * *promiſe* may be *diſcharged* by parol, but not after it is *broken*; for then it is a debt. Mod. 206. Trin. 27 Car. 2. C. B. Milward v. Ingram.—2 Mod. 43. S. C.——259. Edwards v. Weekes. S. P.——* Goldib. 3. contra, Tayler v. Fulham.

24. An agreement in writing ſince the ſtatute of frauds and perjuries may be *diſcharged* by parol. Vern. 240. Paſch. 1684. Goman v. Saliſbury.

Co. Litt. 34. b.—— Hob. 153.

25. A *rent* aſſigned in *lieu of dower* may be by parol without deed, tho' it be a freehold created de novo; and tho' a rent lies in grant, becauſe this is not properly a grant but an appointment. 12 Mod. 201. Trin. 10 W. 3. Saunders v. Owen.

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26. *Leſſee for years ſurrendered* to the leſſor by parol *reſerving a rent*; adjudged this was a good reſervation upon the contract, and that an action of debt would lie for the rent after the firſt day of payment incurr'd, tho' the reſervation was by way of contract and without any deed. 3 Salk. 312. pl. 7.

27. If one has a *bill of exchange*, he may *authoriſe another to indorſe his name* upon it by parol, and when that is done, it is all one as if he had done it himſelf; per Holt Ch. J. at Niſi Prius. 12 Mod. 564. Mich. 1701. Anon.

28. An *inſurance* was made from Archangel to the Downs, and from the Downs to Leghorn, but there was a parol *agreement* at the ſame time, *that the policy ſhould not commence till* the ſhip came to ſuch a place, and it was held that the parol agreement ſhould avoid (or *defeat*) the writing; cited per Holt Ch. J. as adjudged in Pemberton's time. 2 Salk. 444, 445. December 3, 1703. Bates v. Grabham.

29. If a thing is *granted* by a writing, which is grantable by parol, it may be *revoked* by parol. Vid. 10 Mod. 74. Hill. 10 Ann. B. R. in Caſe of the Queen v. Sutton.

30. *Deputation of an office* is in its own nature grantable by parol, and therefore tho' it ſhould happen to be granted by writing, yet ſince it is in itſelf grantable by parol, it may be revoked by parol. 10 Mod. 74. Hill. 10 Ann. B. R. in Caſe of of the Queen v. Sutton.

31. A *preſentation*, being but a commendation of a clerk to the ordinary, or a declaration of the King's will, and not any intereſt, and nothing granted or given by it, may be made as well by the word of the patron only (unleſs a *corporation aggregate* be patron, for they muſt preſent under their common ſeal) as by an inſtrument in writing. Watſ. Comp. Inc. fol. 151. cites as in the margin *.

* 19 E. 3. Quare Imp. 60. 38 E. 3. 3. Trin. 8 Jac. King v. .... 2 Cro. 248. Co. Litt. 120. Dubitat. Mich. 1649. Canes v. Oſby. Sti. 156. 13 H. 8. 12. Br. Corporation. 81.

32. An *officer* being the ſerjeant at arms to attend the Ld. Chancellor *was excuſed the exerciſe* of it by the Queen by parol. See Officers &c. (H) pl. 1. and the notes there.

33. A filacer was *diſcharged of his office* by parol. See Officers &c. (W) pl. 1. and the notes there.

34. Whatever is to take effect *out of a power* or authority, or by way of *appointment* is good without deed. 2 Salk. 467. Trin. 10 W. 3. B. R. Saunders v. Owen.

Otherwiſe where it takes effect out of *an intereſt*, and is to enure as a grant; for then if it be of a thing *incorporeal*, it muſt be by deed. 2 Salk. 467. Saunders v. Owen.

[For more of Parol in general, ſee Agreement, Grants, Partition, Surrender, and other proper Titles.]

Fol. 245.

Parols [alias, Words.]

(A) *Ancient [*Words.*]

* For this, ſee the Gloſſaries and Dictionaries.

[1. 3 E. 1. ROT. chartarum membrana. 2 William the ſecond granted &c. cum omnibus libertatibus & conſuetudinibus quas Anglici vocant *Sac & Soc &c.*]

[200] [2. 19 E. 1. Rot. chartarum generally through all the charter rolls, there is mention of ancient franchiſes, quod vide throughout at large, *infangthefe &c. toll, faccham and ſocham &c.*]

[3. 6 E. 1. Rot. patentium M. 27. a man has liberty of *infangthefe* in all his lands in the county of Kent.]

[4. 18 E. 1. Liber parliamentorum is there pleaded a grant of R. 1. of two vills, habendum cum *ſacha, ſocha, toll, and* * *them infangthefe &c.*]

* See pl. 15.

[5. Nomen Anglicanum vocatum, *flemenefrene or flemenefrenthe* is expounded and interpreted catalla fugitivorum. M. 10. H. 4. Rot. 12. B. R. and there cites the Red Book of the Exchequer accordingly.]

[6. Trin. 7 E. 3. B. R. Rot. 28. In a quo warranto in placitando dictum eſt quod per *flem. & fleth.* is underſtood annus & paſtum & medium tempus quia flem. Anglice fugitivus & convictus interpretatur fleth. Anglice ſolum vel terra dicitur, ita videlicet quod quicquid per feloniam in bonis vel in terris hujuſmodi felonum accreſcere (debet) domino regi extra libertatem ipſius abbatis in corpore comitatus ſpectare debet ad ipſum abbatem infra dominum ſuum.]

[7. By the word *flemaſtare* is underſtood chattels of the tenants of the grantee who is attainted of felony. Time E. 3. Kel. 145. b.]

[8. *Drengagium* eſt certum ſervitium, & non ſervitium militare. P. 6. E. 1. B. R. Rot. 7.]

* Putura in Chacea de Bowland, i. e. conſuetudo clamata per foreſtarios & aliquando per balivos hundredorum, recipere victualia, tam pro ſeipſis hominibus, equis & canibus, de tenentibus & inhabitantibus infra perambulationem foreſtæ ſeu hundredi, quando eo pervenerint nihil inde ſolvend. 4 Inſt. 307.

[9. Hil. 5 E. 3. B. R. Rot. 48. Inquiſitio capta de conſuetudine vocata, * *Putura* in chacea regis in comitatu Eborum.]

[10. Hill. 5 E. 3. B. R. Rot. 24. *Tronagium* debet dari de lanis & *peſagium* de mercibus, and not tronagium de mercibus. Adjudged.]

[11. Hill. 4 E. 1. B. Rot. 29. Secundum legem & conſuetudinem regni nullus jurare debet in aſſiſa poſt *clauſum alleluya.*]

[12.

[12. 42 H. 3. In Grafton's Chronicle, fo. 134. Sir Hugh Spencer held his Court and Pleas in London without order of law, and there punished bakers for default of assise by the tombrell, where before they were punished by the pillory; and note, that there in the margin it is said, that the tombrell was a kind of pillory made four square that turned round about]

[13. By the word * *loke* is intended, that it was at a court of the tenants of the grantee. Time of E 3. Kel. 145.]

* This is misprinted, there being no such word in Kelway, but should be (soke.)

[14. By the word *sake* is intended amercement of the tenants of the grantee of it in his court. Time of E. 3. Kel. 145.]

[15. By the word * *them* is intended the engendring of the grantee. Time of E. 3. Kel. 145.]

* Mancipiorum sobolem Somn. gloss. theam.

[16. By the word of *grant of murther* is intended all amercements * of the tenants resiants of the grantee amerced within his seigniories, by reason of murther, (that is to say) for every murther 100s. to be given, which is in nature of an amercement. Time of E. 3. Kel. 145.]

* Fol. 246.

[17. By the word of *grant of forestal* is intended to have the amercements of forestallers, (scilicet) to amerce them. Time of E. 3. Kell. 145.]

[18. By the word *hutlagh* is intended, if any felon be taken within the seigniory of the grantee, and delivered to the vills to carry to the prison of *Dourgh* and escapes, to have the escape in the same manner as the King for escapes found before the Justices in eyre. Time of E. 3. Kell. 145. b.]

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(B) *Abbreviations.*

[1. IF a *venire facias* be awarded *de* * *visu parochiæ de D.* without any dash, yet it is good; for it shall be so taken, this being the usual abbreviation for *viseneto*, though the dash is wanting. Mich. 9 Car. B. R. between *Pennington* and *Morgan*, adjudg'd in writ of error upon a judgment in Bank.]

* So it is in the original, but it seems it should be thus, viz. (visn.)

2. *Ille numerus & sensus abbreviationum accipiendus est, ut concessio non sit inanis.* 9 Rep. 48. Trin. 7 Jac. in the Earl of Salop's Case.

3. *Franciscus* in the venire facias and *Francus* in the distringas are well enough, being both but one name abbreviated. Cro. J. 534. Moor v. Blackwell.

4. *6 Geo. 2. cap. 14. allows such abbreviations as are used in the English language to be made in all writs &c. pleadings, rules, orders, indictments, and informations &c. notwithstanding 4 Geo. 2. cap. 26.*

Upon a motion in arrest of judgment, the Court was of opinion, that by the statute of 6 Geo. 2. to explain the stat. of 4 Geo. 2. for putting all proceedings, pleadings &c. into the English tongue, abbreviations in an attorney's bill, such as [*fo.*] for folio, [*Mr.*] for master, [*pd.*] for paid &c. are helped after a verdict. Barnes's Notes in C. B. 92. Ray v. Jackson.

See Grants, (H. 13.)

(C) *Expoſition.*

* See pl. 8. and the notes there.

[1. IF a *condition* of an obligation be to ſtand to the award, *ita quod it be made, and* * *to be delivered to the parties at or before ſuch a day*, by thoſe words it is intended that it ſhall be delivered to the parties, otherwiſe they are not bound to performance; and it is not ſufficient to allege, that the arbitrator made it, and was *ready to deliver it* to the parties, in as much as the words imply, that it ſhall be delivered to the parties. Dubitatur. Mich. 9 Car. B. R. between *Wigget* and *Butterie*. The Court divided upon a demurrer. Intratur. Hill. 7 Car. Rot. 840.]

[2. In Action upon the Caſe, if the plaintiff declares, that the defendant promiſed to pay ſo much &c. in conſideration that the plaintiff ſhould *ſo drain certain drowned land, that it ſhould be dry in extremitate hiemis, viz. in aliquo tempore between All Saints and Candlemaſs*; and alleges, that he after drained it in Candlemaſs eve, by which it was dry in extremitate hiemis, between the two feaſts, this is not good; for the words *aliquo tempore* are to be taken according o the ſubject matter, either for ſome time or for all the time, and here by the ſubject matter it appears, that it ſhould be dry through all the extremity * of winter between the ſaid feaſts, and not by one day in † the winter. Mich. 9 Car. B. R. between *Chapman* and *Bell*, per Jones and Berkley againſt Richardſon and Croke, this being moved in arreſt. But herein Richardſon and Croke rely'd much upon the verdict, that it had made the declaration good, being whether it was drained according to the promiſe, and found for the plaintiff that it was.]

* Orig. [deliver.]
† Orig. [leiver.]

[202] [3. In action upon the Caſe, if plaintiff declares that B. was arreſted at his ſuit in a court, and upon this the defendant, in conſideration that the plaintiff would at the requeſt of the defendant *forbear ulterius proſequi* the ſaid B. the defendant, aſſumed, that B. ſhould give ſecurity to the plaintiff for the debt before the next court, or that he himſelf would pay the debt, and avers, that he ulterius proſequi the ſaid B. abſtinuit, & adhuc abſtinet, & abinde huc uſque aliqualiter abſtinet & deſiſtit. This is a good averment of the performance of the conſideration; for the word *aliqualiter* in this ſenſe and context of the words is, that he abſtained utterly; as Littleton ſays, if a man grants an annuity ita quod it ſhall not charge his perſon aliqualiter, hoc eſt, in any ſort. H. 11 Car. B. R. between * *Brent* and *Whitwick*. Adjudged per Curiam in writ of error upon ſuch judgment in Coventry, and the judgment affirmed accordingly. Intratur. P. 11. Car. Rot 270.]

* Fol. 247.

Cro. C. 186. S. C. but there the words are

[4. If a *leaſe* be made habendum *a confectione pro termino octoginta & tredecim annorum*, this is a leaſe for the term of 93 years, and not for 80 and 30 years; but it ſhall be interpreted to be octoginta

octoginta & tredecim annis, that is to ſay, 93 years; for the *intention* of the parties appears to be ſo. Mich. 10 Car. B. R. between *Hoopwell* and *Serle*. Adjudged per totam Curiam upon a ſpecial verdict found in Devon. Intratur. Hill. 9 Car. Rot. * 869.]

octoginta & *terdecim* &c. and all the Court held that it ſhould be taken according to the common parlance for 13 years; and that *terdecem and treſdecem is all one*, and is ſo wrote, *euphoniæ gratia*, and it being one intire word cannot be taken otherwiſe; but if written as ſeveral words, it ſhould be otherwiſe. Hopehill v. Searle.——* Cro. C. 386. cites Rot. 269.

[5. If an action of *account* be brought *de ſeptem ponderibus, and decem unciis ceræ*, and judgment for the whole, this is erroneous, for ponderibus is weights, and not pounds; for *pondus pondi* is a pound, and *pondus ponderis* is a weight, and therefore as it is, it is inſenſible. P. 11. Car. B. R. between *Richards* and *Hance*. Adjudged per Curiam, and the judgment given in Exeter reverſed accordingly. Intratur. Trin. 10 Car. Rot. 720.]

[6. If a man *deviſe land to B.* his wife *for life*, the remainder *to C. in fee*, and after in a codicil theſe words follow, *Item my will is, that the ſaid B. ſhall have power ſix months before her death to make a leaſe thereof, the term to be for ſix years*. B. may make a leaſe for 6 years at any time before her death, though it be not 6 months before her death, but one month, or a week, or a day, for the time of her life cannot be known, and therefore the intent was, that ſhe ſhould have power at any time within 6 months of her death, to leaſe it for ſix years. P. 13 Car. B. R. between *Harris* and *Grahame* adjudged per Curiam upon a ſpecial verdict, for a meſuage in London. Intratur. Mich. 11 Car. Rot. 370.]

[7. If *condition* of an obligation be, *Whereas ſuch ſhip is outward bound in a voyage to St. Luca's in Spain, and from thence to return directly to the port of Dover or London, or any of them, within the realm of England, if the obligor do pay to the obligee* 10*l. within* 20 *days after the firſt or next return or arrival, after the date of of this obligation, of the ſaid ſhip in the port of Dover or London aforeſaid, or either of them, or in any other part or place within the realm of England, or elſewhere, where ſhe ſhall make her right diſcharge from the ſaid voyage without fraud*, then the obligation to be void &c. If the ſhip makes voyage, and makes her return to any place out of the realm, as at Venice, and there makes her diſcharge, the obligor is bound to pay the money, though in the beginning of the condition, it is recited that he ſhould make his return to the port of Dover or London in England, yet in as much as the words are after in the body of the condition more large, viz., or elſewhere, though it is ſaid (*from the ſaid voyage,*) yet it ſhall be taken, that the intent was more large than the firſt words. Hill. 14 Car. B. R. between *Harris* and *Gravener*. Adjudged upon a demurrer. P. 14 Car. Rot. 393.] [203]

[8. If the condition of an *obligation* made *upon a marriage* be, that if A. the obligor at the requeſt of B. who ſhould be his wife, *give licence to B*, with his aſſent, *to declare her laſt will, by*

† To be paid is all one with, *and to pay*; otherwiſe it is an idle thing to permit her to make a will, if he doth not pay; and therefore they all held the plea ill, and adjudg'd for the plaintiff. Cro. C. 597. S. C. Hob. 253.

* Fol. 248.

which ſhe may deviſe to whom ſhe pleaſe 100*l. the ſame* † *to be paid out of the perſonal eſtate of the ſaid A. within one year after the death of B. bona fide*, then the obligation to be void; upon this condition it ſhall be interpreted and taken, that A. not only ſhall give leave to B to make her will of 100l. but alſo that if ſhe gives it by the will, that he will pay it; for it appears to be the intent of the condition, and it is all one as if he ſaid, and * he ſhall pay the ſame &c. for it is ſaid, *the ſame to be paid out of his perſonal eſtate bona fide*, which ſhews, that it ought to be paid by him bona fide, and within a year after the death of B. Mich. 16 Car. B. R. between *Sherman* and *Lilly*. Adjudged upon a demurrer per totam Curiam, præter Jones, who thought that the words ſhould be interpreted, that ſhe ſhall have power to make a will, and of 100l. to be paid out of his perſonal eſtate within a year after the death of B. and that A. is not bound to pay it by the obligation, but the legatee ſhall have only remedy for it in the Spiritual Court. Intratur. H. 15. Car. Rot. 1198.]

[9. The words of a *diem clauſit extremum* to the eſcheator are, Quod per ſacramentum proborum hominum diligenter inquireret & inquiſitionem inde factam nobis &c. ſub ſigillo tuo & ſigillis eorum per quos facta fuerit ſine dilatione mittas; and in the concluſion of the office it is thus, In cujus rei teſtimonium *ſigilla ſua alternatim appoſuerunt*; tho' properly *alternatim* imports interchangeably, and then it cannot be ſuppoſed that eſcheator and jurors ſealed to one part, but the eſcheator to the one, and the jurors to the other part, yet it is good; for it may be true that all ſealed, and then the addition of the word *alternatim* ought not ſo ſtrictly to be conſtrued but that it may be taken, that they all ſealed both parts, the which ſhall not hurt; for the words are in the concluſion, that as well the eſcheator as the jurors ſigilla ſua alternatim appoſuerunt, which implies, that they ſhould put their ſeals to both. Hobart's Reports. Caſe 336. *Waddington's* Caſe reſolved.]

Sty. 122. S. C. Molloy 259.— S. C. cited Arg. Show. 322. in Caſe of Jeffries v. Legendra. —— Comb. 56. Trin. 3 Jac. 2. B. R. S. P. but no judgment. Barton v. Wolford.

[10. If by a *charter party* the owners of the ſhip hire the ſhip for a certain voyage to the merchants &c. and the merchants covenant on their part to cauſe the ſhip to return into the river Thames within a certain time (*periculis & caſualitatibus marium*, Anglice, *dangers of the ſeas, exceptis*.) And after, in the voyage, and within the ſaid time of the return, the ſhip was taken upon the ſea per homines bellicoſos modo guerrino arraiatos to the merchants unknown, againſt the will of the merchants, their factors and aſſigns, & ab inde huc uſque per eos detenta fuit, per quod they could not return it within the river Thames within the time mentioned in the covenant. This is an impediment within the exception; for thoſe words intend as well any danger upon the ſea by *pirates and men of war*, as dangers of the ſea by *ſhipwreck*, *tempeſt*, or ſuch like; and ſo is the common acceptance of the words among merchants upon charter parties. Mich. 24 Car. B. R. between *Pickering and Barkley*, adjudged upon a demurrer, in which divers merchants were heard in Court for the interpretation of the words, and the practice

practice of the merchants in the Court of the policy of aſſurance and otherwiſe, who all agree that it extends in their contracts and bargains by their common acceptance to ſuch dangers upon the ſea by pirates and men of war. Intratur. Paſch. 24 Car. Rot. 154.]

11. Where the words are *dubious* they ought to be taken in [204] ſuch ſenſe *that no wrong be done*; and the law more regards a leſs eſtate by right, than a greater eſtate by wrong. 2 Lev. 155. Arg. Hill. 27 & 28 Car. 2. B. R. in Caſe of Piggot v. the E. of Saliſbury.

12. *Common uſage* and reputation ſhall *direct* the intendment of the parties, as in giving or ſelling a barrel of beer, the barrel is not given or ſold, but the beer only; but otherwiſe of a hogſhead of wine. Savil. 124. Mich. 32 & 33 Eliz. in Caſe of Matthew v. Harecourt.

13. *Verba de futuro*, or in future, ſhall be taken futurely when they refer to a future act, otherwiſe when they refer to a preſent reſolution. Cro. E. 306. Mich. 35 & 36 Eliz. B. R. Burton v. Gowell als. Gamell.

14. *Verba æquivoca & in dubio poſita intelliguntur in digniori & potentiori ſenſu.* 6 Rep. 20. Hill. 38 Eliz. B. R. in Gregory's Caſe.

15. A. grants a rent-charge to B to iſſue out *of the manor of N. and out of all his lands in D. and E. in the county of K. belonging or appertaining to the ſaid manor.* This ſhall be taken to extend to the land occupied in the manor, tho' it is not parcel of it; per three Juſtices againſt Popham. Brownl. 184. Mich. 3 Jac. Crate v. Moor.

16. *Grammatical* conſtruction of a word was *wav'd*, and the word adjudged to ſignify in law according to the common received ſenſe of the word. Lane 11. Arg. Mich. 3 Jac. in Caſe of Brett v. Johnſon.

17. For the interpretation of words there are *two grounds.* 1ſt. If the *ſecond part contradicts the firſt*, the ſecond part ſhall be void. 2d. If the *ſecond part expounds the firſt*, both ſhall ſtand; per Doderidge. Arg. Roll. R. 376. Paſch. 14 Jac. B. R. in Caſe of Berry v. Perry.

18. When a deed is doubtful in conſtruction, the meaning muſt be gathered from all the parts of it; but yet that is tyed with two cautions, that it be not againſt any thing expreſſed by the ſaid indenture, but only in caſe where it is *doubtful.* Winch. 92. Arg. Trin. 22 Jac. C. B.

19. Words *of relation* will never controll that which was certainly put down before, per Winch. Winch. 93. in Caſe of Trenchard v. Hoſkins.

20. A. has three daughters B. C. and D.—A. promiſed R. to give him in *marriage with D. as much as he gave in marriage with any other of his daughters.* A. gave with B. to one H. 100*l.* and a bond of 100*l.* to pay the ſaid H. 50*l.* more at three months end after his deceaſe, if the ſaid B. or any iſſue of her body was then living. Some held that the promiſe extended only to money preſently

preſently given, and not to the bond, others e contra; but all agreed if it extend to the *bond*, it ought to have been averred, that D. or ſome of the iſſue of her body were alive, and not that B. and the iſſue of her body were alive. Cro. Car. 186. Paſch. 6 Car. B. R. Cale v. the Executors of Thorne.

21. The words *modo* & *dummodo*, tho' generally taken conditionally, yet have been always before conſtrued as an admonition or *caution* in granting of licences to hold a ſecond benefice &c. and there *to avoid a multitude of inconveniencies from a different conſtruction*, adjudged that it ſhall not now be conſtrued as a condition, but as it had been uſually. Cro. C. 475. Trin. 13 Car. B. R. Dodſon v. Lynne.

1 Lev. 294. LANGAN v. CARN. S. C. Hob. 275. CLANRICKARD's Caſe.—2 Vern. 325. S. P. Richards v. Lady Bergavenny.

22. *Clauſes in company* are to expound one another. Vent. 91. Trin. 22 Car. 2. B. R. Lion v. Carew.

23. Words tho' never ſo *joint ſhall be taken ſeverally* where they have a diſtinct ſubject matter to work upon; per Holt Ch. J. Arg. 3 Ch. R. 126. Orby v. Ld Mohun.

24. *Several words* are void where they would work on a *joint intereſt*, and joint words are void where they would work on a ſeveral intereſt; per Holt Ch. J. Arg. 3 Ch. R. 128. cites 5 Rep. 18. Slingſby's Caſe.

[205] 25. The words (*heirs of the body*) cannot in the *ſame clauſe* be conſtrued words of limitation as to lands, and of deſignation of the perſon as to goods. 2 Vern. 325. Mich. 1695, Richards v. Lady Bergavenny.

26. Where a matter is *capable of different meanings*, that ſhall be taken which will ſupport the declaration or agreement, and not the other which would deſeat it. 1 Salk. 325. Trin. 2 Annæ, B. R. Wyatt v. Aland.

See Conditions.—Covenants.

(D) *Copulative and Diſjunctive;* where they are one Sentence, and where ſeveral.

Godb. 445. S. C. but not exactly S. P.

[1. IF A. *covenants* with B. *upon reaſonable requeſt* to him made by B. *to ſurrender certain land, and all his intereſt in it to B. and alſo to permit and ſuffer B. to take the profits of the land &c.* in this caſe the *requeſt* does not go to the taking of the profits, but only to the ſurrender; ſo that he is bound to ſuffer him to take the profits without requeſt, tho' * there is but one verb which goes to the whole: but if he had been to ſurrender upon requeſt, and alſo to permit him to take the profits, there it had been more clear. P. 7. Car. in the Exchequer Chamber between *Simms* and *Smith*, per Curiam, upon writ of error upon judgment in B. R. ſeems e contra: but afterwards (to wit) Trin. 7 Car. or Mich. 7 Car. per Curiam reſolved and adjudged, that the requeſt was not neceſſary as to the taking of the profits, and the judgment

* Fol. 249.

ment given in B. R. accordingly upon a demurrer now affirm'd per Curiam.]

[2. If a *leaſe* for years be made to A. *determinable upon the lives of B. C. and D.* and after *B. dies*, and then A. aſſigns to E. and after E. by indenture reciting the ſaid leaſe, and the death of B. and the aſſignment to him by this indenture, now aſſigns the term to F. and *covenants* with him, that he himſelf is lawfully poſſeſſed of all the premiſſes of a good and ſufficient eſtate, for the reſidue of the ſaid term then to come, *if the ſaid C. and D. or either of them ſhall happen ſo long to live, and they the ſaid C. and D. are yet in full life;* tho' the words are not *and (that) the ſaid C. and D. are yet in full life*, yet it is implied by the words, and it ought to be a ſeveral covenant, or otherwiſe this laſt part will be void and to no effect. Trin. 11 Car. B. R. between *Baſkett* and *Scott*, adjudged upon a demurrer, in which the breach was aſſign'd, becauſe *C. was dead at the time of the aſſignment* made to him, and the word (that) was added to the other words in the declaration, and the defendant demanded oyer of the indenture which was entered in hæc verba in which the ſaid word (that) was not; yet becauſe it *was no more than the law implied*, it was adjudged good. Intratur P. 11 Car. B. R. Rot. 221.

3. If A. upon a *marriage* intended by C. his ſon with B. *covenants* with D. to ſtand ſeiſed, and to make other conveyance of certain land to the uſe of C. for life, and after to B. *for her jointure* for life, and after two other uſes to their iſſue &c. and of other land to the uſe of himſelf for life, and after to C. for life, and after to the iſſues &c. as before. And then A. covenants modo & forma ſequentibus, videlicet, Prædictus A. *pro & non obſtante aliquo actu ſive re per ipſum facto in contrarium tempore ſigillationis & deliberationis indenturæ prædictæ ſtabat & fuit legitime ſeiſitus ac uſque tales bonæ & ſufficientes convenientiæ & aſſurancia in lege forent factæ & legitime executæ ut ſupradictum eſt ſteteret & eſſet ſeiſitus de præmiſſis ſibi & hæredibus ſuis in feodo ſimplici abſque aliquo genere*, Anglice, manner, condition, defeaſance, mortgage, limitation, *ſive poteſtatis revocationis mutare [vel] permutare eadem*; ac inſuper quod *dicta terra & præmiſſa, præantea limitata pro junctura dictæ B. a tempore deceſſus prædicti A. pro & durante termino vitæ dictæ B. continuarent, remanerent & forent eidem B. & aſſignatis ſuis pleni* & clari annui valoris 200 l. ultra & *præter omnia onera ſolutiones exitus & repriſas quæcunque.* In this caſe, tho' this bears a ſemblance of being a covenant, becauſe the words of covenant are but once named; and tho' it is ſaid at the beginning, that he covenants in manner following, and tho' the word *et* couples all together, yet the *laſt part touching the value is an abſolute* ſeveral *diſtinct covenant of itſelf*, ſo that if the land limited for the jointure be not of the value of 200l. a year, tho' it is not by any act of himſelf, yet he has forfeited his covenant, becauſe it is *uſual* in caſe of jointure to covenant for the value, and ſo *ſubjecta materia* explains it. Alſo it appears throughout the deed to be the *intent of the parties*; for it is not uſual to covenant that the value is ſuch notwithſtanding any act done by himſelf;

Cro. Car. 495. S. C. —Jo. 403. S. C. and ſays it was the Caſe of one *Jones*. —Litt. Rep. 185. marg. of Caſe of *Trenchard* v. *Hoſkins*, cites S. C. which the [206] reporter ſays he argued.

himſelf; for then it would be of no effect. P. 14 Car. B. R. between *Hughes* and *Bennet*, adjudged upon a demurrer. Intratur Trin. 13 Car. Rot. 1536.]

Fol. 250. Winch. Rep. 91. S. C. Trin. 22 Jac. in C. B. there it was held by Hobert Ch. J. and Jones J. that this is all one covenant, but Hutton and Winch. J. held that they were ſeveral.

[4. Upon a conveyance of land made by A. to B. if A. *covenants* that he *is ſeiſed of a good and indefeaſible eſtate in fee, and that he has good power to convey it to B. according to the indenture notwithſtanding any act done by him*, this laſt clauſe and covenant ſhall not reſtrain the firſt clauſe of the covenant, ſcilicet, that he has a good and indefeaſible eſtate in fee notwithſtanding any act done by him, but it is abſolute and general; becauſe *the general method of conveyances* is to make it ſo, and the one covenant independent upon the other, and *ſeveral*. B. R. between Sir *G. Trenchard* and *Hoſkins*, adjudged per Curiam, as the Court now ſaid.]

—S. C. argued by counſel. Litt. Rep. 62. 65. 185. and Mich. 4 Car. by the Court of C. B. Ibid. 201. when the whole Court, viz. Yelverton, Harvey and Hutton J. and Richardſon Ch. J. held that all was one abſolute covenant.——S. C. cited Sid. 328. in Caſe of Gamsford v. Griffith; and 'tis there ſaid that true it is that the ſame was ſo adjudged in C. B. but that a writ of error was afterwards brought in B. R. where it was held by Jones, and all the other Juſtices except Whitlock, that the judgment be revers'd; but it was ſaid that no reverſal was enter'd; and therefore the Reporter adds a quære.

Covenant *that he was ſeiſed in fee, notwithſtanding any act done, and that the lands were of the annual value of* 200*l.* in this caſe the words (*notwithſtanding &c.*) cannot be applied to the covenant concerning the value, becauſe they were plac'd in the middle of the ſentence. Saund. 60. in Caſe of Gainſforth v. Griffith, cites Cro. Car. 106. Crayford v. Crayford, and 495. Hughes v. Bennet.

[5. In an indenture between A. and B. it is recited, that where B. by other indenture dated &c. had aſſigned to C. a meſſuage &c. Now this indenture witneſſeth, that B. *covenants* that he or D. his brother *will deliver* to the ſaid C. or in his abſence to E. at his ſhop, *a terrar of the premiſſes; and of the truth thereof*, ad optimam eorum peritiam, *upon requeſt* made to them by the ſaid C. *would take their oath* before a Maſter in Chancery *; *and alſo would deliver to one W.* ſafely to be kept to the uſe of the ſaid B. and C. *the original demiſe* whereof he then had a copy, the which demiſe ſhould be ſhewn, with the aſſent of both parties, or as neceſſity ſhould require &c. Tho' in this caſe they are not bound to make an oath of the truth of a terrar without requeſt made, yet he is bound to deliver the original demiſe without requeſt; for the requeſt does not refer to this, but to the firſt, as appears by the *coherence, and putting the requeſt among the covenants, and not in the beginning or end.* P. 15 Car. B. R. between *Smith* and *Garbutt*, adjudged per Curiam, upon a demurrer, where it was pleaded that there was not any requeſt made, and the breach aſſign'd for not delivery of the original demiſe. Intratur Hill. 14 Car. Rot. 1052.]

* Condition that huſband and wife, being leſſees for life of land, ſhould *levy a fine to a ſtranger at the coſts of the ſtranger; and alſo that they ſhould levy a fine of* [207] *other lands*, which they alſo had for their lives, *to a ſtranger, and at their charge.* Obligor pleads that huſband and wife offer'd to levy the fine, if the ſtranger to whom the fine was to be levied would bear the charges. Obligee demurr'd; and adjudged for the plaintiff, becauſe the levying the ſecond fine has no reference to the firſt; for they are *two diſtinct ſentences*, and the words (and alſo) make them ſo. Brownl. 94. Paſch. 5 Jac. Hollingworth v. Huntley.

And where in ſuch caſe it was

[6. If A. be bound to B. by *obligation*, whereof the condition is, that where they have ſubmitted themſelves to the award of

J. S.

J. S. that if A. ſtands to and *performs the award of J. S. ita quod* the award be under the hand and ſeal of the arbitrator, and *delivered to either of the ſaid parties* before ſuch a day, then the obligation ſhall be void. In debt upon this obligation, if defendant pleads no award made, and plaintiff ſhews the award, and ſhews that the award *was delivered to the plaintiff*, but does not allege that the award was delivered to the defendant, it is not good, becauſe here the words (to either of the ſaid parties, in Latin *utrique partium*) ought to be *interpreted to both parties*. Trin. 16 Car. B. between *Holwell* and *Woredge*, adjudged upon demurrer. Intratur Trin. 16 Car. R.

Roger Ward attorney for Holwell.]

pleaded that the award *was delivered to the plaintiff, and to one of the defendants*, but *not to the other*: the Court upon demurrer gave judgment againſt the plaintiff, and held that the word (uterque) is ſometimes to be taken *diſcretive*; as where *two or three are bound* in a bond, *et utrumque eorum*; which makes the obligation ſeveral: and ſometimes *collective*, as in the preſent caſe; and this depends upon the ſubject-matter, ſo that a reaſonable conſtruction be made, et ut evitetur abſurdum. Now in this caſe, as each of the parties is ſubject to the penalty and danger, it is reaſonable that the award ſhould be delivered to each, in order that they may be able to perform it. It was likewiſe held, that there being *two of one party*, the delivery to one of them in this caſe was not ſufficient; for *party* is to be intended of an *intire party*, and one is as much within the penalty and danger as the other. 5 Rep. 103. Trin. 43 Eliz. B. R. Hungate's Caſe.—It ought to have been delivered *omnibus partibus*. Cro. E. 885. S. C. Huntage v. Meaſe and Smith.—Mo. 642. S. C.

7. In *treſpaſs* if plaintiff declares *Quare defendentes apud D. clauſum ſuum fregerunt & intraverunt & ſolum querentis adtunc & ibidem effoderunt & mille carectatas ſoli ad valentiam* 10 *l.* & 100 *pecias maheremii ipſius querentis ad valentiam* 200 *l. adtunc & ibidem inventas ceperunt & aſportaverunt &c.* Tho' it is not ſaid that the *mille carectatæ* ſoli were *provenientes of the ſaid digging* of the land; nor is it directly ſaid that the mille carectatæ ſoli were *the ſoil of the plaintiff*, yet upon the whole the declaration ſhall be ſo taken: for tho' the words (ad valentiam) are interpoſed between the ſoil and maheremium, and the words (ipſius querentis) come immediately after the maheremium, and before the words (ad valentiam) ſo that the words (ipſius querentis) ſeem to be reſtrained to the timber, and not to extend to the ſoil, yet becauſe all come under the words *ceperunt & aſportaverunt*, it is good enough; and ſo the words *(ipſius querentis)* ſhall have *reference as well to the ſoil as the timber*. Trin. 23 Car. B. R. between *Barret* and *Johnſon*, adjudged, it being moved in arreſt of judgment upon a trial at bar, which concerned the haven of Yarmouth in Suffolk. Intratur Hill. 22 Car. Rot. 561.]

This caſe agreed by Gould J. for that by virtue of the copulative the (ipſius querentis) goes to all. Trin. 2 An. 2 Salk. 640. Joce v. Mills.—— Agreed per Cur. 6 Mod. 15. S. C.

8. *Præcipe* quod reddat *of the manor of D. and S. and of three houſes and* 20 *acres of land*, 10 *acres of meadow, and* 40 *acres of paſture in A. B. and C.* And per Cur. it ſhall not be intended by the *copulative*, that the manors are in A. B. and C. but that they are vills by themſelves, and that the houſes and land lie in A. B. and C. Br. Relation, pl. 47. cites 14 E. 4. 7.

9. Debt upon bond for performance of covenants in an indenture; one was, *that the indenture of leaſe at the time of the aſſignment is a good, true and indefeaſible leaſe, and that* (the covenantee)

Saund. 58. S. C. by name of Gains-

FORTH v. GRIFFITH; and judgment for the plaintiff.

* Orig. (ſemble).

nantee) *ſhall enjoy &c. without the lett or interruption of* (the covenantor) *or any claiming from, by, or under him.* The queſtion was whether (*indefeaſible leaſe*) ſhall be conſtrued * as a diſtinct ſentence, or with reference to the laſt words, (*without the interruption of &c.*) the Court upon ſeveral arguments * inclined, that the laſt words do not mitigate or qualify the firſt, but are diſtinct clauſes, tho' they allow'd the rule, that reſtraining words at the beginning or at the end of the ſentence, ſhall govern the whole; but here they are as diſtinct as the laſt words; (that he ſhall enjoy it without the lett or interruption) cannot without impropriety of ſpeech be applied to the firſt clauſe of (indefeaſible leaſe.) Sid. 328. Paſch. 19 Car. 2. B. R. Gamſforth v. Griffith.

See Condition, (M. b.) pl. 3. 4. 9.

(E) *Relative.* In what Caſes they ought to refer *to the next Antecedent.*

[1. IF A. be bound in an obligation, whereof the *condition* is, *that he and B. his wife will levy a fine* of ſuch land *to C. and D. and their heirs, and at their coſts and charges.* This word (*and*) makes a new ſentence, and ſo the obligor is bound to do two things, ſcilicet, to levy a fine, and to levy it at his own coſts and charges, and not at the coſts of the conuſees, and ſo thoſe words do not relate to the next antecedent. H. 4. Ja. B. R. per Curiam]

[2. If *in the county of N. be the pariſh of Road, and in this pariſh is a vill call'd Road, and another vill call'd Aſton, and four houſes of another vill call'd Hartwell in this pariſh of Road alſo*, and the King *grants* to another the *manor of Hide*, and all the lands thereto appertaining in parochia de Road, *& omnes decimas in tenura de Wake nuper pertinentes monaſterio Sancti Jacobi in Road & Aſton, & omnia terras redditus & hæreditamenta in Road prædicta*, and the King had not any land, tenement or hereditament in the pariſh of Road, but thoſe before granted: it ſeems that *Road prædicta* ſhall not have reference to Road the vill the next antecedent, but to the pariſh, and ſo the tithes which the King had in Hartwell within the pariſh ſhall paſs; for Road the pariſh was only named before by itſelf, for Road the vill was named with Aſton, and ſo prædicta ſhall not have reference to it. Mich. 38, 39. El. B. R. between *Farmer* and *Wixe*. But dubitatur.]

—*Brownl. 74. S. C.—Dy. 226. in marg. cites S. C. by the name of Pye v. Coe, and ſays, the bond was *to pay* 100*l.* *the* 19*th November next enſuing, and another* 100*l. the next December enſuing*; and adjudged that the

3. If a man by *obligation, dated 6 April* 12 Ja. be bound *to pay* 10*l. the* 28*th day of April next enſuing the date hereof*, thoſe monies are not payable till April 13 Ja. for the (next enſuing) ſhall refer to the month of April, not to the 28th day. Hill. 12 Ja. B. between *Road* and *Abingdon*, per Curiam. Contra Mich. 13 Ja. B. between * *Price* and *Coe* adjudged, the intent of the parties being found to be ſo.]

the firſt 100l. ſhall be paid the 10th day of the ſame November, and that the intent of the party appeared by the appointment of the ſecond payment of 200l.

4. If obligation be *made 23d May for payment of money upon 24th of May next enſuing*, this doth not refer to the month, but to the day, properly and of itſelf, without finding of the intent of the parties, Mich. 21 Jac. B. R. adjudged between * *Preſcott* and *Gwinn*. P. 21 Ja. B. R. per Curiam, between † *Bulkley* and *Hilbank*.]

* Cro. J. 646. S. C.
† Cro. J. 677. S. C.
An obligation bore *date the 5th of May*, and the condition was to pay 20l. *the 11th day of May next enſuing*; it was adjudged that this ſhall be intended the next 11th day of the ſame May in which the obligation was made, and not the next May, and month of May following. 2 Roll. Rep. 255. Mich. 20 Jac. B. R. Anon.

A bond was *dated in March*, to be paid *ſuper viceſimum octavum diem Martii prox. ſequentem*. It was argued that ſequentem) refers to the day, which ſhall be underſtood of the ſame month; and that if it had been *(ſequentis)* then it had referr'd to March, and ſo it had been payable the next year. But the Court was of opinion that it ſhould be underſtood the *current month*. 1 Mod. 112. pl. 8. Paſch. 26 Car. 2. B. R. Anon. [209]

But tho' a bond dated 5 March, conditioned to pay 20l. the 25th March next, ſhall refer to the day, and not to the month, yet ſuch a conſtruction ſhall *never be made to loſe a debt*, deſtroy an *indictment*, or vacate a *judgment*, but only when 'tis *in maintenance of them*. Per Cur. 2 Show. 160. Paſch. 33 Car. 2. B. R. The King v. Forbis.

[5. *But* if it be *found that the intent was, that it ſhould be referr'd to the month* the Court ſhall judge ſo. Held in the Caſe of Bulkley.]

S. P. If the circumſtances of their agreement had been found, and that it was intended to be May twelvemonth following, per Doderidge and Haughton J. But per Lea Ch. J. *(next following)* ſhall not be referr'd to May next following, unleſs *ſome matter in the ſame deed* might be ſhewn, and *not a collateral agreement* found by the jury, nor any *collateral deed*. Cro. J. 677, 678. Trin. 20 Jac. Rot. 32. S. C. by the name of Buckley v. Guilbank.

[6. In a treſpaſs, if the plaintiff counts *Quare clauſum ſuum fregit vocatum G. abutting upon the land of A. &c. in D.* where the uſe is to count Quare clauſum fregit in D. vocatum &c. yet the other is good, and D. ſhall have reference to the cloſe. M. 32. 33 El. B. R. *Duke's* Caſe adjudged. For the clerks ſay, that their form is both days.]

[7. If the condition of an obligation to perform an award be with ſuch clauſe, ſcilicet, *ſo as the ſame award be made on this ſide the 8th day of July before 4 o'clock in the afternoon of the ſame day &c.* here the laſt words (ſcilicet before 4 o'clock in the afternoon of *the ſame day*) ſhall not be referr'd to the 8th day, but to the day before the 8th day, and ſo the arbitration ought to be made before the 8th day, or otherwiſe is not good. And by this interpretation all the words ſhall ſtand where otherwiſe the firſt words ſhall be void. Paſch. 42 El. B. R. adjudged Mayor v. Browne.]

[8 If the Queen reciting two ſeveral leaſes made by her the 18 & 19 El. makes a *leaſe of the ſcite of the manor of D. &c. and of the perquiſites of the Court*, which were *not leaſed before*, to commence *poſt expirationem* & ſurſum redditionem of the ſaid two ſeveral leaſes, *reddendo inde extunc* annually 78l. in forma ſequenti, videlicet, 36l. for the ſcite and 6l. for the perquiſites &c. and reſerves ſeveral other ſeveral rents upon the determination

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nation of the ſeveral leaſes. Tho' the *rent for the perquiſites be payable preſently, yet the reſidue ſhall not be* payable preſently by the word (*extunc*) H. 7 Ja. B. R. between *Hall* and *Feram* per Curiam. For the word (*inde*) refers to the whole, and makes the rent payable when every leaſe commences.]

Brownl. 76. S. C. but reports it held that the defendant Draper ſhould levy the fine.

[9. If D. be obliged in 40 l. to M. the *condition* of which is *to pay* 20 *l. upon the* 23*d of October following* (*if Gilbert Rocket be then living*) *and that he before* 20*th October levy a fine*, and ſuffer a recovery of certain land. Theſe words, (and that he ſhall levy a fine and ſuffer a recovery) refer to the next antecedent, ſcilicet, Gilbert Rocket, tho' he comes in in a parentheſis. M. 12 Ja. B. R. per Curiam, between Manceſtor and Draper.]

[10. In an action upon the Caſe in Reading Court, if plaintiff *declares that in conſideration that the plaintiff would carry* certain meal *from Reading to London, the defendant adtunc & ibidem promiſed to pay* ſo much as he ſhould deſerve; upon this declaration it ſhall be taken, that the promiſe was made at London, which is the next antecedent, and ſo out of the juriſdiction of the Court of Reading. Mich. 9 Car. B. R. *Long* and *Atkins* adjudged in writ of error upon a judgment in Reading, and the judgment there given reverſed accordingly. Intratur. Hill. 8 Rot. 217.]

[210] [11. In an action upon the Caſe if the *plaintiff declares upon three ſeveral promiſes made* by the defendant *upon ſeveral cures to be made by the plaintiff* being a phyſician, and *ſhews that* 20 *s. was to be paid upon every of the three promiſes upon requeſt quæ in toto ſe attingunt to* 3 *l. & licet ad hoc ſolvendum requiſitus fuit &c.* This is a good requeſt, for the requeſt ſhall not go to the general ſum of 3 l. which is the next antecedent; for then the requeſt ſhould not be good. But it ſhall go to every ſeveral 20 s. ſo that it is all one as if he had ſaid licet ad ſolvendum the firſt 20 s. and ſic de cæteris requiſitus &c. and ſo good. M. 21 Ja. B. R. between *Manowry* and *Strong* adjudged, it being moved in arreſt of judgment. Shapcot attorney for the plaintiff.

12. Aſſiſe of *common of turbary* in S. and made his *plaint to have common of turbary in* 100 *acres* of moor, to dig, cut and *carry away at his will.* Trewe demanded judgment of the plaint; for your plaint is, that you have it but at will, but becauſe this word *at will is referr'd to the digging* and *not to the turves*, therefore the plaint was awarded good. Br. Plaint, pl. 7. cites 5 Aſſ. 9.

13. Aſſiſe *of the manor of T. except* 100 *s. rent*, and the *writ was Delibero tenemento in T.* and one as *tenant of parcel ſaid, that the manor extended into T. and C.* Judgment of the writ, and if &c. nul tort; and the *plaintiff ſaid, that that which was in C. was the* 100 *s. rent in the exception;* and upon this the writ was awarded good; and yet by ſome the exception cannot extend but to the vill in the writ, which Bacon denied. Br. Aſſiſe, pl. 128. cites 7 Aſſ. 20.

Br. Relation, pl. 10. cites S. C.

14. *Nuper obiit in A. B. and C. in the iſle of P.* the tenant ſaid, that no ſuch vill as A. and B. in the iſle & non allocatur; for

for *iſte ſhall not have relation but to the laſt vill*; but Brook ſays, quod mirum! Br. Brief, pl. 157. cites 7 H. 6. 8.

15. In *præcipe* quod reddat, the *tenant pleaded the warranty of R. Coſin of the demandant*, viz. *brother of M. mother of J. mother of the demandant, whoſe heir he is*; this ſhall have *relation* that the demandant is heir of R. and not of J. his mother only; quod nota, per Cur. Br. Pleadings, pl. 150. cites 11 H. 6. 53.

16. Debt upon obligation; the defendant ſaid, that it is indorſed upon *condition, that if he appeared before the Juſtices of Gaol-delivery ſuch a day, or at the next Seſſions, before the Juſtices of the Peace (reaſonable warning being firſt had)*, that *then the obligation ſhall be void* &c. and ſaid that reaſonable warning was not made to him; and it was held a good plea; for theſe words *reaſonable warning* ſhall have relation as well to the gaol-delivery as to the ſeſſions, tho' the ſeſſions are there next antecedent, and that the general warning of the ſeſſions is not ſufficient, but *ought to have ſpecial warning* by the plaintiff made to him. Br. Relation, pl. 21. cites 5 E. 4. 126.

17. A man is indicted by the name of *J. S. ſervant of W. N. of S. butcher*; theſe words (of S. butcher,) ſhall have relation to the maſter and not to the ſervant, and therefore ill; for then the ſervant is not named of any vill. Br. Relation, pl. 37. cites 9 E. 4. 48.

18. Debt of 20 l. by obligation, which was, *that the obligee ſhall receive 5 l. by the hands of A. when K. comes to his houſe*, and *at Michaelmas 5 l.* and *at St. Andrew then next following 5 l.* and *at Chriſtmas then next &c. 5 l.* and as to that which A. ſhould pay, and which ſhould be paid by the hands of A. this is void and *ſhall be paid immediately* by the obligor; but by the words, that it ſhall be paid when K. comes to his houſe, therefore it is not payable 'till he comes to his houſe. And Brian ſaid, as to the words (and 5 l. at the Feaſt of St. Michael then next following (by this he ſhall pay 5 l. at next Michaelmas after the making of the obligation, by reaſon of theſe words, (then next following;) for *if thoſe words (then next following) had been left out*, it ſhall be Michaelmas next after the coming of K. to his houſe. Quod tota Curia conceſſit. Br. Obligation, pl. 56. cites 20 E. 4. 17. [211]

19. Condition was to do a thing *on the 29th day of February next*, he is not bound to do it 'till *leap-year*; for February has 29 days in ſuch year only. Le. 101. Paſch. 30 Eliz. B. R. Anon.

20. Within the manor of D. was a *place known by the name of E.* in which was a *houſe and ſix acres of land, to which tenement divers other lands throughout the whole manor were pertaining*, and had been uſed with it by the ſpace of 60 years, and had always paſſed by one grant, and under one rent, *which was then in the hands of A. B. copyholder thereof.* W. S. being lord of the manor, *deviſed that J. S. after the death of A. B. ſhould have the tenement with the appurtenances in which A. B. dwelleth in E. for 60 years, rendering 4 l. a year, (the ancient rent being 45 s. but the*

houſe and ſix acres were worth 5*l.*) It was argued, that all the lands as well out of as within E. paſſed, and that the words (in which A. B. *dwelleth* in E) ſhall *not* be *referred to the land, but to the tenement;* for a man cannot dwell in land; and the words ſhall be referred, *ut verba accipiantur apte & in proprio ſenſu;* beſides, relation ſhall always be *ut ſententia non impediatur,* and not to the laſt antecedent. And here the deviſe was of the tenement with the appurtenances, which is all things belonging to it; and the lands out of E. were belonging to it. And adjudg'd accordingly. Cro. E. 113. Mich. 30 & 31 Eliz. Boocher v. Sampford.

Savil. 124. Matthew v. Harcourt. S. C.—And 240. S. C. founds the judgment on defendant's pleading non aſſumpſit.

21. Promiſe to pay money *next Trinity term*, and the promiſe was after the eſſoign day of Trinity term; this is intended the ſame Trinity term. Le. 210, 211. Mich. 32 & 33 Eliz. Biſhop v. Harecourt.

22. A man is bound to pay 20*l.* *at Michaelmas*, and alſo afterwards to pay 20*l.* *at the ſame feaſt*, and this was intended the ſame feaſt in another year, and not in the ſame year. Arg. 2 Brownl. 114. Mich 9 Jac. C. B. in Caſe of Croſs v. Weſtwood.

D. 225. b. pl. 35. marg. Biſhop v. Harcourt.

23. Promiſe to pay 10*l.* at or before the *firſt day of next Michaelmas term*; payment according to the common acceptation is good, and need not be upon the eſſoign day, but upon the quarto die poſt. 2 Roll. R. 432. Trin. 21 Jac. B. R. Condall v. Coſſin.

24. R. promiſed, that if A. would haſten his marriage with R.'s daughter, and *ſhould have a ſon within* 12 *months* then next following, to pay A. 100*l.* this will refer to the day of marriage. Vent. 262. Mich. 26 Car. 2. B. R. Anon.

25. An *indictment* for not coming to church was taken *at a ſeſſions held* 13 *Jan.* anno 32 Car. 2. for that the defendant, being of ſuch an age, on the *firſt of January laſt paſt*, and for ſix months after he forbore to come to any church or chapel &c. And upon motion to quaſh it, it was held per Cur. that the *(firſt of January laſt paſt)* ſhall be intended to be the month laſt paſt, and not the day. 2 Show. 160. Paſch. 33 Car. 2. B. R. The King v. Forbis.

26. An arbitration bond was dated 18 June 1684. An *award* was made 18 *Aug.* that defendant ſhould ſeal to the plaintiff *two obligations*, each of the penal ſum of 10*l.* *conditioned to pay* 5*l.* *on the 5th of December next after, and the other to pay* 5*l.* *upon the* 1 *May then next after the date of the arbitration bond, and that each ſhould give to the other a general releaſe of all things which had been or then were mov'd &c. between the ſaid parties, which releaſes and bonds ſhould be ſealed and delivered on the 1ſt of December then next following at D. &c.* It was inſiſted, that the releaſes are to be made of all things which had been or then were mov'd &c. And that (then) refers to the next antecedent, which is 1 May, and then the releaſe is of more than is ſubmitted,

mitted, and will releaſe the ſubmiſſion * bond. But per Cur. this cannot refer by the word (then) to the 1 May; for the laſt clauſes [viz. the ſealing and delivery of the bonds and releaſes] are to be done the 1 December, which is before the 1 May next after the ſubmiſſion. But they thought, that the (then) in the laſt clauſe referred to December next enſuing, and gave judgment accordingly Niſi &c. 3 Lev. 238. Mich. 1 Jac. 2. C. B. Barnes v. Harvey.

27. In a return to a mandamus to reſtore a member of a corporation it was ſaid, that at ſuch a time one *J. B. was mayor, and that he aſſembled the ſaid burgeſſes, and that the ſaid J. being ſummoned, and not appearing, he the ſaid John W.* was removed by the ſaid mayor and burgeſſes; it was objected, that the word *ſaid* refers proximo antecedenti, and that is *J. the mayor, ſo that J. W. was not ſummoned;* but the Court held it well enough; for *ſaid* ſhall refer to the next antecedent if it does *not break the ſenſe*, as here it would do. Holt's Rep. 449. Paſch. 5 Ann. The Queen v. Truebody.

(F) In what Caſes they ſhall relate *to ſeveral Things reſpectively.*

[1. IF A. *promiſes* B. for a certain conſideration &c. *to pay to B. 15 l. annually and every year during the term of 4 years then next enſuing, if J. S. tam diu haberet & occuparet a certain* meſuage in D. if J. S. *occupies it but one year*, yet B. ſhall have an action for one 15 l. becauſe the words *(ſi J. S. tam diu occupies it)* refers to every year, in as much as it is agreed to be paid annually, and ſo it is as much as if he had ſaid, that he ſhall pay 15 l. annually for every [of the] 4 years that J. S. ſhall occupy it reſpectively. Tr. 23 Car. B. R. between *Freer* and *Prentice*. Adjudg'd in writ of error upon ſuch judgment in Bank, and the judgment given in Bank affirmed accordingly. Intratur. Hill. 22 Car.]

2. The words * *(dimidia pars)* or *(medietas)* ſhall be reſpectively taken for *moiety divided or undivided*, ſecundum ſubjectam materiam; as (medietas, of a thing to be delivered) ſhall be underſtood a divided moiety; becauſe it cannot be delivered unleſs it be divided; ſo (dimidia pars, of a thing which cannot be reduced to a divided moiety) ſhall be underſtood a moiety undivided. 6 Mod. 231. Mich. 3 Ann. B. R. Knight v. Burton.

* So in dower, a woman demands *tertiam partem*; if it be of ſuch a thing as is capable of having a third part divided made of it, it ſhall be ſo; but if it be of a third part of lands of tenant in common, mill &c. it muſt be a third part undivided. Ibid.

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(G) Parols. Generalis Clauſula non porrigitur ad ea, quæ ſpecialiter ſunt comprehenſa.

See Grants, (H. 13) pl. 44 &c. Hob. 65. Green v. Armſteed. S. C.—And ſays, the word (elſewhere) ſhall rather be *ſurpluſage* and void, than by ſuch a looſe word to alter a large, plain, and particular deviſe before.

[1. IF a man *deviſes land in D. to B. for life, remainder to C.* &c. and after in the ſame will deviſes *his land in S. and elſewhere to E. for life, remainder to F. in tail, and after to the ſaid C.* In this caſe the words *(elſewhere)* ſhall not extend to the land in D. before deviſed, tho' he has *not any other land beſides the land in D. and S.* Hobart's Reports, 12 Ja. 89. between Green and Armſtrong.]

[213] 2 Leon. 47. S. C.—cited 8 Rep. 118. t. in Bonham's Caſe.

2. A. ſeiſed of ſeveral lands in Odiham, and likewiſe of the manor of Stapley in Odiham, ſuffered a recovery, and declared the uſes of it thus, viz. that the recoveror ſhould ſtand ſeiſed of *all his lands in Odiham, to the uſe of himſelf and his wife*, and after to other uſes; and as to the *manor of Stapley in Odiham, to the uſe of himſelf, and the heirs of his body*, and died; and the Court held, that the wife ſhould have nothing in the manor of Stapley; for tho' by the firſt part of the deed ſhe is to have (all the lands in Odiham), yet it being expreſsly ſhewn, that the (manor of Stapley) ſhall be to other uſes, the law ſhall expound it ſo as that every part of the deed ſhall ſtand together if it may. Cro. E. 208. 32 & 33 Eliz. B. R. Carter v. Ringſtead.

(H) *Collective. Heir.*

Cro. J. 141. Melinux v. Molinux S. C. and S. P. held by all the Juſtices except Popham, who doubted upon account of the words added, (and *if my heir do not* &c. then my executors ſhall have the ordering thereof, and *my ſon and heir to have no meddling therewith*) ſo that it extends only to him in words; and the intent ſhall not be ſtretched in a condition.

[1. IF a man *deviſes that A. ſhall have ſuch an annual rent as he has given to him by writing ſeal'd &c.* and that he wills, that *if his heir* after his deceaſe *pays it* according to this will, that *he ſhall have the diſpoſition of his land ſo long as he ſhall perform it*, and *if his heir does not perform his will*, then he deviſes, that his executor ſhall have the diſpoſition of the ſaid land. In this caſe the word (heir) is nomen collectivum, and ſhall extend to all the heirs ſucceſſively. H. 4 Ja. B. R. adjudg'd between *Fretzville* and *Molineux*.]

[2. If a man deviſes that every one of his younger ſons and his daughters ſhall have a certain annuity out of certain land, and the will is further, Item *I will, that if my heir do pay the ſaid annuities, then I will that my ſaid heir ſhall have the land*; *and if my ſaid heir do not pay them, then I will that my executors ſhall have the land* &c. The heir of the heir ſhall be charged with thoſe annuities, for the heir of the heir is heir to the firſt man; and

and it was not the intent of the deviſor, that the annuities ſhould ceaſe by the death of the firſt heir. H. 42 El. B. R. per Curiam. Adjudged between Purſlow and Parker.]

[3. If a man makes *feoffment to the uſe of himſelf for life*, the remainder *to another for life*, the *remainder ad uſum hæredis vel hæredum of his own body, & ad uſum talis hæredis vel hæredum*, and if he dies without iſſue of his body, the remainder over &c. in this caſe his heir ſhall take by deſcent; for tho' heir be a name of purchaſe, yet (*vel hæredum* explains it, and makes him in by deſcent of an eſtate tail) P. 12 Ja. B. adjudged between Bony and Taylor.]

[4. If A. ſeiſed in fee of a *copyhold ſurrenders it to the uſe of his will*, and after by his will *deviſes it to B. for life, and after his death to the heir of his body begotten for ever*: in this caſe the word (*heir*) being limited to the body of B. is nomen collectivum, and all one with the word (heirs) and ſo B. has a fee executed, and his heir ſhall have it by deſcent, and not by purchaſe; and this is not like to *Archer's* Caſe, where it is deviſed to B. for life, and after to his heir male, and to the heirs male of ſuch heir male; for there the inheritance is limited to the heir male of the body of the heir male. Paſch. 1651. between *Lawſey* and *Lowdell*, adjudged in writ of error upon a judgment * in Bank, per Cur. præter Juſtice Jermyn, who was of the contrary opinion. But the judgment in Bank was reverſed accordingly for this error. Intratur. 1650. Rot. 279.]

G. Treat of Ten. 254. ſays, it ſeems it muſt be intended of a *fee tail*; becauſe the heirs are reſtrained to the body of B.

* Fol. 254.

[214] Deviſe *to Serjeant Miller and his wife for their lives*, remainder *to the next heir male of their two bodies*; it was held, that this was a deviſe in tail; for a deviſe to the heir male is a deviſe in tail, unleſs there are words of limitation ſuperadded, ſo as to bring it within the reaſon of ARCHER'S CASE; but the words (*firſt*, *next*, or *eldeſt*) or any like words ſuperadded, make no difference. Rob. of Gav. 96. Mich. 10 Geo. 1. B. R. Miller v. Seagrave.

A. deviſed to his firſt ſon W. for life, remainder to the heirs males of his body, remainder *to his ſecond ſon T. for life, and* after his death *to the firſt heir male* of his body, remainder to the third ſon C. and the heir males of his body, remainder in like manner in tail male to the fourth, fifth &c. ſons: the Court held, that the words (heir male) were to be underſtood collectively, and that T. the ſecond ſon took an eſtate tail, it appearing to be the intention by the other deviſes; and it differs from ARCHER'S CASE, no limitation being ſuperadded to the words (firſt heir male) and the word (*firſt*) ſhall be underſtood firſt in order of ſucceſſion from time to time. And a judgment given in C. B. was affirmed. Rob. of Gav. 96. Eaſt. 8 Geo. 2. B. R. Dubber on the demiſe of Trollop v. Trollop.

Deviſe of *gavelkind to A. and his wife for their lives*, remainder *to the next heir male of their bodies for ever*. The huſband and wife have iſſue three ſons, and die; per Daliſon J. the eldeſt ſhall take the whole by purchaſe, and have a fee by reaſon of the word (*for ever*); but Portman Ch. J. and Whiddon J. were of opinion, that all the ſons ſhould inherit. Rob. of Gav. 95, cites a MS. note of D. 13 [illegible]. pl. 5. and that it was the caſe of May v. Milton and Hammond.—And, it ſeems, with equal reaſon may the word (heir) be underſtood as nomen collectivum, where the lands are gavelkind, as all the ſons are in judgment of law but one heir; and then the words in this caſe will create an eſtate in ſpecial tail in the firſt takers, which will deſcend to all the males; for the law will without difficulty reject the word (*next*) in favour of the cuſtomary inheritance; or it may naturally enough be taken to ſignify the neareſt in courſe of ſucceſſion from time to time. Ibid. 96. 97.

5. Heir is nomen collectivum. Arg. Bulſ. 219. cites 16 H. 7. 15. and 19 H. 8. 10. and 42 Eliz. in Parſlow and Parker's Caſe.——Bulſ. 221. cites the Caſe of Cheek v. Dale.

(I) Collective Words. *Other Words.*

Br. Brief, pl. 209. cites S. C.

1. TRespaſs quod cepit piſcem &c. and counted of ſeveral fiſh, as pikes and carps; it is good; for piſces is nomen collectivum, which has no plural number. Br. General Brief, pl. 9. cites 4 H. 6. 11.

2. *Vaſtum* is nomen collectivum. Br. Brief, pl. 207. cites 4 H. 6. 11.

* D. 207. b. pl. 14.—So the word *farm* is a collective word conſiſting of divers things collected together, viz. as meſuage, lands, meadows, paſture, woods, commons, and other things lying near, and belonging to it; per Dyer Ch. J. and Brown J. Pl. C. 195. 1 Eliz. Wroteſley v. Adams.

3. The words * *manor*, *monaſtery*, *rectory*, *caſtle*, *honour*, &c. are compound things, and may contain meſuages, lands, meadows, woods &c. under them. Pl. C. 170. a. b. 3 Ma. 1. Hill v. Grange.

4. In treſpaſs quare clauſum, et *domum ſuam* fregit, defendant pleaded, nd put the plaintiff to a new aſſignment, viz. a *houſe* called a *ſtable*, a *barn* and another houſe called a *carthouſe and granary*; and this was urged to be error, for that this aſſignment is not warranted by the declaration. But per Gawdy, it is well enough; for domus in the declaration contains all things mentioned in the new aſſignment. But if the declaration had been of a cloſe, and the new aſſignment of a barn, it had not been good. Per Wray Ch. J. (domus) eſt nomen collectivum, and contains many buildings, as barns, ſtables &c. And of this opinion was the whole Court. 2 Leon. 184. Mich. 32 Eliz. B. R. Hore v. Wridleſworth.

In an aſſiſe de *libero tenemento*, it was objected, that the plaintiff had joined in one plaint two freeholds, the one of them being of four acres of willows (at common law) the other of eſtovers in 100 acres of wood, (by the ſtatute of Weſt. 2. cap. 25.) Sed non allocatur; ſo likewiſe one plaint of two rent ſervices was awarded good; for (liberum tenementum) tho' it be in the ſingular number, is yet nomen collectivum. 8 Rep. 47. b. in Jehu Webb's Caſe.—cites 11 Aſſ. 13.

5. *Tenementum* is nomen collectivum, and may contain land, or any thing which is holden. 13 Rep. 48. Trin. 7 Jac. John Bailie's Caſe.

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1 Brownl. 61.—Hob. 276.

6 *Durante termino prædicto* ſhall have reference to every term demiſed by the deed. 10 Rep. 107. Mich. 10 Jac. Loſield's Caſe.

Trial 667. (C. e) pl. 1. Mo. 531. Blackwell v. Eyres.—Cro. E. 353. S. C.

7. If ſeveral iſſues are join'd, and the Court awards a venire ad triandum *exitum* illum &c. the word exitus may be for the whole, reddendo ſingula ſingulis. Hob. 66. Ledſham v. Rowe and Mudge.

8. Habeas corpus cum cauſa iſſues; the word *cauſa* is nomen collectivum, and if the officer returns not all the cauſes, it is an eſcape in him. 2 L. P. R. tit. Habeas Corpus. 2.

[9. Tho'

9. Tho' the word *children* may be made nomen collectivum, the word *iſſue* is nomen collectivum itſelf; per Hale. Arg. Vent. 231. Mich. 24 Car. 2. B. R. in Caſe of King v. Melling. ——But when it is a word of purchaſe, it is not, ſo as to take in the deſcendants to all generations. Gibb. 21. in Caſe of Shaw v. Way. 10 Mod. 379.—2 Chan. Caſes 20.

10. Deviſe to A. and if he dies not having a *ſon*, then to remain to the heirs of the teſtator. Son was there taken to be uſed as nomen collectivum, and held an intail; per Hale. Vent. 231. cites Hill. 42 & 43 Eliz. Biſield's Caſe.

11. In debt upon a bond againſt an executor he pleads *ſeveral judgments in bar*. Plaintiff replies, that *placitum prædictum* eſt minus ſufficiens &c. becauſe &c. Upon demurrer to the replication it was objected that the word (placitum) goes only to one of the judgments, and then there is a diſcontinuance. But the Court held, that all the judgments make but one bar, and therefore the word (*placitum*) in the replication anſwers the whole. Sid. 429. Mich. 21 Car. 2. B. R. Hancock v. Prowt. The word (placitum) is nomen collectivum; per Cur. 1 Sand. 338. S. C.—— Dubit. 1 Salk. 219. Combe v. Talbot.—*Placitum prædictum* is a *genus*, that contains a *plea*, *replication* &c. or a *demurrer*, and ſeveral books were cited, where a demurrer is called placitum; per Holt Ch. J. Skin. 554. Wilson v. Law.—— Reſolved Carth. 334. S. P.

In the like caſe it was held by the Court to be a diſcontinuance; for it is uncertain to which of the pleas the word (placitum) refers; and whichever it refers to, yet the other two remain unanſwered, and the whole is diſcontinued. Yelv. 65. Trin. 3 Jac. B. R. Middleton v. Cheſeman.

12. In covenant it was objected upon demurrer, that the breach related to *three covenants*, and the concluſion was, (et ſic *conventionem* ſuam prædictam fregit) in the ſingular number, without ſhewing what covenant in particular: but it was anſwered, that (conventio) is nomen collectivum; and if 20 *breaches* had been aſſigned, he ſtill counts (de placito *quod teneat ei conventionem* inter eos fact'); and of that opinion was the Court, and that the breach being of all three covenants, the recovery in one would be a good bar in any action afterwards to be brought upon either of thoſe covenants. 2 Mod 311. Trin. 30 Car. 2. C. B. Aſter v. Mazeen.

13. Holt Ch. J. ſeem'd to be of opinion, that *tempus* is not nomen collectivum. Skin. 309. Hill. 3 W. & M. B. R. in Caſe of Parker v. Harris.

[For more of Parols [alias, Words] in general, ſee Arbitrement, Condition, Covenant, Debt, Grants, and other proper Titles.]

Particular Eſtate.

(A) *Pleadings.*

* S. P. Br. Pleadings, pl. 30. cites 15 E. 4. 6. 8.

1. HE who *claims by* * *tenant for life,* * tenant *in tail, parſon of a church* &c. who are particular tenants, ought to *aver the life of the particular tenant* in his pleading. Br. Pleadings, pl. 24. cites 19 H. 6. 73.

2. In the caſe of *parties, or privies in intereſt,* who come to a particular eſtate deriv'd out of another, which requires a deed to create it, as in the caſe of the King's patent, or a leaſe of a Corporation, or in caſe of the grant of a rent, or of any other thing which lies in grant, the firſt patent or deed ought to be ſhewn; otherwiſe of thoſe who come to ſuch things by act of law; as tenant by elegit, or ſtatute, tenant in dower, tenant by the curteſy, &c. Jenk. 305. pl. 80.

3. In *debt for rent* upon a leaſe parol, the defendant pleaded that the plaintiff nil habuit in tenementis tempore dimiſſionis; the plaintiff replied, that *J. S.* being ſeiſed in fee, *convey'd it to* R. N. *for 99 years; the eſtate of which ſaid R. N. by ſeveral meſne conveyances came to the plaintiff,* by virtue whereof he was poſſeſſed, and demiſed to the defendant as aforeſaid; and upon demurrer to this replication, it was adjudged that it was ill, becauſe the plaintiff did not *ſhew how* he came by the term. Raym. 389. Trin. 32 Car. 2. B. R. Rider v. Hill.

Becauſe that gives him a good title againſt all men, except the diſſeiſee. But now particular eſtates are *not the framed by law, but by contract*; and therefore you muſt ſhew what that contract is, and how it came to be made, if it is carved out of an eſtate that is able to ſupport it. 12 Mod. 191. Silly and Dally.

4. In all *bars, avowries* and *replications,* where a *title is made under* a particular eſtate, be it *for years, life, or in taile,* the commencement of ſuch eſtate muſt be ſhewn; for in thoſe parts of pleading, none but the general eſtate in fee ſimple, (which may be gain'd by wrong, as by diſſeiſin) may be generally alleged; per Cur. Carth. 445. Paſch. 10 W. 3. B. R. Silly v. Dally.

2 Vent. 182. Adams v. Croſs. S. P. —* S. P. So where the party *comes to it in privity,* or it be *collateral.* Cart. 30, 31. Gold v. Barnſly.

5. *But* in a *declaration, where it is only an* * *inducement to the action, and not traverſable,* it is otherwiſe; *as* where an action of *debt for rent* was brought *by an executor* for rent *grown due after teſtator's death, who had only a term* in the land for years, it is ſufficient to declare that *teſtator poſſeſſed for a certain term for years not yet expired did demiſe to the defendant &c.* becauſe this is grounded on a *privity of a contract.* Per Cur. Carth. 445. Silly v. Dally.

6. *Debt*

6. *Debt* for rent, on a *demiſe* by plaintiff to defendant; *defendant pleaded* that he was *poſſeſſed of a leaſe for* 41 *years made to him by the Lord W. who had full power to demiſe*; and tho' the judgment was reverſed for a fault in the declaration, yet the replication was held good without ſetting forth a title; which Holt ſaid was true, and that in that caſe it was not neceſſary to ſet out a title, for nihil habuit in tenementis was the iſſue; for if the defendant plead nihil habuit in tenementis, the plaintiff may reply, quod ſatis habuit in tenementis, viz. in feodo or any other eſtate, on the trial whereof he may give any other eſtate in evidence, the alledging any particular eſtate being only form, the iſſue being whether he had any thing in the premiſes. 12 Mod. 192. Paſch. 10 W. 3. Silly and Dally.

[For more of Particular Eſtate in general, ſee Eſtates, and other proper Titles.]

Partition. [217]

(A) *Of what Things.*

See Parceners (A).

[1. IF a *county* deſcend to coparceners, no partition ſhall be of it; becauſe if there ſhould be partition of it, this may be divided in proceſs of time into ſo many parts, that none ſhall have power in the county. Bracton de acquirendis rerum dominiis. 76. b. Dod. of the nobility according to the law 40. Contra. 23 H. 3. Partition 28. Adjudg'd Da. 1. County Palatine 61. b.]

[2. By the *feudal law*, ſuch *dignity* ought not to be divided, but the one ſhall have all, and ſhall *give recompence to the others* for their parts. But now, *by uſage*, ſuch dignity is dividable. Weſenbech in his Prelections, cap. 6. 279.]

[3. The ſame law of a *barony*. Bracton, 76. b.]

[4. The ſame law of a *caſtle*, Bract. 76. b. and of the *capital meſuage*; for this ſhall not be divided. 14 H. 3. Raſtal Partition. 2.]

5. Not only *lands* and other *things that may paſs by livery*, but things alſo that *lie in grant*; as rents, commons, advowſons &c. that cannot paſs by grant without deed, whether they be in one county

county or *ſeveral counties*, may be parted and divided *by parol*, without deed. Co. Litt. 169.

6. Tho' partition cannot be of a *view of frank pledge*, becauſe it is not ſeverable, as Anderſon and Glanvill held, but Walmſley and Kingſmill e contra, yet the *profits* of it may be divided: or it may be divided, that the *one may have it one time*, and the other another time; yet being demanded to have partition thereof with the manor and other things, it well lies; for it may be *entirely allotted to the one, and land* in recompence *to the other*. Cro. E. 760. Paſch. 42 Eliz. C. B. Moor and Brown v. Onſlow.

S. P. F. N. B. 62. (D). 7. *Partition may be made of an advowſon by Stat.* 7 *Annæ*. 18.

(A. 2) *How* it may be made, and what Partition amounts to a Partition in Deed.

1. SCIRE Facias; if a man has iſſue *two daughters* and dies ſeiſed, and they *take barons*, and *one has iſſue and dies*, the *baron is tenant by the curteſy*, and the *other baron and feme have iſſue and die*, now this is a *partition in law* during the eſtate of the tenant by the curteſy: and the one parcener ſhall have aid of the other; contrary without partition. Br. Partition, pl. 8. cites 21. E. 3. 14.

2. *Fine* was *levied of a manor*, and the *conuſee rendered to the conuſor for life* the *remainder of the fourth part towards the eaſt to A. in fee*, the *fourth part towards the weſt to B. in fee*, and *ſo the other two fourth parts to* two *others*, to the intent that ſurvivorſhip between them ſhould not hold place; but *tho' this makes tenants in common, yet it is no partition*. Br. Jointenants, pl. 44. cites 44 Aſſ. 11.

[218] 3. A partition made between two coparceners, that the one *ſhall have* and occupy the land *from Eaſter until* the *firſt of Auguſt*, only in ſeveralty by himſelf, and that the other ſhall have and occupy the land from the firſt of Auguſt until the feaſt of Eaſter yearly, to them and their heirs, is a good partition. Co. Litt. 167. a.

S. P. F. N. B. 62 (I).—1 Rep. 87. a. S. P. per Walmſley J. in Corbet's Caſe. So if two coparceners *of an advowſon agree to preſent by turns*, this is partition as to the poſſeſſion; but they ſhall join in writ of right. And in the other caſe it is good as to the poſſeſſion, and taking of the profits, but not as to the ſeverance of the inheritance.

S. P. F. N. B. 62. (K).—And alſo coparceners may make partition for term of life, or for years. 4. If two coparceners have two manors by deſcent, and they make partition, that the one ſhall have the *one manor for one year*, and the *other the other manor for this year*, and ſo alternis vicibus to them and their heirs; this is a good partition. Co. Litt. 167. a. b.

F. N. B. 62. (L).——So if the partition be made in form aforeſaid *for two or more years*, and each coparcener hath an eſtate of inheritance, and no chattel, albeit either of them *alternis vicibus*, hath the occupation but for a term of years. Co. Litt. 167.

5. Another

5. Another partition may be made between parceners which varieth from the partitions aforeſaid; as if there *be three parceners*, and the *youngeſt will have partition, and the other two will not*, but will hold in parcenary that which to them belongs, without partition: in this caſe, if *one part be allotted in ſeveralty to the youngeſt* ſiſter, according to that which ſhe ought to have, then the others may hold the remnant in parcenary, and occupy in common without partition, if they will; and ſuch partition is good enough. And if afterwards the eldeſt or middle parcener will make partition between them of that which they hold, they may well do this when they pleaſe. But where partition ſhall be made by force of a *writ de partitione facienda*, there *'tis otherwiſe*; for there it behoveth that every parcener have her part in ſeveralty. Co. Litt. S. 276.

Obſerve, that the partition is good by *conſent*, for conſenſus tollit errorem; but if it be by the King's writ, then every parcener muſt have her part. And here you may ſee that modus & conventio vincunt legem. Co. Litt. 180.

6. *Where the thing and the profits are the ſame*, a *partition of the profits is* a partition *of the thing*. Per Holt. Ch. J. 1 Salk. 43. In Caſe of Biſhop of Sarum v. Phillips.

(A. 3) What amounts to a good Partition *in Law*.

See aid of a common perſon (E. a.) pl. 6, 7, 9, 10, 11, 12.

1. *TWO coparceners, the one enters into the whole in the name of both*, and *the other releaſes to her all her right*; this is a *partition in law*; ſo that the other who is impleaded, may vouch for the moiety by reaſon of the releaſe, and pray aid of the other moiety, becauſe the *releaſe countervails the partition*, and ſo ſhe did; and well; per Cur. nota. Br. Partition, pl. 9. cites 21 *E.* 3. 27.

S. P. and it countervails entry and feoffment for a moiety. Br. Aide, pl. 67. cites S. C.

2. Where two jointenants are, and *one recovers in aſſiſe* againſt the other, and prays judgment to hold in ſeveralty, he ſhall have it; and this is a partition and ſeverance of the jointure. Br. Partition, pl. 11. cites 7 H. 6. 4.

S. P. Br. Partition, pl. 19. cites 10 Aſſ. 17. —See (E. 2) pl. 3.

3. Of partitions in law, ſome be *by act in law without judgment*, and ſome be by judgment, and not by a writ de participatione facienda. Co. Litt. 167. b.

4. If there be *lord three coparceners, meſnes, and tenant*, and *one* coparcener *purchaſe the tenancy*: this is not only a partition of the meſnalty, being extinct for a third part, but a diviſion of the ſeigniory paramount; for now he muſt make ſeveral avowries. Co. Litt. 167. b.

5. If *one* coparcener *make a feoffment in fee of her part*; this is a ſeverance of the coparcenary, and ſeveral writs of præcipe ſhall lie againſt the other coparcener and the feoffee. Co. Litt. 167. b. [219]

6. If *two coparceners* be, and *each of them take huſband and have iſſue*, the wives *die*, the coparcenary is divided, and here is a partition in law. Co. Litt. 167. b.

(A. 4) *Good, in what Cases.*

1. IF partition be made between two parceners, where *one has no colour*, (as to an especial tail) the partition is *void*. 8 Rep. 101. b. in Sir Richard Lechford's Case.——Cites 11 Ass. 23. Wimondham's Case.

2. Partition or surrender may be made *in another county than where the land is*; per Cur. Br. Partition, pl. 6. cites 11 H. 4. 61.

3. *Equal* partition shall bind an *infant* within age; per Cur. Br. Partition, pl. 40. cites Register fol. 76, and 9 H. 6. 5.

4. If *two sisters of divers venters* make partition it is good. And *so* of a partition made *between the bastard eigne, & mulier puisne*. Br. Partition, pl. 13. cites 21 H. 6. 25.

5. In writ of partitione facienda, where there are two parceners and *two manors*, the sheriff may assign the *one to the one*, and *the other manor to the other*. Br. Dower, pl. 72. cites 12 E. 4. 2. Per Littleton.

Fol. 225.

(B) By Coparceners. [*Of what Things.*]

[1. COparceners cannot make partition of an *advowson in gross as to the right*, because it is intire; for though they make partition, this is only as to the presentment; but the advowson continues in right in coparcenary; for they ought to *join in writ of right* after. 17 E. 3. 38. b. 1 Rep. 87. Corbet's Case.]

S. P. F. N. B. 62. (F).

[2. Jointenants of a *mill* may make partition of it. 47 E. 3. 22. 47 Ass. 8.]

[3. So parceners may make partition of a *mill*, tho' it cannot be severed. 17 E. 3. 28. b.]

(C) *How* it may be made; *without Deed*, by Parceners.

[1. A *Manor with advowson appendant* may be *allotted* to a parcener without deed.]

[2. An *advowson in gross* may be *allotted* to one without deed. Dubitatur. 11 H. 4. 3. b.]

[3. Partition may be made *to present by turn* without deed. 11 H. 4. 3. b. 39 E. 3. 37. b.]

[4. A *rent for equality* may be reserved without deed. 11 H. 4. 3. b. 11 H. 4. 61. 12 H. 4. 17. b. 21 E. 3. 2. b. 21 Ass. pl. 1.]

[5. Upon a partition, if a *mill with a pool* be *allotted to one and a way to it* out of the land which the other has by the partition, this is good without deed. 21 E. 3. 2. b. 21 Ass. pl. 1.]

[6. Par-

[6. Partition may be made *in other county*, than where the land lies, without deed. 11 H. 4. 61. Curia.]

[7. *Jointenants* cannot make partition by parol *in other county* than where the land lies. D. 2 El. 179. 43.]

[8. *Jointenants in fee* may make partition *by indenture*. Quere. 3 H. 4. 1.]

9. Note, that partition by agreement *between parceners* may be made by law between them, as well *by parol* without deed as by deed. Co. Litt. S. 250. 1 And. 50. in pl. 125.

(D) By others [*than Parceners, by Deed or without.*]

See (B) pl. 2. (C) pl. 7, 8. --Parceners (B) (C).

[1. *Jointenants* cannot make partition *by parol of a franktenement*, becauſe the one cannot compel the other to the partition againſt their joint purchaſe. 3 H. 4. 1. per Hill. 6 Rep. 12. b. *Morris's* Caſe. Per Curiam. D. 18 El. 350. 20. per Curiam. Contra. 47 E. 3. 22. 19 H. 6. 25. b. 30 Aſſ. 8. Admitted. 47 Aſſ. 8. Adjudged. 19 Aſſ. 1. ſame Caſe.] S. P. by the opinion of the whole Court. D. 350. b. pl. 20. (bis) Paſch. 18 Eliz. Anon. ——And. 50. pl. 115. S. C. by name of EDEN v. HARRIS. Adjudged.—S. C. Bendl. 157. Adjudged.—Mo. 29. pl. 93. Trin. 3 Eliz. is general, without mentioning franktenement.——Serjeant Hawkins makes a quære, if parol partitions are not *reſtrained by* 29 *Car.* 2. 3. Hawk. Co. Litt. 253. (169.)

A *partition* between *jointenants* is not good *without deed*, albeit it be of lands, and jointenants are compellable to make partition by the ſtatute 31 H. 8. cap. 10. and 32 H. 8. cap. 32. becauſe they muſt purſue the act by *writ de partitione facienda*, and a partition between jointenants without writ remains at the common law, which could not be done by parol. Co. Litt. 169.—Goldſb. 28.—Co. Litt. 187.——*So* it is, and for the ſame reaſon of *tenants in common*. Co. Litt. 169.——*But* if two *tenants in common* be, and they make partition by parol, and *execute the ſame in feverality by livery*, this is good and ſufficient in law; and therefore where books ſay, that jointenants made partition without deed, it muſt be intended of tenants in common, and executed by livery. Co. Litt. 169.

[2. *Jointenants* cannot make partition *of a franktenement by parol upon the land*; becauſe the one cannot make livery to the other. 3 E. 4. 9.] S. P. Cro. E. 95. Paſch. 30 Eliz. in Caſe of Docton v. Prieſt.—Partition without deed is good between jointenants or tenants in common, if it be *made upon the land*. Per the beſt opinion. Br. Partition, pl. 27. cites 3 E. 4. 9, 10.

[3. *Tenants in common* may make partition *by deed*. 19 H. 6. 25. b.] S. P. F. N. B. 62 (E). *And* if they make it *upon the land*, it is good *without deed*; for it amounts to a livery in law. But where two tenants in common were of a *houſe and land*, and they *made partition within the houſe of the houſe, and land* by parol without deed, and it was *not found that the land was within view*, ſo as it could not amount to a livery in law, it was for that reaſon adjudged for the defendant, that the partition was not good for the land, for which only the action was brought. Paſch. 30 Eliz. Cro. E. 95. Docton v. Prieſt.——Le. 102. pl. 136. S. C. adjudged. And as it was void for the land, it was void for the houſe alſo.——S. P. Nevertheleſs *contrary* between *coparceners*, who are compellable, there partition *by parol* or agreement is ſufficient. Br. Partition, pl. 12. cites 19 H. 6. 25.

[4. *But* they cannot make partition *without deed*, for want of privity, having ſeveral rights, and becauſe they are * not compellable to make it. 19 H. 6. 25. b. D. 18 El. 350. 20. per Curiam.]

5. Join-

Fol. 256.

[5. *Jointenants or tenants in common* cannot make partition *ſince the ſtatute* 31 & 32 *H.* 8. *no more than before*, tho' they are compellable to make partition by writ; for *the common law in this reſpect is not altered by the ſtatutes, but only where* the partition is *made by writ.* 6 Rep. 12. b. per Curiam. Morris's Caſe. D. 2 El. 179. 43 Dubitatur. D. 18 El. 350. 21. per Curiam.]

The father had iſſue two daughters, and *deviſed his land to his two daughters, and the heirs of their bodies* lawfully begotten. Per tot. Cur. a partition by parol is void; and if the one dies the other ſhall have all by ſurvivor. And. 50. pl. 125. M. 16 & 17 Eliz. Edon v. Harris.——D. 18 Eliz. 350. b. pl. 20. ſeems to be S. C.——Bendl. 257. 16 & 17 Eliz. S. C. and the pleadings.

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[6. *Jointenants of a term for years* may make partition *without deed*, becauſe it is but a chattle. D. 18 El. * 250. 20.]

S. P. Per Wray, Cro. E. 95.—Co. Litt. 187.—* Miſprinted for 350.——D. 350. b. pl. 20. (bis) S. P. in an anonymous caſe, ſays only that (peradventure) the partition is good.

[7. *So* of *tenants in common* of a term for years. D. 18 El. 350. 20.]

In covenant the caſe was, that ſeveral perſons being *ſeiſed in common* of a large parcel of ground, and deſirous to have a partition, *ſubmitted to the award* of certain arbitrators choſen for that purpoſe, and entered into covenants for the performance of it. The arbitrators by their award *allotted ſeveral parts of the premiſſes to ſeveral perſons*, with directions for making and maintaining fences and hedges, *and awarded that thenceforth the parties ſhould hold in ſeveralty.* In covenant againſt one of them for non-performance of the award, there was judgment by default, and damages given upon a writ of inquiry; and then it was mov'd in arreſt of judgment, that the arbitrators had not made a compleat partition, having only awarded that the parties ſhould hold ſeverally, *without directing any deeds* to carry the partition into execution, and to veſt the reſpective ſhares in the particular perſons. And of this opinion was the Court, after time taken to conſider; for that Co. Litt. 166. cited in behalf of partitions without deed, mentions it only as between parceners, and in the ſame page expreſsly ſays, it is not good between jointenants without deed, adding, that wherever the books allow of a partition by jointenants without deed, it muſt be intended of tenants in common, and that too executed by livery. This was at common law; a fortiori ſince the making the *ſtat. of the* 29 *Car.* 2. which expreſsly requires that all aſſignments, grants and ſurrenders ſhall be by deed in writing; conſequently there can be no partition now, tho' by feoffment and livery, without deed; and therefore the arbitrators ought to have directed ſuch proper deeds to be executed; ſo that the award, which is the ground of the action, being inſufficient and void, the plaintiff cannot have judgment. Trin. 14 & 15 Geo. 2. C. B. JOHNSON v. WILSON.

8. In *aſſiſe* between the uncle and nephew, the caſe was, that the *two brothers purchaſed a mill in fee*, and after by variance as to the reparations, *they put themſelves in award* of the third brother, *who awarded that one ſhould repair ſo far as to a poſt in the mill of one part, and* that *the other* ſhould repair *the reſt of the other part for ever*; and this was *for the purpoſe to be a ſeverance for ever*, for them and their heirs; afterwards the mill was leaſed to farm, and one took the one moiety of the profits, and the other the other moiety; and then one died, and his heir received part of the profits, and the uncle diſturb'd him, and he brought aſſiſe of the moiety, and recovered by award, notwithſtanding that the partition was not by writing. Br. Partition, pl. 4. cites 47 E. 3. 24 & 19 Aſſ. 1. & M. 20 E. 3.——Br. Jointenants, pl. 8 & 37. cites S. C.

9. Partition *of an advowſon and rent* is good without deed; contrary of a grant of theſe when they are in groſs. Per Thirn & Hill. Br. Partition, pl. 5. cites 11 H. 4. 3.

S. P. F. N. B. 62. (D.)

10. Partition *by parol without deed is good of the reverſion.* Per Danby, Br. Partition, pl. 3. cites 28 H. 6. 2.

11. Par-

11. Partition is good without deed *of a thing which lies in grant*, becauſe *the heir is in as heir after the partition; but in* caſe *of exchange he is in as purchaſer*, therefore there a deed is requiſite of the reverſion. Per Danby, Br. Partition, pl. 3. cites 28 H. 6. 2.

12. A writ of partition was brought by the *dean and chapter* of C. *againſt the biſhop*, upon the ſtatute of 32 H. 8. But per 2 Juſtices it would not lie. But Anderſon ſeemed to be of another opinion. 3 Le. 162. Hill. 29 Eliz. C. B. The Dean of Glouceſter's Caſe.

13. Partition *between huſband and wife* of lands, if it be equal, ſhall bind the makers, becauſe they are compellable to make partition: but ſecus *of an uſe*, becauſe they are not compellable. Arg. 2 Le. 25. Paſch. 30 Eliz. B. R. in Caſe of Roſs v. Morris.

(E) By whom it may be made [*on Behalf of a Parcener Infant* &c.] [222]

[1. THE *prochein amy of an infant* may make partition with the other parcener; and this ſhall bind the infant if it *be equal*. 9 H. 6. 5.] Br. Partition, pl. 1. contra, and that 'tis void; for *prochein amy* or *guardian*, have not power to make partition but *for his time only*. But partition by *the infant himſelf*, or a *feme covert and her baron*, ſhall bind if it be equal. Per the beſt opinion; for writ of partition lies in ſuch caſe; cites 9 H. 6. 5.

[2. *Guardian by ſervice of chivalry of one parcener* may make partition with the other parcener; and this ſhall bind during his time. 9 H. 6. 5. b.]

[3. So it ſeems that his partition *ſhall bind the infant, if it be equal*. Contra admitted, 9 H. 6. 5. b.]

[4. If there are two *coparceners*, *one* of whom *is within age, and in ward to the other*, and the *coparcener of full age makes partition*, which is *not equal*, this ſhall not bind the infant at full age. 43 Aſſ. 14.]

[5. *But if the infant takes baron of full age, and they leaſe their part for lives, rendring rent, and accept the rent*, this *affirms* the partition during the coverture. 43 Aſſ. 14.]

6. Partition made *by the baron of the right of his feme* is good, and *the feme cannot without reaſonable cauſe diſagree, as* if the partition *be not equal, or* if the land be *incumbred with action*; per Danby and all the Juſtices. Br. Partition, pl. 28. cites 8 E. 4. 4.

(E. 2) *Good. By Judgment in Aſſiſe.*

Br. Aſſiſe, pl. 121. cites S. C. and that it is the ſame if ſhe *takes more of the profits than belongs to her.*

1. PArtition ſhall be made *by judgment in aſſiſe between parceners*, where the one takes the whole profits, or makes other diſſeiſin; *contrary between jointenants.* Br. Partition, pl. 16. cites 7 Aſſ. 10.

—— Co. Litt. 167. b. (q) ſays, that Britton is to the contrary, and that it ſeems reaſonable, for he muſt have his judgment according to the plaint, and that was of a moiety, and not of any thing in ſeveralty, and the ſheriff cannot have any warrant to make any partition in ſeveralty or by metes and bounds.

2. *And where* upon partition *the moiety* of ſuch land *is allotted to the one, and the other moiety to the other*, this *is a good partition without ſeverance* of the land, and *aſſiſe ſhall be brought accordingly of the moiety* by plaint, and good. Br. Partition, pl. 16. cites 12 Aſſ. 17.

6 Rep. 13. —* Br. Partition, pl. 21. S. C.— Tho' ſome books are, that judgment ſhall be given to hold in ſeveralty in the caſe of jointenants, as 10 E. 3. 40. and 10 Aſſ. 17. Ld. Coke thought it would be hard in law to maintain the judgment; for beſides that he ought to recover according to his plaint, he ought alſo to recover in the aſſiſe *by view of the recognitors*, and they had no view of any thing in ſeveral; and likewiſe this *would be to the plaintiff's prejudice, as well for the ſurvivorſhip as for warranty &c.* and with this accords, 28 Aſſ. pl. 35. where the caſe was adjudged, not upon any opinion at the aſſiſes, but upon adjournment in Bank, and there adjudged that the plaintiff recover generally, tho' the plaintiff himſelf pray'd judgment to hold in ſeveralty; for the prayer of the party ſhall not alter the judgment of the law. 6 Rep. 13. a. in a nota in Merrice's Caſe.

3. If two *jointenants* are, and *one diſſeiſes the other* and he *brings aſſiſe*, the *judgment* was, *that he recover the moiety to hold in ſeveralty*, and *the ſame law of coparceners.* 7 Aſſ. 10. But * 28 Aſſ. 35. is contrary, and the reaſon ſeems to be, becauſe the ſeverance would defeat the ſurvivorſhip, which ſhall not be by law, unleſs they aſſent, but between coparceners there is not any ſurvivor. Br. Partition, pl. 35. cites 10 Aſſ. 17.

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4. In *aſſiſe* purparty was pleaded, upon which they were at iſſue, and it paſſed for the plaintiff, by which he according to his prayer had *judgment to hold his part in ſeveralty*, notwithſtanding that he may have writ of partition againſt the other. Br. Partition, pl. 36. cites 12 Aſſ. 17.

(F) Equal. *What* ſhall be ſaid *equal.*

[1. THO' the partition be *equal in the value* of the land, *yet* if it be *not of ſo good avail to the one as to the other*, this is not equal. 9 H. 6. 5. b.]

Br. Partition, pl. 1. cites S. C. * Orig. (*eaſie*) Br. Partition, pl. 1. cites S. C.

[2. *As* if the *one part is incumber'd with an aſſiſe* and the other not, this is not equal. 9 H. 6. 5. b.]

[3. *So* if the one part is *convenient to the one, and the other part lies in a place inconvenient to the other*, this is not equal, tho' the land be of equal value. 9 H. 6. 5. b.]

4. If

4. If there are *three houſes of different value to be divided between three*, it would not be right to divide every houſe; for that would be to ſpoil every houſe; but ſome recompence is to be made, either by a ſum of money, or rent for owelty of partition, to thoſe that have the houſes of leſs value; per Ld. C. Parker. Wms's Rep. 447. Trin. 1718. in Caſe of Ld. Clarendon and Bligh v. Hornby.

But if there be *but one houſe or mill or advowſon* to be divided, then this *intire thing* muſt be divided into ſo many parts, but not where there are other lands which may make up the other's ſhares; per Ld. C. Parker. Ibid.

(G) *Rent* for Equality. *What* ſhall be good Grant of a *Collateral Thing for Equality*.

[1. IF the part of the one coparcener is *of more value than the part of the other*, ſhe may grant a rent to the other for equality, and this ſhall be good partition. 29 Aſſ. 23.]

As if two houſes deſcend to two parceners, and the one houſe is worth 20s. per ann. and the other but 10s. per ann. one parcener may have one houſe and the other parcener the other houſe; and ſhe who has the houſe worth 20s. per ann. and her heirs ſhall pay 5s. per ann. iſſuing out of the ſame houſe to the other parcener and to her heirs for ever. Co. Litt. f. 251.

[2. If upon partition the one grants a rent to the other, and that *if the* ſaid *rent be arrear, he may levy it of his land*, tho' the rent *be granted generally*, not expreſſing to be taken of any ſoil, yet the clauſe ſubſequent explains it, and therefore ſhall iſſue out of the land divided. 29 Aſſ. 23. adjudged.]

[3. *So* if upon partition the one *grants* a rent to the other *generally for equality of partition, without mention to be taken of any ſoil, and without more*; yet this ſhall iſſue out of the land ſo divided, and ſhall be good partition; for inaſmuch as it is expreſſed to be for equality of partition it cannot be otherwiſe taken. 29 Aſſ. 23.] Fol. 257.

[4. *Baron and feme may grant* a rent for equality of partition, and this ſhall bind at leaſt during the coverture. 29 Aſſ. 23. adjudged.]

5. Upon a partition made *by jointenants*, a rent cannot be [224] reſerv'd for equality of partition; for they are in by purchaſe, and were not compellable by the common law to make partition. Le. 27. in Caſe of Marſh v. Smith,—cites 26 H. 8. 4. 9 E. 4. 5.

(G. 2) Owelty. *What may be granted for Owelty of Partition; and in what Cafes good without Deed.*

Br. Nufance, pl. 11. cites S. C.—S. P. and ſo of a *common of eſtovers*, or *eſtrey*, or a *common of paſture*. Co. Litt. 169. a. b.—* S. P. Br. Reſervation, pl. 40. ——Br. Monſtrans, pl. 45. cites S. C.—— Pl. 7. cites S. C.—† Br. Partition, pl. 7. cites S. C.

1. A * *Way* or † *rent-charge* may be reſerved *upon partition for equality* thereof without deed, and good. Br. Reſervation, pl. 11. cites 21 E. 3. 2.

S. P. and if *advowſon* which was *appendant* be *reſerved and excepted in the partition* of the land, this makes the advowſon in groſs, notwithſtanding that it was appendant before. Br. Reſervation, pl. 24. cites 2 H. 7. 2. ——S. P. Br. Partition, pl. 32. cites 11 H. 4. 61. ſays it is good without deed, tho' *rent* be *reſerved* upon it *for equality* of partition; for this ſtands with common right.

2. Partition is good and ſhall bind without deed or fine, and rent may be reſerv'd upon it without deed or fine; and *if the land be in tail, the rent ſhall be in tail likewiſe, and of the ſame condition as the land was.* Br. Partition, pl. 25. cites 2 H. 7. 5.

* See (D) pl. 8. in the notes there.

3. Partition by parceners might *at law* be by parol, and *rent* or *eſtovers* which lie in grant might be *reſerved or granted* without deed for equality of partition *out of the lands deſcended, but not out of other lands*, and rent ſo reſerved or granted is diſtrainable of common right, tho' it be not rent ſervice. *But* * *quære if parol partitions be not reſtrained by* 29 *Car.* 2. 3. Hawk. Co. Litt. 253. (169)

Pl. C. 134. b. in Caſe of Browning v. Beſton.

4. If the *rent* be granted *generally* (*out of no land certain*) for owelty of partition *pro reſiduo terræ*, it ſhall be intended out of the purparty of her that grants it. Co. Litt. 169. b.

5. If rent be granted *out of other lands* than deſcended to the coparceners, then there muſt be a deed. Co. Litt. 169. b.

(H) *In what Manner* they ſhall have the Thing parted. [*Coparceners.*]

[1. IF a *county palatine* deſcend to diverſe coparceners, and they make partition, *every one of them ſhall have a ſeveral county palatine*, and the liberties and prerogatives in it. Da. 1. County Palatine 61. b. 23 H. 3. Partition 28.]

[2. *So* if coparceners of a *manor* make partition, every one ſhall have a *ſeveral manor and court baron.* Da. 1. 61. b.]

[3. If there are three coparceners, and 10 l. rent is granted to one, and 10 l. rent to the other of them for equality, tho' this *rent be granted ſeverally*, yet they *are coparceners of it*; for they may join in one ſcire facias for it againſt the third. 29 Aſſ. 23. adjudged.]

(I) The

(I) The *ſeveral Ways* of *making* Partition; and of the *Election and Privilege of the Eldeſt and her Iſſue.*

1. PArtitions between parceners are either *expreſs* or *imply'd*; of expreſs partitions there are *four by conſent*, and *one by compulſion*. The *firſt* partition by conſent is, when they *agree to divide* the lands into equal parts in ſeveralty, and that one ſhall have ſuch a part, and another ſuch a part &c. The *ſecond* is when they agree *that ſome friends ſhall divide* the lands into equal parts, and then the eldeſt ſhall chooſe firſt one of the parts ſo divided &c. unleſs they otherwiſe agree. The part choſen by the eldeſt is called *enitia pars*; becauſe this * *privilege is perſonal to the eldeſt*, being given to her out of reſpect to her age, and deſcends not to her iſſue; for if ſhe die the next eldeſt ſhall chooſe firſt. *But* if they have an *advowſon*, the law gives the firſt *preſentation to the eldeſt*, if they cannot agree, and this privilege *goes to her iſſue*, *aſſignee*, or *tenant by curteſy*. The *third* partition is when the *eldeſt divides*, and in ſuch caſe ſhe ſhall not chooſe. The *fourth* is when after the land is divided they *caſt lots* for their ſhares. The *expreſs compulſary partition* is by *writ de partitione facienda*, the words of which are Cum eædem A. and B. inſimul & pro indiviſo teneant tres acras terræ &c. Hawk. Co. Litt. 251. (166.)

* The eldeſt ſiſter ſhall not have the firſt election, but the ſheriff ſhall aſſign to her her part, which ſhe ſhall have &c. And it may be that the ſheriff will aſſign firſt one part to the youngeſt &c. and laſt to the eldeſt &c. Co. Litt. f. 249. —Whether the *grantee of the eldeſt* ſhall have ſuch privilege was doubted by Frowike, but he inclined that he ſhould. But ſee Kelw. 49. pl. 5. 18 H. 7. Anon —— It was held by three Juſtices, that the grantee ſhould have the privilege, but Anderſon doubted; but he agreed that *tenant by the curteſy* ſhould have the ſame advantage, as the wife ſhould have had. Cro. E. 18, 19. Paſch. 25 Eliz. C. B. Harris and Hales v. Nichols.——— Advowſon deſcended to two coparceners, the *youngeſt was within age and in ward*, the *guardian marries with the eldeſt*, the *church avoided*, the *guardian preſented in the name of both* ſiſters. Afterwards the *younger ſiſter came to age and the church avoided again*. It was thought by ſeveral that the eldeſt ſhall have the preſentment, if the youngeſt will not join with her; for this ſhall be ſaid the commencement of her turn, inaſmuch as ſhe had not the turn at the laſt avoidance, but that the ſame was made indifferently in the name of both. But others held the contrary. Quære. D. 55. a. pl. 5. Paſch. 34 & 35 H. 8. Carow's Caſe.—The privilege of the eldeſt to make the firſt preſentation is not in reſpect of her perſon only, but as it is annexed to the eſtate alſo; for as it is agreed 5 H. 5. 1c. b. her baron who is tenant by the curteſy ſhall have it. 3 Rep. 22. b. in Walker's Caſe.

2. Note, That the word *tenet* in a writ always implies a tenant of the freehold; therefore *if one* of them *be diſſeiſed by the other*, no writ of partition lies; and if *one* of them *make a leaſe for life*, the other ſhall not have a writ of partition againſt her; but *againſt her leſſee ſhe ſhall*; and if one make a leaſe for years, yet the other may have a writ of partition againſt her. Hawk. Co. Litt. 252. (167).

3. There are alſo ſeveral *implied* partitions in law; as if there be *three parceners of a meſnalty*, and *one* of them *purchaſe the tenancy*, this is a partition in law, and extinguiſhes the meſnalty for a third part, and the lord muſt make ſeveral avowries. Hawk. Co. Litt. 252. (167).

4. *And* if *one* parcener *infeoff a ſtranger* of her part, the other parcener and the feoffee are tenants in common. Hawk. Co. Litt. 252. (167).

5. *And if both* of them *marry* and have iſſue and die, leaving huſbands *tenants by curteſy*, the parcenary is divided, and ſeveral *præcipes* lie againſt the tenants by curteſy &c. Hawk. Co. Litt. 252. (167).

6. *But* if one *recover againſt the other in aſſiſe or nuper obiit*; yet they remain parceners; for as the plaint was for a moiety, the judgment and execution muſt be purſuant thereunto. Hawk. Co. Litt. 252. (167).

[226] (K) *In Hotch-pot. What*; and in what Caſes to be made.

1. PUtting in hotch-pot *is*, where the other lands or tenements not given in frank-marriage deſcend from the donors in frank-marriage only; for if the lands deſcend from the father, mother or brother of the donor, and not from the donor, the donee in frank-marriage ſhall have her part as if no ſuch gift had been; becauſe ſhe was not advanced by them but by another. Co. Litt. f. 272.

If the donees will put the land into hotch-pot, then the other coparcener ſhall out of the remnant make up her part equal, but the donees muſt do the firſt act. Co. Litt. 176. a. b.——And if the parcener to whom the land in fee ſimple deſcended will not put the lands into hotch-pot, then may the donees enter into the fee ſimple lands, and hold them in coparcenary with her. Co. Litt. 176. b.

2. If a man hath *two daughters*, and *giveth* with the eldeſt *in frank-marriage part of his lands, and dieth ſeiſed of the remnant of greater value*; in this caſe neither the huſband or wife ſhall have any of the remnant, unleſs they will put their land given in frank-marriage in hotch-pot with the remnant with this ſiſter. Co. Litt. f. 266, 267.

3. If the *donees die before ſuch partition their iſſues ſhall upon the putting into hotch-pot*, have the ſame benefit; for it is inheritable, and deſcendible to the iſſues. Co. Litt. 178. a.

The *value* ſhall be accounted as it was *at the time of the partition*; for if the donor purchaſe more land after the gift, or if the land given in frank-marriage be by the act of God decayed in value, or if the remnant of the lands in fee-ſimple be improved after the gift, or e converſo, the law ſhall adjudge of the value as it was at the time of partition, unleſs it was by the proper act or default of the parties. Co. Litt. 179. a.

4. If the *lands* given *in frank-marriage* be *of equal, or of more yearly value* than *the lands deſcended*, then the ſame ſhall not be put in hotch-pot. Co. Litt. f. 273.

For of lands intail'd, the donee in frank-marriage ſhall have as much part as the other coparcener; becauſe the iſſue in tail claimeth per formam doni, and both the parceners muſt equally inherit by force of the gift, & voluntas donatoris &c. obſervetur. Co. Litt. 179. b.

5. Lands or tenements given *in frank-marriage* ſhall not be put in hotch-pot, nor unleſs where lands deſcend in fee-ſimple; for of *lands deſcended in fee-tail*, partition ſhall be made as if no ſuch gift in frank-marriage had been made. Co. Litt. f. 274.

6. *No*

6. *No lands* ſhall be put in hotch-pot with others, *unleſs lands* which were *given in frank-marriage* only; for if a feme has any other lands or tenements by any other gift in tail, ſhe ſhall never put ſuch land ſo given in hotch-pot, but ſhe ſhall have her purparty of the remnant deſcended &c. viz. as much as the other parcener ſhall have of the ſame remnant. Co. Litt. f. 275.

For if the anceſtor infeoffeth one of his daughters of part of his land, or purchaſeth to him and her, and their heirs, or giveth to her part of his lands in tail, ſpecial or general, ſhe notwithſtanding this ſhall have a full part in the remnant of the lands in fee-ſimple; for the benefit of putting &c. into hotch-pot is only appropriated to a gift in frank-marriage, (quia maritagium cadit in partem) which ſhall be accounted as parcel of his advancement. Co. Litt. 179. b.

(L) *The Effect* of a Partition; and *how ſeiſed after.*

1. PArtition between two ſiſters and heirs to the father *is a good bar in aſſiſe between them, tho' the one ſiſter only be heir by ſpecial tail*; and this is by reaſon of privity of blood: *but* partition *between ſtrangers to the blood*, is no bar. Br. Partition, pl. 20. cites 11 Aſſ. 23.

S. P. Br. Aſſiſe, pl. 468. cites [227] 11 E. 3.— But this partition being *made during coverture* of the ſiſter by the firſt venter, who was heir to the entail, it was for that reaſon avoided. Br. Aſſiſe, pl. 174. cites S. C.

2. Tho' partition be made *between parceners*, yet *they are in by their common anceſtor, and may vouch* as heir, *and may have every advantage as heir.* Br. Quare Impedit, pl. 73. cites 21 E. 3. 30. 31.

Two *jointenants* are *with warranty*, and partition is made between them by judgment in writ of partition, by the ſtatute of 31 H. 8. cap. 1. it was adjudged that the *warranty remains*, becauſe by the King's writ they are compellable by the ſtatute (to which every man is a party) to make partition, and having purſued his remedy according to the ſtatute, it ſhall work no wrong to him; but had they made partition otherwiſe than by writ, notwithſtanding they were compellable by writ to make it, yet not having purſued the ſtatute, ſuch partition remains at common law, and conſequently the warranty is gone, as is agreed, 29 E. 3. tit. Warranty. 6 Rep. 12. b. Paſch. 27 Eliz. C. B. Morrice's Caſe.

3. *Where a manor is parted between two coparceners, each has a moiety* of the manor: *contra* it ſeems *where the one has all the demeſnes, and the other all the ſervices*; but as long as the one has land and ſervices, and the other likewiſe, each has a moiety of the manor. Br. Demand, pl. 10. cites 9 E. 4. 5.

4. Treſpaſs: if a manor to which a villein is regardant, deſcends to two parceners, who make partition, and the *manor is allotted to one, and the villein and other land to the other*, now the *villein is in groſs*, and admitted for a good partition. Br. Partition, pl. 30. cites 13 E. 4. 2.

5. If two *coparceners of a manor and advowſon appendant make partition of the manor reſerving the advowſon*, now they *are ſeveral tenants of the lands, and jointenants of the advowſon*; and by this the advowſon is in groſs, and not appendant. Br. Partition, pl. 25. cites 2 H. 7. 5.

6. *Leaſe to two for years* with a *proviſo* in the end of the indenture, that *if they die within the term, the term ſhall ceaſe.* They make partition, or one aliens his part, and dies. The

leſſor cannot enter, but the grantee or the *executors of leſſee* (if no alienation be made, or otherwiſe the grantee) *ſhall have his part during the life of the ſurvivor*, and there ſhall be no occupancy. D. 67. a. pl. 18. Mich. 3 E. 6 Farington's Caſe.

7. If a *leaſe* be made *to two, upon condition not to alien*, and they make partition, and afterwards the *one aliens his part*, the *whole is forfeited*. D. 67. a pl. 18. Marg. cites Mich. 31 & 32 Eliz. C. B. Croſtwick's Caſe.

* It remains in common. F. N. B. 62. (F.)

8. If *advowſon* be *appendant* to a manor, which *deſcends* to divers coparceners, and they make *partition of the manor to which &c.* * *without ſpeaking of the advowſon*, the advowſon notwithſtanding the diviſion and ſeverance of the manor to which &c. *remains appendant*. 8 Rep. 79. b. Trin. 7 Jac. in Wyat Wild's Caſe.

(M) *Bound. By what Partition.*

1. *IF perfect partition be made*, the *one parcener cannot re-enter into his part again without agreement* of the other *to defeat the partition*; *but* if *a ſtranger enters into part by elder title*, there the coparcener may enter with the other, and they ſhall make a new partition. Br. Partition, pl. 34. cites 15 E. 4. 3.

[228] (N) What Partitions ſhall bind them and the Iſſue, *being made by Infants, Feme-Covert*, &c.

1. IF the partition be of *lands intailed*, or if any of the parceners be of *non ſanæ memoriæ*, it ſhall bind the parties themſelves, but not their iſſues, unleſs it be equal. Co. Litt. 166.

2. *Or* if any be *covert*, it ſhall bind the huſband, but not the wife or her heirs. Co. Litt. 166.

3. *Or* if any be *within age*, it ſhall not bind the infant. Co. Litt. 166.

4. If the tenements (whereof they make partition) be to *them in fee* tail, and the part of the one is better in yearly value than the part of the other, albeit they be concluded during their lives to defeat the partition, yet if the parcener which has the leſſer part in value has iſſue, and dies, the iſſue may diſagree to the partition, and enter and occupy in common the other part which was allotted to her aunt, and ſo the other may enter and occupy in common the other part allotted to her ſiſter &c. as if no partition had been made. Co. Litt. f. 255.

5. Huſband and wife *tenants in ſpecial tail* of certain lands in fee have iſſue a daughter; the wife dies; the huſband by a ſecond wife has another daughter; *both the daughters enter (where the eldeſt is only inheritable)*, and make partition; the eldeſt is con-

concluded during her life to impeach the partition, or to ſay that the youngeſt is not heir; and yet ſhe is a ſtranger to the tail, but in reſpect of *privity* in their perſons the partition ſhall conclude; for a partition between *mere ſtrangers* in this caſe is void; but the iſſue of the eldeſt ſhall avoid the partition as iſſue in tail. Co. Litt. 170. b.

6. If *two parceners* of lands in fee *take huſbands, and they and their huſbands make partition* between them, if the part of the one be leſs in value than the part of the other, *during the lives of their huſbands the partition ſhall ſtand* in its force. *But* albeit it ſhall ſtand during the lives of their huſbands, yet *after* the death of the huſbands, that woman which has the leſſer part may enter into her ſiſter's part as is aforeſaid, and ſhall defeat the partition. Co. Litt. f. 256.

But if the partition made between the huſbands were thus, that each part *at the time* of the allotment made was of *equal* yearly value, then it cannot afterwards be defeated in ſuch caſes. Co. Litt. f. 257.

7. The *wife muſt be party* to the partition. Co. Litt. 170. b.

8. Tho' the partition be unequal, yet is not the partition void, but voidable; for if, *after the deceaſe of the huſband, the wife enters* into the unequal part, and agrees thereunto, this ſhall bind. Co. Litt. 170. b.

9. Note, The partition ſhall not be defeated for the ſurplusage only to make the partition equal; but it ſhall be avoided for the whole. Co. Litt. 170. b.

10. If the parts at the time of the partition be of equal yearly value, neither the* wives nor their heirs ſhall ever avoid the ſame, and the reaſon thereof is; for that the huſbands and wives were *compellable by law* to make partition, and that which they are compellable to do in this caſe by law, they may do by agreement without proceſs of law. If the annual value of the land be equal at the time of the partition, and after become unequal by any matter ſubſequent, as by ſurrounding, ill huſbandry &c. yet the partition remains good. Co. Litt. 171.

* S. P. F. N. B. 62. (F).—*But* if the partition be made *by force of the King's writ*, and judgment thereof given, it ſhall bind the ſeme coverts for ever, albeit the parts be not of equal annual value; becauſe it is made by the ſheriff by the oath of 12 men, by authority of law. And the *judgment* is, that partition ſhall remain firm and ſtable for ever. Co. Litt. 171.

But a partition *in Chancery* where one coparcener is of full age, and ſues livery, and one other is within age, and has an *unequal* part allotted to her, ſhall not bind her at her full age; for in a *writ* directed *to the eſcheator* to make partition, there is a *ſalvo jure*; and there is *no judgment* upon ſuch a partition. Co. Litt. 171. [229]

But if ſuch a partition made in Chancery, and between coparceners, whereof one is of full, and the other within age, be equal, it ſhall bind, ſo that a part of the land holden in capite be allotted to every of the coparceners; for to that end there is an expreſs proviſo in that writ. Co. Litt. 171.

And this partition may be *avoided either by ſcire facias* in the Chancery, *or by a writ de partitione faciendâ* at the common law at her full age. Co. Litt. 171.

11. If two coparceners be, and the youngeſt being *within the age of* 21 years, partition is made between them, ſo as the part which is allotted to the youngeſt, is of leſs value than the part of the other; in this caſe the youngeſt, during the time of her nonage, and alſo when ſhe comes to full age, viz. of 21 years, may enter into the part allotted to her ſiſter, and ſhall defeat the partition. Co. Litt. f. 258.

And tho' the partition be *unequal*, and the infant has the leſſer part, yet is not the partition *void*, but *voidable* by his entry; for if he *take the* whole *profits of the unequal part after his full age*, the partition is made good for ever. Co. Litt. 171. b. —— Nor ſhall an unequal partition in Chancery bind an infant. Co. Litt. 171. b.

12. As before in the caſe of a feme covert, ſo it is in caſe of the infant; for if the partition be *equal at the time* of the allotment, it ſhall bind him for ever; becauſe he is compellable by law to make partition, and he ſhall not have his age in a partitione facienda. Co. Litt. 171.

But a partition made *by the King's writ* de partitione facienda by the ſheriff by the oath of 12 men, and judgment thereupon given, ſhall bind the infant, tho' his part be unequal. Co. Litt. 171. b.

13. If a writ of partition be of lands in fee and lands entailed the eldeſt ſhall not be compelled to take the whole eſtate in tail (and ſo the younger ſiſter to have the whole fee ſimple, both being of equal value), for the prejudice that might enſue after, but may challenge *one moiety of the lands intailed, and another of the lands in fee ſimple*; and this ſhe may do ex proviſione Legis. Co. Litt. 173.

14. The *inequality of the value* ſhall not impeach a partition made of lands in fee ſimple, between coparceners of full age and unmarried, no more than it ſhall do in caſe of an exchange. Co. Litt. 170. a.

15. A partition of *land intailed* between parceners, if it be *equal at the time* of the partition, ſhall bind the iſſue in tail for ever, albeit the one does alien her part. Co. Litt. 173. b.

16. J. S. ſeiſed of land in fee has two daughters, Roſe and Anne Baſtard eigne and mulier puiſne, and dies, and Roſe and Anne enter and make partition; Anne and her heirs are concluded for ever. Co. Litt. 170. b.

See (R).

(O) *Voidable. For what Cauſe, and How.*

1. *After partition in Chancery*, ſhe who is within age ſhall after ſhe comes of full age (if ſhe has too little) have a *writ de partitione facienda* againſt her ſiſter, *or a ſcire facias* upon the record of the partition in the Chancery againſt her coparcener, which ſhall be returned into the Chancery &c. to ſhew wherefore new partition or extent ſhall not be made &c. F. N. B. 62. (H).

Ibid. in marg. ſays, Nota, that ſo it was done, and new writ of partition awarded. 4 Car. in the Caſe of Taylor v. Brockhurſt.

2. Upon a writ of partition the *Sheriff returned the partition made by twelve lawful men.* One of the defendants was griev'd with his purparty, becauſe it was too little in value, and would have put in a *ſurmiſe againſt the Sheriff and his partial return, and pray'd a new writ* to make a more equal partition, and it was well debated if he ſhould have it or no. D. 73. pl. 7. Mich. 6 E. 6. Anon.

3. If

3. If the *Sheriff is not upon the land in perſon, at the executing the writ* of partition, and this be ſhewn to the Court, they may well examine it. And in this caſe they examined the under ſheriff, who confeſs'd that he was there, but not the ſheriff himſelf; and thereupon the writ was ſtay'd and a new writ awarded. But after the return of the ſheriff is received and fil'd, it will be too late, and the party can have no averment againſt the return, nor can he have error. Cro. E. 9, 10. Mich. 24 & 25 Eliz. C. B. Clay's Caſe.

If partition of lands be made *by bayliff of a franchiſe*, it is not good within the 31 H. 8. of Partition, but it ought to be done by the ſheriff himſelf. 4 Le. 106. pl. 216. Mich. 25 Eliz. C. B. Howen v. Gerrard.——See 8 & 9 W. 3. cap. 31. ſ. 4, 5. at (U) pl. 2.

4. In a writ of partition it was found for the plaintiff, and a *writ awarded to the ſheriff to make the partition*, and the ſheriff did thereupon allot part of the lands in ſeveralty, and for other part of the lands *the jurors would not aſſiſt him to make the partition*; all which appeared upon the return of the ſheriff. An attachment was pray'd againſt the jurors, and a new writ to the ſheriff. The Court doubted what to do, and took time to adviſe and ſee precedents. Godb. 265. pl. 366. Hill. 13 Jac. C. B. Bagnal v. Harvey.

(O. 2) Voidable. *Made good, by what* Act.

1. IF there are two coparceners, and the *one within age, who make partition which is not equal* by 5 l. in value, there ſhe within age *may enter and defeat* the partition, *but if ſhe at full age makes leaſe* or ſuch like act in agreement to the partition, there ſhe ſhall be bound by it. Br. Partition, pl. 23. cites 43 Aſſ. 14.

So if ſhe *takes* to her own uſe *all the profits of the lands or* tenements which were *allotted* unto her, by this ſhe agrees to the partition at ſuch age, in which caſe the partition ſhall ſtand and remain in its force. Co. Litt. ſ. 258.——*But* peradventure ſhe may take the profits *of* the moiety, leaving the profits of the other moiety to her ſiſter. Co. Litt. ſ. 258.

2. Partition made *by baron and feme, or an infant, may be affirm'd by entry when ſhe is ſole, or* the infant *of full age*; but contrary where they waive it. Br. Partition, pl. 13. cites 21 H. 6. 25.

(P) Voidable. How a Partition may become ſo. *By Matter ſubſequent.*

1. WHERE partition is made between two ſiſters, ſo that the *one has the land of fee ſimple, and the other the land tail'd*, if *ſhe who has the fee ſimple land* ‡ *aliens in fee and has iſſue* and dies, *her iſſue ſhall have formedon of the moiety* of the land tail'd; *but if* ſhe who has the fee ſimple land does not alien it, but

Br. Formedon, pl. 2. cites 20 H. 6. 2. 13. S. C.—— ‡ The iſſue may enter

into the lands in tail, and hold occupy them in purparty with her aunt, and this is for two cauſes, one is, for that the iſſue can have no remedy for the land ſold by the mother, becauſe the land was to her in fee ſimple, and inaſmuch as ſhe is one of the heirs in tail, and has no recompence for that which belongs to her of the lands in tail, it is reaſon that ſhe have her portion of the lands tailed, and namely when ſuch partition does not make any diſcontinuance. Co. Litt. ſ. 260.—* But the contrary is holden. M. 10 H. 6. viz. that the heir cannot enter upon the parcener who has the intail'd land, but is put to a formedon. Ibid.—

but *the other aliens the land tail'd and has iſſue and dies*, her iſſue ſhall have the † *formedon of the whole*, tho' there be another coheir to the gift alive, and recover the whole; *but if the other aliens the fee ſimple after*, then her iſſue ſhall have *formedon of the moiety*: per Newton; contra, as long as the fee ſimple land is not alien'd; for then ſhe is ſeiſed of her portion. Quære, where the one has recovered, if the other cannot enter with her who recovered in the formedon. Br. Partition, pl. 2. cites 20 H. 6. 14.

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* Ld. Coke ſays, this is no part of Littleton, and is contrary to law, as appears by Littleton himſelf; and that beſides, the caſe intended is not truly vouched; for it is not in 10 H. 6. but in 20 H. 6. [14] and yet there it is but the opinion of Newton obiter by the way. Co. Litt. 173. a.

This partition prima facie is good. But yet the eldeſt coparcener has, by the partition, and the matter ſubſequent, barred herſelf of the right in the fee ſimple lands, inſomuch as when the youngeſt ſiſter alien'd the fee ſimple lands and dies, and her iſſue enters into half the lands intail'd, yet *ſhall not the eldeſt enter into half of the lands in fee ſimple upon the alienee*; for by the alienation the *privity of* the ſtate *is deſtroy'd*. Co. Litt. 172. b. 173. (t.)—*So* if the *youngeſt* daughter *had made a gift in tail; for* the reverſion expectant upon an eſtate tail is of no account in law, becauſe it may be cut off by the tenant in tail. But otherwiſe it is of an eſtate for life or years. Co. Litt. 172. b.—If in this caſe the *youngeſt* daughter *alien part* of the land in fee ſimple and dies, ſo as full recompence for the land intailed deſcends not to her iſſue, the *may waive the taking of any profits* thereof, and enter into the lands intailed; for the iſſue in tail ſhall never be barr'd without a full recompence, tho' there be a warranty in deed or in law deſcended. Co. Litt. 173.

† S. P. For ſo long as the partition continues in force, ſhe is only inheritable to the whole land in tail. Co. Litt. 173.

(Q) *Defeated* in Part or in all. *By Eviction of the Party.*

1. IN avowry it was agreed, that where *two parceners make partition, where the third is extra patriam, reſerving rent to the one for equality* of partition, and after *the third returns within age, and re-enters*, the firſt partition is determined; *contrary without entry*; for then the rent remains quouſque &c. Br. Partition, pl. 14. cites 24 E. 3. 27.

2. Where *two manors are exchanged in fee*, the one for the other, or put in partition, and *one has the moiety of his manor in tail, and the other moiety in fee, and has iſſue* and dies, *and the iſſue enters into the whole*, the partition is defeated in all; per Litt. and other Juſtices. Br. Partition, pl. 31. cites 13 E. 4. 3.

S. P. 4 Rep. 121. b. in BUSTARD's CASE, cites 13 E. 4. 3. and 42 Aſſ. 22. and ſays, that the opinion of Cavendiſh there, viz. that tho' an eſtate for life, or in tail, be evicted againſt one coparcener, yet that the partition ſhall remain in force, is not law, as was reſolved by the Court in the caſe there, viz.

3. A. leaves *two daughters*, and *two acres*, *in one* of which he has *a good title*, *in the* other *a bad one*; one takes the one, the other the other, and after an eſtate of freehold is evicted from the parcener that had the acre with the bad title, either as to the whole or part of her purparty; ſhe may enter and avoid the partition as to the whole. Hawk. Co. Litt. 258. (174).

viz. the Earl of Pembroke's Caſe.——*But* if ſhe *alien her part in fee before the land is recovered*, ſhe cannot enter into the other acre; for an alienation in fee *diſſolves the privity*, but a leaſe for life or years or gift in tail does not. Hawk. Co. Litt. 258. (174.)

4. *And* tho' in the caſe above, the *reverſion expectant on a ſtate in tail*, made by the parcener, which had the fee, be of ſo ſmall conſideration in law, that it ſhall not be eſteemed a recompence ſufficient to bar the entry of the iſſue into the lands in tail allotted to the other parcener; yet in this caſe a reverſion on a ſtate tail, inaſmuch as it *continues the privity* of the coparcenary, ſhall give the parcener or her iſſue all the privileges incident thereto. Hawk. Co. Litt. 258. (174).

So when the *privity of the ſtate remains* and the part of the one is evicted, ſhe ſhall enter and hold in coparcenary with her other coparcener; and ſo it is in caſe of an exchange. Co. Litt. 173. b. 174.

5. If the *whole eſtate in part of the purparty* be evicted, that ſhall avoid the partition in the whole, be it of a manor that is intire, or of acres of ground or the like that be ſeveral; for the partition in that caſe implies for this purpoſe both a warranty and a condition in law, and either of them is intire and gives an entry in this caſe into the whole. And ſo it was reſolv'd both in the caſe of exchange and of partition. Co. Litt. 173. b. 174.

6. If *any eſtate of freehold* be evicted from the coparcener in all or part of her purparty, it ſhall be avoided in the whole. *As* if A. be ſeiſed in fee of one acre of land in poſſeſſion, and of the reverſion of another expectant upon an eſtate for life, and he *diſſeiſes the leſſee for life*, who makes continual claim, and A. dies ſeiſed of both acres, and has iſſue 2 daughters; partition is made ſo as the one acre is allotted to the one, and the other acre to the other; the *leſſee enters*, the partition is avoided for the whole, and ſo it was reſolv'd. Co. Litt. 174.

[232] Br. Error, pl. 131. cites 42 Aſſ. 22. per Cavendiſh contra. Arg. and nothing ſaid againſt it.——But ſee Sup. pl. 3.—Yelv. 8. Mich. 44 & 45 Eliz. B. R. Buſtard v. Bolter.——Cites 42 Aſſ. 22. Spencer's Caſe.

7. There is a diverſity between the *warranty* and *condition* which the *law creates* upon the partition. Where one coparcener takes benefit of the condition in law, ſhe defeats the partition in the whole. Co. Litt. 174.

But when ſhe vouches by force of the warranty in law for part, the partition ſhall not be defeated in the whole, but ſhe ſhall recover recompence for that part. Co. Litt. 174.

(R) *Writ* of Partition. *Proceedings* therein.

See (O).

1. IN partition to be made between 2 parceners of 2 manors, the *ſheriff may by writ aſſign one manor to one, and the other to the other*, per Litt. Juſtice; nevertheleſs it ſeems that this *is intended where they are of an equal value*; and the ſame of 2 acres. Br. Partition, pl. 29. cites 12 E. 4. 2.

2. If

See (U).

2. If before the return and filing of the writ, it appears, that the *ſheriff was not on the land in perſon*, as he is to be, the writ will not be received. Cro. E. 9. Mich. 24 & 25 Eliz. C. B. Clay's Caſe.

3. The proceſs in partition is *ſummons, attachment, and diſtreſs*, and the proceſs are *returnable from* 15 *days to* 15 *days*; if the writ be brought againſt two or more, *ſeveral eſſoigns* will lie, but *no view*, and the ſheriff upon diſtreſs is compellable to *return the value of the land* from the teſte of the original until the return thereof; if the writ be againſt *two or more defendants, and only one appears*, the plaintiff *cannot declare* againſt him, *until the reſt* of the defendants *appear*. In this action there are *two judgments*, the firſt is, that partition ſhall be made, and if the *plaintiff die after the firſt* judgment, *and before the ſecond judgment*, the writ ſhall not abate, but his *heir ſhall have a ſcire facias againſt the defendants, to ſhew cauſe* why partition ſhould not be made; and the *death of one of the defendants* abates the writ; and note, the plaintiff may have a *general writ but a ſpecial count*; and if the *defendant confeſſes part, and pleads* quod non tenet inſimul & pro indiviſo *for the reſidue*, the plaintiff may have judgment upon the confeſſion, and a writ to make partition upon the confeſſion before the trial, and afterwards try the iſſue for the reſidue, or elſe he may reſpite his judgment upon the confeſſion till the iſſue be try'd, but this is dangerous; for if the plaintiff be *non-ſuit* at the aſſiſe, then the whole writ will abate, and if the *ſheriff return the tenant ſummoned when in truth he was not*, an action of *deceit lies not*, but an action upon the *caſe*, and the plaintiff ſhall not recover the land by *default*, and you ſhall never have a writ of partition againſt one, where he cannot have one againſt the other. Brownl. 156, 157. Anon.

4. S. and B. were *tenants in common of a leaſe for years*, and B. brought a partition upon the 32 *H.* 8. *cap.* 32. and the *writ was general* as in the regiſter, with a *ſecundum formam ſtatuti*, which made it to be a partition upon his caſe within the ſtatute, as the ſtatute limits and appoints. But it had not been good if that clauſe had been omitted.—And it was ſo ruled in one Maurice's Caſe. Noy. 71. Stringborow v. Beedloe.

[233] 5. 8 & 9 *Will.* 3. *cap.* 31. *ſ.* 1. enacts, That *after proceſs of pone or attachment returned upon a writ of partition, affidavit being made of due* notice *given of the writ* to the tenant *to the action, and a* copy *thereof* left with the occupier or tenant, *or if they cannot be found, to the* wife, *ſon, or daughter (being of the age of* 21 *years) of the tenant, or to the tenant in poſſeſſion, (unleſs the tenant in poſſeſſion be demandant in the action) at leaſt* 40 days before the return *of the pone or attachment*; *if the tenants to ſuch writ, or any of them, or the true tenant to the lands*, ſhall not *within* 15 *days after return of ſuch pone or attachment* cauſe an appearance to be entered, *the demandant having entered his declaration, the Court may proceed to examine the demandant's title and quantity of his purpart, and ſhall for ſo much give* judgment by default, *and award a writ to make partition, whereby ſuch pur-*

part may be ſet out ſeverally; which being executed after eight days notice given to the occupier or tenants, and returned, and final judgment entered, the ſame ſhall conclude all perſons, altho' all perſons concerned are not named in the proceedings, nor the title of the tenants truly ſet forth.

S. 2. Provided, that if ſuch tenant or perſon concerned ſhall within one year after the firſt judgment *entred, or in caſe of infancy, coverture, non ſanæ memoriæ, or abſence out of the kingdom, within one year after their return, or the determination of ſuch inability, apply to the Court by motion, and* ſhew *a good and probable matter* in bar *of ſuch partition, or that the demandant hath not title to ſo much as he hath recovered, the Court may ſuſpend or ſet aſide ſuch judgment, and admit the tenant to appear and plead; and if the Court upon hearing thereof ſhall adjudge for the firſt demandant, the firſt judgment ſhall ſtand confirmed againſt all perſons, except ſuch other perſons as ſhall be abſent or diſabled; and the perſon ſo appealing ſhall be awarded to pay* coſts; *or if within ſuch time aforeſaid the tenants or perſons concerned, admitting the demandants title and purparts, ſhall ſhew to the Court any* inequality in the partition, *the Court may award a* new partition, *to be made in preſence of all parties, if they will appear, which ſecond partition returned and filed ſhall be good againſt all perſons, except as before.*

S. 3. No plea in abatement *ſhall be received in any ſuit for partition, nor ſhall the ſame be abated by the* death *of any tenant.* Made perpetual by 3 & 4 Ann. cap. 18.

S. 6. This act ſhall continue ſeven years.

(S) Writ of Partition. *Between* what Perſons, and *for and againſt whom; and how.*

1. IF one coparcener makes a *leaſe for years*, yet a writ of partition lies. Co. Litt. 167. *But* if one or both make a *leaſe for life* a writ of partition does not lie between them, becauſe non infimul & pro indiviſo tenent; they don't hold the freehold together, and the writ of partition muſt be againſt the tenant of the freehold. Co. Litt. 167.

2. It lies againſt *tenant by the curteſy*; becauſe though he be a ſtranger to the blood, yet he continues the eſtate of coparcenary, as the other coparcener did, and ſhall be jointly impleaded. Co. Litt. 174. b. 175. And yet he cannot *have this writ* by the common law; nevertheleſs now he may *by the ſtatutes of* 31 *H.* 8. 1. & 32 *H.* 8. 32. ut patet. Br. Partition, pl. 41. cites 3. E. 3. —*But* ſuch writ lies not againſt his grantee. 3 Le. 121. Arg.

3. If two coparceners be, and one aliens in fee, they are tenants in common, and ſeveral writs of præcipe muſt be brought againſt them; and yet the parcener ſhall have a writ of partition againſt the *alienee* at the common law, which is a far ſtronger caſe than the caſe put of tenant by the curteſy. Co. Litt. 175. [234]

4. Neither

But now *tenant by the curtesy* shall have a writ of partition *upon the statute* 32 *H.* 8. *cap.* 32. [which see at pl. 12] for albeit he is neither jointenant nor tenant in common; for that a præcipe lies against the parcener and tenant by the curtesy, yet he is in equal mischief as another tenant for life. Co. Litt. 175. a. b.—S. P. Br. Partition, pl. 41.

4. Neither the *tenant by the curtesy*, *nor* (much less) the *alienee* of a coparcener, shall have a writ de partitione facienda at the common law; for Littleton says here, that such a writ lies only for parceners. Co. Litt. 175.

5. *But* it may be brought by a parcener against strangers. Co. Litt. 175.

6. If three coparceners be, and the *eldest purchases the part of the youngest*, the eldest having one part by descent, and the other by purchase, shall have a writ of partition at the common law against the other middle sister; et sic de similibus. Co. Litt. 175.

F. N. B. 61. (S) S. P. and see the Writ at 62. —D. 243. a. b. in pl. 57. S. P. cites the register.

7. And so it is in a far stronger case; if there are three coparceners, and the *eldest take husband*, and the *husband purchase the part of the youngest*, the husband for his part is a stranger and no parcener, and yet he and his wife shall have a writ of partition *against the middle* sister *at the common law*, because he is seised of one part in the right of his wife who is a parcener. Co. Litt. 175.

* See pl. 11, 12.—So by the *custom of some cities* or boroughs, *one jointenant or tenant in common* may compel his companion by writ of partition grounded upon the custom to make partition. Co. Litt. 187.

8. Since Littleton wrote, *by the * statutes one jointenant or tenant in common may have a writ of partition against the other*; and therefore at this day the *alienee of one* parcener may have a writ of partition against the other parcener, because they are tenants in common. Co. Litt. 175.

9. A writ of partition lies *between parceners by the custom* as between females; but it is convenient in the declaration to make mention of the custom. Co. Litt. f. 265.

10. If a man has two daughters, and *gives* with the eldest *in frank-marriage* part of his land, and *dies seised of a greater remaining part*, a writ of partition does not lie, because non tenent insimul et pro indiviso. Co. Litt. 176. b.

11. 31 *H.* 8. *cap.* 1. *s.* 1. *Forasmuch as by the common law of this realm, divers of the King's subjects, being seised of manors, lands, tenements, and hereditaments, as joint tenants, or as tenants in common, with other of any estate of inheritance, in their own rights, or in the right of their wives, by purchase, descent, or otherwise, and every of them so being joint-tenants, or tenants in common, have like right, title, interest, and possession in the same manors &c. for their parts and portions jointly, or in common undividedly together with other. (2) And none of them by the law does, or may know their several parts or portions in the same, or that that is his or theirs, by itself undivided, and cannot by the laws of this realm otherwise occupy or take the profits of the same, or make any severance, division, or partition thereof, without other of their mutual assents and*

and conſents. (3) by reaſon whereof divers and many of them, being ſo jointly and undividedly ſeiſed of the ſaid manors &c. oftentimes of their perverſe, covetous, and malicious minds and wills, againſt all right, juſtice, equity, and good conſcience, by ſtrength and power, not only cut and fallen down all the woods and trees growing upon the ſame, but alſo have extirped, ſubverted, and pulled down and deſtroyed all the houſes, edifices, and buildings, meadows, paſtures, commons, and the whole commodities of the ſame, and have taken and converted them to their own uſes and behoofs, to the open wrong and diſheriſon, and againſt the minds [235] *and wills of others holding the ſame manors &c. jointly, or in common with them, and they have been always without aſſured remedy for the ſame.*

S. 2. *Be it therefore enacted, that all* joint-tenants, or tenants in common, *that now be, or hereafter ſhall be* of any eſtate *or eſtates* of inheritance, *in their own rights, or in the right of their wives of any manors &c. within this realm of England, Wales, or the marches of the ſame, ſhall and may be co-acted and compelled, by virtue of this preſent act, to make partition between them of all ſuch manors &c. as they now hold, or hereafter ſhall hold as joint-tenants, or tenants in common, by writ, de participatione facienda, in that caſe* to be deviſed in *the King our ſovereign Lord's Court of* Chancery, *in like manner and form as coparceners by the common laws of this realm have been and are compelled to do, and the ſame writ to be purſued at the common law.*

12. 32 *H.* 8, *cap.* 32. enacts, That *all joint tenants and tenants in common, and every of them, which now hold, or hereafter ſhall hold, jointly or in common, for term of life, year or years, or joint tenants or tenants in common, where one of them have, or ſhall have eſtate or eſtates for term of life or years, with the other that have or ſhall have eſtate or eſtates of inheritance or freehold in any manors, land, tenements or hereditaments, ſhall and may be compellable from henceforth by writ of partition to be purſued out of the King's Court of Chancery upon his or their caſe or caſes, to make ſeverance and partition of all ſuch manors &c. which they hold jointly or in common, for term of life or lives, year or years, or where one or ſome of them hold jointly or in common, for term of life or years with other, or that have an eſtate or eſtates of inheritance or freehold.*

Provided always, and be it enacted, That no ſuch partition or ſeverance hereafter to be made by force of this act, be, nor ſhall be prejudicial or hurtful to any perſon or perſons, their heirs or ſucceſſors, other than ſuch which be parties unto the ſaid partition, their executors or aſſigns.

13. Three ſons, viz. A. B. and C. were heirs in gavelkind; C. alien'd his purparty to another in fee: the *alienee and B. join'd* in a writ of partition againſt A. and the *writ was contra formam ſtatuti de anno* 31 *H.* 8. which gives writ of partition between jointenants &c. This writ was abated; for here the ſecond ſon is not a jointenant, and ſo cannot join in this writ with

And. 30. pl. 72. S. C. for upon the matter the one ſon was not joint-tenant, nor tenant in

common with the other; and ſays that the like caſe was adjudged between *Wooton and Temple v. Cooke, who was coparcener with Wootton. And ſays that it ſeems the *alienee may have partition againſt the coparceners, and the coparceners againſt the alienee.*—But it muſt be by writ. Jenk. 211. pl. 46.——D. 128, pl. 5. S. C. of Ballard v. Ballard accordingly; for they are intitled to ſeveral writs, viz. the one to the writ of coparcenary at common law, and the other by the ſtatute; but they cannot join.——* Bendl. 52. pl. 210. Mich. 7 & 8 Eliz. cites S. C. accordingly; and that the two coparceners may have a writ of partition at the common law againſt the alience, but not upon the ſaid ſtatute.—So where *one coparcener brought writ againſt the other, and the alienee* upon the ſtatute, the writ abated becauſe ſhe might have had a writ at common law. D. 243. pl. 56. 7 & 8 Eliz. Anon.

with the alienee. Bendl. 42. pl. 76. Mich. 2 & 3 Ph. & M. Ballard v. Ballard.

14. *Leaſe* was made *to A. and M. his feme*, and to *B. and E. whom the ſaid B. was to marry, and* to *C. and K. his feme for years. A. died, and M. ſurvived; B. married E.* and after the ſaid *M. granted &c. her intereſt to* the *ſaid B.* and after the ſaid *C. and K.* his feme *brought writ of partition againſt* the ſaid *B. and E.* his feme, *and* thereby *claimed partition of the fourth part*, according to the ſtatute; and the writ awarded good. Note, that the baron and feme for two of the four parts are jointtenants, and for other part the baron is tenant in common with the plaintiffs; ſo this writ is not between jointenants only, nor between tenants in common only &c. And. 42. pl. 107. Rider v. Williamſon.

15. *Thirteen* men *join'd in a purchaſe of a manor*, the *conveyance was of a moiety to one* of them *in fee*, and the *other moiety to the other twelve in fee;* the *twelve made a feoffment to J. S. of twelve ſeveral tenements*, and land, and *J. S. made twelve ſeveral feoffments to thoſe twelve;* now *the thirteenth man*, who had the other moiety, *brought one writ of partition againſt them all*, pretending that they held inſimul & pro indiviſo; and by the opinion of the whole Court it would not lie, but he ought to have brought ſeveral writs. Brownl. 157. Anon.

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16. Writ of partition *lies only againſt tenant of the freehold*; for 'tis a real action, and the ſtatute gives a *temporal partition againſt tenant for life*, and after there ought to be *another againſt remainderman*. Litt. R. 300. Mich. 5 Car. B. R. Cole v. Aylott and Stevens.

(T) Writ. *At what Time Writ lies. After abatement of* a *former* Writ &c.

1. WHERE *part* of the partition *is recovered againſt the one* of the parceners, *new partition* ſhall be made. Br. Partition, pl. 22. cites 42 Aſſ. 22.

2. Two *jointenants for years; one ſuffer'd a ſtranger to occupy his moiety with him;* the other brought a writ of partition againſt his companion and the ſtranger, ſuppoſing that his companion had granted a moiety of his part to the ſtranger; the ſtranger ſhew'd that he was but tenant at will to the companion,

panion, and ſo the writ abated. Reſolved that he might have another writ by journey's accounts againſt his companion, the poſſeſſion of the ſtranger being good colour for bringing the writ of partition, and he could not take notice what eſtate the ſtranger had &c. Cro. J. 218. Hill. 6 Jac. B. R. Beedle v. Clerke.

3. The Court will not allow *two writs of partition* to be brought, viz. *a ſecond by the defendant againſt the plaintiff*, where there is one pending in Court by the plaintiff againſt the defendant, becauſe the *defendant may have the ſame remedy on the firſt writ as he can on the ſecond.* G. Hiſt. of C. B. 209. But ſee (Y) pl. 9.

(U) *Judgment. Of the ſeveral Judgments*, and in what Caſes Error lies, and when.

See (O)—R. pl. 3. 5.

1. *PArtition* made between parties *after an erroneous judgment is no bar nor eſtoppel in* writ of *error* brought to reverſe it; quod nota. Br. Partition, pl. 12. cites 19 H. 6. 25.

2. When judgment ſhall be given upon this writ, the judgment ſhall be thus. *That the partition ſhall be made between the parties, and that the* * *ſheriff in his proper perſon ſhall go to the lands* and tenements &c. *and that he by the oath of twelve* lawful men of his bailiwick &c. *ſhall make partition between the parties, and that one part* of the lands and tenements *ſhall be aſſigned to the plaintiff*, or to one of the plaintiffs, *and another part to another* parcener &c. not making mention in the judgment of the eldeſt ſiſter more than of the youngeſt. Co. Litt. f. 248. *8 & 9 W. 3. cap. 31. ſ. 1. enacts, That when the high-ſheriff by reaſon of diſtance, infirmity or other hindrance, cannot conveniently be preſent at the execution of any judgment in partition, the* under-ſheriff, in preſence of two juſtices *of peace*, may proceed to execution *by inquiſition*; *and the high-ſheriff thereupon ſhall make the ſame return as if he were perſonally preſent*; *and the tenants of the lands ſhall be tenants for ſuch parts ſet out ſeverally to the reſpective owners, under the ſame rents and reſervations*; *and the owners of the ſeveral purparts ſhall make good unto their reſpective tenants the ſaid parts ſeverally, as they were bound to do before partition made.*

S. 5. The ſheriffs, *their* under-ſheriffs *and deputies*, and in caſe of diſability in the high-ſheriff, all juſtices of peace, *ſhall give due attendance to the executing ſuch writ of partition, (unleſs reaſonable cauſe be ſhewn to the Court upon oath) or otherwiſe be liable to pay unto the demandant ſuch coſts and damages as ſhall be awarded by the Court, not exceeding 5l. for which the demandant may bring his action in any of his Majeſty's Courts at Weſtminſter*; *and in caſe the demandant doth not agree to pay unto the ſheriff or under-ſheriffs, juſtices and jurors, ſuch* fees *as they ſhall demand, the Court ſhall award what each perſon ſhall receive*, having reſpect to the diſtance of the place *from their habitations, for which they may ſeverally bring their actions.*

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S. 6. This act ſhall continue ſeven years &c.

This act is *made perpetual by* 3 & 4 *Ann. cap.* 18.

3. Note, the *firſt judgment* in a writ of partition *is*, *Quod partitio fiat* inter partes prædictas de tenementis prædictis cum pertinentiis. Co. Litt. 167. b. 2 Bulſt. 114. Trin. 11 Jac. Rawlins v. Barret.

4. There be two judgments in a writ of partition; of the former is ſpoke to above: and when partition is made by the oath of twelve men, and aſſignment and allotment thereof, and ſo returned by the ſheriff, then the *latter judgment is*, *Ideo conſideratum* Cro. E. 635, Mich. 40 & 41 Eliz.

B. R. Lord Berkley v. Warwick. *conſideratum eſt quod partitio prædicta firma & ſtabilis in perpetuum teneatur;* and this is the principal judgment. Co. Litt. 168. a. ——11 Rep. 38. Mich. 12 Jac. in Metcalf's Caſe.——Sty. 290. Trin. 1651. Spittlehouſe v. Farnery, S. P.

5. If partition be made by the ſheriff, tho' the *writ be not returned*, yet 'tis good enough, and none of the parties ſhall except againſt it. Per Dyer. Owen 31. Paſch. 6 Eliz. Anon.—A writ of error lies on the firſt judgment before return of the writ. Brownl. 157. Cocks v. Combſtocks.

C. L. 168. a. S. P.—S. C. Cro. E. 635. 636. Mich. 41 & 42 Eliz. B. R. adjornatur. —Ib. 643. S. C. and then the Court held that *until the ſecond judgment given quod partitio ſtabilis fiat, the record is not full, nor the judgment perfect*, and therefore the record ſhould not be remov'd———Award quod partitio fiat is only an award of the Court, and *interlocutory only, and not definitive*; and till the laſt judgment the parties have day by the roll, which proves that the principal plea remains undetermined. 11 Rep. 40. a. in Metcalf's Case, and cites the Caſe of Lady Warwick v. Lord Berkley———2 Roll. R. 85. Mich. 12 Jac. B. R. in the Caſe of Wood v. Medcalfe, it was ſaid by Coke Ch. J. there was not any reſolution, but that it ſeem'd in ſuch caſe that before the ſecond judgment no writ of error lay; quod fuit conceſſum per Doderidge; but Croke and Haughton doubted of it.

6. A writ of partition was brought, and judgment *quod partitio fiat*; and before it was executed in the country by the ſheriff, *error* was brought; and it was ſaid by the Court, that it *does not lie* upon ſuch a judgment *before* the partition be made and returned by the ſheriff. And *judgment* was given *quod partitio ſtabilis remaneat*; for 'tis not like to other real actions, where error lies before the *habere fac. ſeiſinam* be return'd; for that is a final judgment, and no other to be given. Alſo there needs no return of an *habere fac. ſeiſinam*; for the party that recovers may execute his judgment by his entry, as Dyer 67. a. Noy 71. Counteſs of Warwick v. Lord Berkley.

7. A. brings partition; and thereby demands the fourth part &c. if the jury find that they hold *pro indiviſo*, but that A. ought to have only a fifth part &c. A. ſhall not have that which is due to him [viz. the fifth part, which he has a right to]; for then the judgment will be variant from the demand. Noy 107. Becket v. Bromley.

8. Several judgments are to be given, *as the caſe is*, upon the ſeveral ſtatutes; for the judgment upon the firſt ſtatute of 31 *H.* 8. *of inheritances* is, Sit firma partitio in perpetuum; but upon the ſtatute of 32 *H.* 8. 'tis not ſo; for judgment given upon that ſtatute ſhall not bind him in the reverſion; for there is a proviſo in the ſtatute in the end of it, that partition made by force of that ſtatute ſhall *not be prejudicial* or hurtful *to any* perſons *other than ſuch who be parties to the ſaid partition, their executors or aſſigns.* Per Gawdy J. Godb. 86. pl. 97. Mich. 28. & 29 Eliz. B. R. Stranſam v. Colburn.

S. C. Sid. 269. where it is ſaid that judgment was reverſed. 2 Keb. 473. S. C. adjor.

9. On a writ of error to reverſe a judgment in a writ of partition, the errors aſſigned were, 1. For that the executory judgment was, quod *partitio fact.* inſtead of, ſit or fiat. 2. The precept thereon to the ſheriff, quod per ſacramentum proborum [238] hominum *in comitatu* &c. and *not* ſaid *de comitatu.* 3. There was *no continuance* for the tenant by *idem dies*, when the partition was to be made. 4. *No mention* was made *of the view of frankpledge*

frankpledge mentioned in the writ as not appurtenant to the manors, but diſtinct and ſo cum pertinentiis does not ſupply it. 5. Then the ſheriff returned *unam medietatem eorundem* (viz. the premiſſes) to be delivered *to the plaintiff*, viz. ſuch manors *per parcella medietatis ſuæ*, and other manors to the defendant, and then again *alteram medietatem to the plaintiff*, and ſo he had two moieties. 6. The ſheriff delivered *quartam partem* of &c. and did *not ſay metas & bundas*. 7. The ſheriff *divided the rents without ſhewing which* viz. copy or free, or upon leaſes for life, years, or at will. 8. The return did *not conclude that theſe were all the lands* comprehended *in the writ*, as it is in Co. Ent. 412. a. pl. 2. 9. The *demand was of* 400 *acres of wood*, and no *mention thereof* in the partition, but only of a park una cum omnibus arboribus eidem pertinent. which was not the wood here. 10. Diverſe *things were delivered* in the partition *not demanded* or mentioned *in the writ*, and *of which writ of partition lies*, viz. paſture for ſix beaſts, ſhopas &c. 11. The *delivery is of* 3 *acres* of meadow lying in &c. *excepting duobis rodis* and *no diſpoſal of thoſe* two rods before or after. Laſtly, The writ was that the *ſheriff ſhould go to the advowſon*, which could not be, it being *incorporeal*. Et adjornatur. Raym. 172. Mich. 20 Car. 2. B. R. Danby v. Palmes.

natur. But Ibid. 580. ſays, the parties agreed for want of an idem dies, and other exceptions unanſwerable that the judgment be reverſed; and ſo it was.

(W) Jury. What the Jury muſt do where the Lands to be divided were not certainly known.

1. A. One tenant in common of a *manor purchaſes in a freehold* which was ſo *intermixt* with the demeſnes, that it could not be diſtinguiſhed by the jury. A. ought to inform the jury of the bounds, but if *no one informs the jury*, and they do as well as they can, and make partition according to the beſt of their judgment, they do their duty; for they are compellable to make partition at their peril. D. 265. b. Mich. 9 & 10 Eliz. Temple v. Cook and Wotton.

(X) *Sheriff.* What he muſt do after Partition made.

1. OF the partition which the ſheriff has made, he ſhall *give notice to the juſtices under his ſeal, and the ſeals of every of the* 12 &c. Co. Litt. f. 249.

It muſt be ſo return'd for the *words of the* judicial *writ* of partition which commands the ſheriff to make partition are, *Aſſumptis tecum* 12 &c. (ſo as there muſt be 12) *& partitionem inde* &c. *ſciare facias juſticiaris* &c. *ſub ſigillo tuo & ſigillis eorum per quorum ſacramentum partitionem illam feceris* &c. And this is the reaſon wherefore in this caſe the partition which they make upon oath ought to be returned under their ſeals; and the reaſon for that is for the more ſtrengthening of the partition by the 12, and that the ſheriff ſhould not return what partition he would. Co. Litt. 168. b. 169.

2. If partition be made by the ſheriff, altho' the *writ be not returned*, it is good enough, and none of the parties ſhall

except againſt it ; per Dyer. Ow. 31. and ſo he ſaid was the better opinion in the Caſe of Culpepper v. Naval.

See (R). * (Y) *Pleadings, and what* ſhall be *recovered.*

In a partic' facienḍ' by A. againſt B. who pleaded that the plaintiff had leaſed to him his purparty for five years, and that *ſaving to him his* ſaid *term, he is ready to make partition*, and always has ſo been, and his proteſt was entered on the roll, Skipw. to have damages, replied, that he had not been always ready, et non allocatur ; for altho' he counts ad damnum, yet no damages ſhall be recovered, and therefore a partition was awarded with the ſaving of the term ; and per Candiſh. the like law is in a nuper obiit, account, perambulatione facienda. But per Strange and Martin, the plaintiff ſhall recover damages. F. N. B. 62. (G) in the notes there (a).

1. IF one *coparcener leaſes her part* to another for years, yet ſhe ſhall have a writ of partition againſt her ſiſter during the term of years. F. N. B. 62. (G) cites 22 E. 3. 57. (17).

2. Where the avowry is *for rent reſerved upon equality of partition* upon partition made *between two parceners*, it is a good *plea that they were three parceners, and the third at the time of the partition was out of the country, and came back within age, and re-enter'd*, and the *other ſaid, that the third after releaſed her eſtate abſque hoc, that ſhe enter'd ; Priſt*, and others e contra. Br. Avowry, pl. 68. cites 24 E. 3. 51. 58.

3. Entry in nature of aſſiſe ; per Danby, if the *tenant ſays that J. N. was ſeiſed, and leaſed* to him *for life, and died ſeiſed of the reverſion, and of other lands, and has iſſue two daughters*, and that they made partition, ſo that the *reverſion* was *allotted to the one* in allowance of *the other lands allotted to the other*, this is good pleading *without ſhewing what the other lands are.* Br. Partition, pl. 3. cites 28 H. 6. 2. and book of entries.

4. Partitione facienda, and *counted that they held* the carve of land *in common by deſcent of inheritance*, and ſhewed how &c. Boef ſaid, their common *anceſtor in his life infeoffed A. whoſe eſtate he has, abſque hoc, that he held in common with the plaintiff by deſcent of inheritance, prout* &c. And a good plea per Cur. by which the *plaintiff ſaid, that they held the ſaid land in common by deſcent of inheritance ut ſupra* ; and this was held a good iſſue, but he would have ſaid, that they held in common in the manner &c. And Priſot ſaid, that he ſhall ſay that he held in common by deſcent ; quod nota. Br. Partition, pl. 15. cites 39 H. 6. 19.

5. In partition the *defendant ſaid, that he was ſole ſeiſed, abſque hoc, that he held pro indiviſo*, and a good plea ; per Brian Ch. J. for he has traverſed the point, and the ſuppoſal of the writ ; but contrary per Vaviſor, and the Reporter ; for the entry and ſeiſin of the one parcener is the entry and ſeiſin of the other. Br. Partition, pl. 26. cites 4 H. 7. 9.

6. In writ of partition of ſeveral manors, the *defendants appeared, and confeſſed the action, and judgment thereupon*, quod partitio fiat, and writ awarded to the ſheriff to make partition, pending

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ing which writ unſerved, inaſmuch as *the return of the partition was vitious, another writ was awarded, and before execution one of the defendants brought a new writ againſt the plaintiff and the other defendant of one of the ſaid manors*, who pleaded all this matter in bar. The Reporter makes a queſtion, if the plea was good, or that they ſhould have pleaded it by way of *eſtoppel*, to ſay that they contradicted the partition made, where it appears by the firſt record that they were always ready when they confeſſed the action; or whether they ſhould plead all the matter aforeſaid, and *conclude if pendente dicto breve priore de partitione faciend. & nondum rite execut. to this writ the plaintiff may be anſwered?* And he cites Paſch. 22 E. 3. That quare impedit was brought by A. againſt B. and B. brought a quare impedit againſt A. of one and the ſame church returnable at one and the ſame day; and the Court would not ſuffer both to ſtand, but made one to be diſcontinued. D. 92. b. pl. 21, 22. Mich. 1 Mar. Weſt v. Moyle & al.

7. In writ *againſt two, one appeared, and granted* the partition, and *the other made default*. Dier ſaid, that writ of partition ſhall iſſue to the ſheriff, but *ceſſabit executio* till the other comes; for partition by writ cannot but be againſt all; contra of partition by agreement. Dal. 28. pl. 12. 2 Eliz. Anon. [240]

8. The *writ upon* the ſtatute 31 *H.* 8. *was general, that they did hold inſimul & pro indiviſo manerium de D. & terras & viſum franci plegii in D. and that the defendant denied partition, contra formam ſtatuti &c.* The defendant *pleaded* quod *non tenuit inſimul prout &c.* The Jury found that the *plaintiff held* one moiety *in fee*, and that the *defendant was tenant in tail, remainder to his right heirs of the other moiety*. It was objected, that this writ was not good, but it ſhould have been a writ ſpecially founded according to the caſe; for ſo the ſtatute appoints, and that it be fram'd by the Clerks of the Chancery; and of that opinion was Anderſon: but all the other Juſtices held the writ good; for the ſtatute preſcribes no form, but leaves it to the clerks, who deviſed it upon this ſtatute generally, adding only the words (contra formam ſtatuti) which ſhews it grounded on the ſtatute. And the uſual practice hath been ſince the ſtatute to allow ſuch writs between jointenants and tenants in common of an inheritance; *but* a *writ* founded *upon* 32 *H.* 8. *between jointenants and tenants in common of a particular eſtate ought to be ſpecial*, ſhewing their particular eſtates; and ruled that the writ was good. Cro. E. 759. Paſch. 42 Eliz. C. B. Moor and Brown v. Onſlow.

It was objected, that the declaration ſuppoſed a joint-holding in fee, whereas the verdict found that defendant held in tail, and that ſo the eſtate was miſtaken; and the Court held this to be ill; for tho' the one needed not to take notice of the other's eſtate, yet when he will take upon him the know-

ledge of it, and miſtakes it, he fails, and his writ ſhall abate. But the parties compounded. Ibid.—So where the one eſtate was in fee, and the other eſtate was for life, a general writ againſt the defendant as jointenant was held good by reaſon of the precedents, without framing it ſpecially upon the ſtatute 32 H. 8. Cro. E. 742, 743. Hill. 42 Eliz. C. B. Tayler v. Bayer.——And 2 Lutw. 1168. Hill. 1 & 2 Jac. 2. Hicks v. Witshell, ſuch general writ was held good, being brought by tenant in fee of the one moiety, againſt tenant for life of the other moiety.—In a writ of partition *between tenants in common title need not be ſhewn;* and ſo was the opinion of the whole Court, and ſaid, they would not reverſe a judgment contrary to ſo many precedents. Cro. E. 64, 65. Mich. 29 & 30 Eliz. B. R. Yates & al. v. Windnam.—3 Le. 231. S. C.

S. P. Brownl. 156. Anon.

9. It is no plea that the *defendant had brought a writ of partition of the ſame land.* Brownl. 158. Mill v. Glemham.—See (T) pl. 3. Contra.

If there *are but* 3 *parts*, and *two are demanded*, there it is good, without ſaying in three parts to be divided; for when parts are demanded it is intended all the parts but one, and that only one remains. Ibid. cites 17 E. 3. 44. 19 E. 3. Brief 244. 17 Aſſ. And the Regiſter fol. 16. 12 Aſſ. And ſays, it was adjudged in B. R. in one JORDAN's CASE, that demand of two parts, where there are but three parts, is good.——And alſo cites 39 H. 6. SALFORD v. HURSTON in formedon, which demanded two parts where there were but three, and ſo of *three parts where there were but four*, and that it was good without ſaying (in three or four parts to be divided.) 2 Brownl. 275. in Caſe of Bayly v. Clare.

10. Writ was *of two parts*, without ſaying *in three parts to be divided.* The opinion of the Court was, that it was good. 2 Brownl. 275. Mich. 7 Jac. C. B. Baily v. Clare.

11. No *damages* ſhall be recovered in a writ of partition, nor an inquiry for them, and yet the writ and the count is ad damnum, per Cur. Noy. 68. Counteſs of Warwick v. Ld Berkley.

12. In a writ of partition betwixt tenants in common by the ſtatute of 31 H. 8. cap. 1. the tenant *pleaded ancient demeſne*, and adjudg'd a good plea. Raym. 249. Hill. 30. and 31 Car. 2. C. B. Pont v. Pont.

[241] (Z) Equity. *Decreed* in Equity, and *How.*

1. WHERE the *tenant of the King held land of the King, and had an advowſon, and* had *three daughters and died*, the partition may well be made in Chancery *during the poſſeſſion of the King*; and there *partition was made* ſo, *that one alone had the advowſon in allowance of other lands*; and *after the parceners made partition ſo that each ſhould preſent by turn*; and becauſe it was *without licence of the King*, therefore it was void againſt the King. And per R. Thorp, *if the partition in Chancery is not equal*, ſhe who is grieved ſhall have *ſcire facias* to bring in again all the coparceners into Chancery, and there to make partition de novo, and not otherwiſe. Br. Partition, pl. 10. cites 21 E. 3. 31.

2. Partition made in Chancery, *rendring rent*, is good, and may be ſent into C. B. and execution may be made thereof there by ſcire facias, and well. Br. Juriſdiction, pl. 114. cites 29 Aſſ. 23 & 37 H. 6. accordingly.

S. P. Ibid. 221. cites 32 Eliz. li. A. fol. 404.

3. An *unequal* partition relieved in equity. Toth. 220. cites Mich. 1594. Long v. Miller. Nourſe v. Ludlow.

4. The Court would not grant a partition, the *matter being but nine pounds.* Toth. 221. Mich. 14 Car. Babb v. Dudeney.

* Hob. 179. Points v. Gibbons.

5. Partition was decreed notwithſtanding *feme coverts* and * *infants*, and ſome *incumbrances* were in this caſe concerned. Chan. Rep. 235. 14 Car. 2. Martyn v. Perryman.

6. *A. ſeiſed of three fourths* of a farm, *and B. ſeiſed of the other fourth,*

fourth, lets her parts to the defendant for life, or years determinable on lives, and he took the profits of all; a diviſion is decreed to be made by commiſſioners *during the defendant's term* and titles. 3 Ch. R. 29. Mich 21 Car. 2. Pyne v. Matthew.

7. A partition between tenants in common of a *great waſte* was decreed, tho' many reaſons tending to great inconveniences, viz. want of paſture, ſhade &c. 2 Chan. Caſes 237. Mich. 29 Car. 2. Manaton v. Squire.

8. *Bill* lies for partition, and this is *grounded on the ſtatute*, which makes one tenant in common accountable to another; ſo that now ſince the ſtatute, they are become as it were truſtees for one another. Arg. Vern. 421. in Caſe of Earl of Kildare v. Sir Maurice Euſtace.

9. Two thirds of an *eſtate, conſiſting of a great houſe, park, and farms of* 1000 *l.* a year belong'd to A. and one third to B. who inſiſted to have a third part of the houſe and park. But Ld. Ch. Parker held, that tho' B. muſt have a third part in value of the eſtate, yet there was no colour of reaſon that any part of the eſtate ſhould be leſſened in value, in order to his having a third part of it, but if B. ſhould have one third of the houſe and park, it would much leſſen the value of both; and recommended it that the ſeat and park be allowed to A. ſhe having two thirds, and that a liberal allowance out of the reſt of the eſtate be made to B. in lieu of his ſhare of the houſe and park. Wms's Rep. 446. Trin. 1718. Earl of Clarendon and Bligh v. Hornby.

10. A. *deviſed lands to truſtees and their heirs, viz. as to one moiety to B. an infant in tail*, and *the other moiety to C. (of age.) but whether an eſtate tail, or for life only, was doubted by reaſon of the wording the limitation.* B. brought a bill for a partition; and that the truſtees convey the legal eſtate of the ſeparate moiety to be allotted to him, to him and the heirs of his body, there being no doubt of his being intitled to an eſtate tail. Lord C. King decreed a partition, and directed a commiſſion to allot ſeveral moieties to B. and C. to hold according to their ſeveral eſtates under the will, and to be reſpectively quieted in [242] the poſſeſſion; but becauſe B. cannot join in conveying the moiety to C. becauſe of infancy, and ſo there cannot be mutual conveyances, the conveyances of the truſtees were reſpited until B. ſhould be 21, or the Court gave further order. 2 Wms's Rep. 518. Hill. 1728. Ld. Brook v. Lord and Lady Hertford.

[For more of Partition in general, ſee Manors, Parceners, and other proper Titles.]

Partners.

(A) *How liable to Creditors.*

1. IF there are two partners and *one breaks*, you ſhall not *charge the other* with the whole, becauſe 'tis ex maleficio; but if there are two partners, and one of them *dies*, the ſurvivor ſhall be charged for the whole. Per Twiſden J. Mod. 45. Hill. 21 and 22 Car. 2. Anon.

2. Two entred into articles of copartnerſhip.—Each brought in 1000l. ſtock. There was to be no benefit of ſurvivorſhip, neither was to become indebted without the other, nor either to take out of the ſtock without the other. One became *indebted without conſent of his partner*, and made his wife executrix and dy'd. The wife *confeſſed judgment* for the debt. The other ſues for account and relief againſt the creditor and the wife. They confeſs the articles, and obtaining the judgment, Lord Chancellor granted an *injunction* againſt the judgment, becauſe the debt related not to the partnerſhip, ſaying, if this be ſuffered, no trade could be in ſuch caſe. 2 Chan. Caſes. Trin. 32 Car. 2. 38. Anon.

On a joint commiſſion of bankruptcy againſt two traders ſeparate creditors are allowed to come in, but the joint effects are to be apply'd firſt to pay the partnerſhip debts, and then the ſeparate debts; and the ſeparate effects to pay firſt the *ſeparate creditors*, and afterwards the *partnerſhip creditors*. Per Cowper C. 2 Vern. 706. Mich. 1715. Crowder's Caſe.——Wms's Rep. 226. S. P. per Lord Cowper.——S. P. 2 Wms's Rep. 500. by Lord C. King. Mich. 1725. Ex parte Cook.

3. Joint debts are to be paid out of the joint ſtock firſt, and if there be an overplus, then that ought to be apply'd to pay *particular debts* of each partner: but if there be not enough to pay all the joint debts, and if either of the partners ſhall pay more than a moiety of the joint debts, then ſuch partner is to come in before the commiſſioners of *bankrupts*, and be admitted as a creditor for what he ſhall ſo *pay over and above his moiety*. 2 Chan. Rep. 226. 34 Car. 2. E. Craven & al. v. Knight & al.

A quære is added, how the ſeparate creditors could have other title than thoſe under whom they claim? Ibid.

4. Two partners in trade *put in each an equal ſtock, and agreed* by covenant, *that the ſtock ſhould pay the debts of the ſtock, and neither of their ſeparate debts ſhould charge the ſtock*, but only his own eſtate, or to that effect. They *both became bankrupts*, and a commiſſion againſt them both; *one of them owed ſeparately more than the other*. The queſtion was between the ſeparate creditors of each bankrupt, and the creditors on account of the joint ſtock; for theſe would exclude the ſeparate creditors from charging the joint ſtock, but that it ſhould ſatisfy the ſtock debts. But the

Ld.

Ld. North was of a contrary opinion; for the covenant of the partners cannot bind any of their creditors; but only themſelves. 2 Chan. Caſes 139. Paſch. 35 Car. 2. 27. Apr. 1682. Ld. Craven v. Widdows.

5. A. B. and C. were copartners of goods of great value. B. being indebted to J. S. a *fieri facias* was ſu'd *againſt B. and thereupon all theſe goods were ſeiſed.* It was held by Holt Ch. J. That tho' A. B. and C. had joint and undivided intereſts, yet only the ſhare or part of B. and no more could be ſeiſed upon the execution againſt B.'s goods. Show. 173, 174. Mich. 2 W. & M. Bachurſt v. Clinkard. [243] The Reporter ibid. ſays, This point was reſolved in Court the day before, by Holt Ch. J. in his argument, and ſays, that he ſaw Ld. Ch. J. Pollexſen's opinion under his hand upon this occaſion, that on an execution againſt one partner's goods, only his ſhare or part is liable.

in the Caſe of ETKINS v. WESTERNE, and not denied by any of the Judges.

6. If there are two partners, and *execution* is ſued *againſt one*, the ſheriff muſt ſeiſe all the goods and ſell an undivided moiety, and the vendee will be tenant in common with the other partner. 1 Salk. 392. Mich. 5 W. & M. B. R. Heydon v. Heydon. Comb. 217. S. P.—If *one or more* of the joint traders *become bankrupt*, his or their proportions only are aſſignable by the commiſſioners, to be held in common with the reſt who were not bankrupts. At Niſi Prius coram Holt Ch. J. 12 Mod. 446. Paſch. 13 W. 3. Anon.

7. Where there are ſeveral partners, and a man *goes upon the credit of all*, the act of one is evidence againſt the reſt, unleſs they ſhew a *diſclaimer*. Coram Holt Ch. J. at Niſi Prius. 1 Salk. 292. . . . . v. Layfield.

8. A. and B. are partners.—A. *borrows money* and gives his *note ſubſcribed for ſelf and comp.* There was no proof that the money was brought into ſtock, but the *money was paid in the ſhop.* Per Cur. the note of one partner (the money being paid in the ſhop) binds both, and tho' at law the note ſtands good only againſt the executor of the ſurviving partner who was A. who received the money and ſign'd the note, yet it is proper in equity to follow the eſtate of B. for ſatisfaction; and decreed accordingly. 2 Vern. 292. Trin. 1693. Lane v. Williams. This Caſe after a diſmiſſion by the Maſter of the Rolls, was heard on appeal, Mich. 1692. when no notice is taken of any mention to have been made of the circumſtance of the money's being paid in the ſhop, and yet then the Court declared they took it that both partners were bound. See 2 Vern. 277. S. C.

Acceptance of a bill by one partner binds both if it concerns the joint trade. 1 Salk. 126. Hill. 8 W. 3. B. R. Pinkney v. Hall.——And an action lies againſt the other. Arg. Sti. 370. Paſch. 1633. Anon.

9. A. and B. are partners dry-ſalters.—A. *embezzles the joint ſtock, contracts private debts, and becomes bankrupt.* Commiſſioners aſſign the goods in partnerſhip. Bill by B. for an account, and to have the goods ſold for the moſt profit. It was inſiſted that thereout debts in partnerſhip ſhould be firſt paid, and that then ſatisfaction ſhould be made out of A.'s ſhare for what he had embezzled, and that the * aſſignees could be in no better condition than the bankrupt himſelf; and the Court ſeem'd to be of that opinion. 2 Vern. 293. Trin. 1693. Richardſon v. Goodwin. * Aſſignee can have only ſuch action as bankrupt might.—2 Show. 103. Ruſworth v. Hods.

10. If

But if in that caſe one *had rather deal with one of them upon his own account*, he

10. If there be ſeveral joint partners, and J. S. has *dealing generally with one of them in matters concerning their joint trade*, whereby debt is due to him, it ſhall charge them jointly, and the ſurvivors of them. At Niſi Prius coram Holt Ch. J. 12 Mod. 446. Paſch. 13 W. 3. Anon.

muſt make his agreement ſpecially, in which caſe the debt will be only his and his executors, and ſhall not ſurvive. At Niſi Prius coram Holt Ch. J. 12 Mod. 446. Anon.

11. A. and B. goldſmiths and partners were *bound to J. S. in a bond for payment of* 1000 *l.* and intereſt in 1693. Afterwards in the ſame year they *diſſolved the partnerſhip*, when A. by money and bond ſecured to B. his ſhare of the ſtock, and took on himſelf the partnerſhip debts. *Public notice was given to creditors of the joint ſtock to receive their money, or to look on A. only as their paymaſter.* B. died. J. S. in 1708, called in his money from A. but *continued the money on A.'s ſubſcribing the bond at* 6 *l. per cent.* A. was ſolvent till 1711, and till then J. S. might have had his money when he pleaſed; but then A. became bankrupt. Ld. C. Parker held, that the executor of B. was ſtill liable; that the notice was res inter alios acta, and could not bind
[244] J. S. and that changing the intereſt did not alter the ſecurity; for ſtill it was the bond of both, but B's executor could not be liable to more than 5l. per cent. for the arrears of intereſt; and J. S. was decreed his debt and coſts. Wms's Rep. 682. Mich. 1720. Heath v. Percival.

12. Three perſons enter'd into partnerſhip in the trade of ſugar-boiling, and *agreed that no ſugar ſhall be bought without the conſent of the majority; one* of them after *makes a proteſt that he would no longer be concerned* in the partnerſhip with them. *The two* other perſons *after make a contract* for ſugars, the *ſeller having notice that the third had diſclaimed* the partnerſhip; he ſhall not be charged. MS. Tab. 14 June 1721. Minnitt v. Whitney.

13. If a joint commiſſion of bankruptcy iſſues out againſt 2 joint traders, it was queſtioned, if ſeparate creditors may come in under it? And that they may it was argued, that if there are 2 joint traders, and *one becomes bankrupt one day, and the other the next* day, and a *joint commiſſion* is taken out, different relations muſt be had under the joint commiſſion with regard to the different times of the bankruptcy, and the diſtribution under it muſt be the ſame as if ſeparate commiſſions had been taken out. For in both caſes the joint fund is primarily apply'd to the joint debts, and the *ſeparate* fund to the ſeparate debts, and then in an *average* to the joint debts & vice verſa. So are the orders of the Court of Chancery in the following inſtances. A. and B. were partners, but the partnerſhip being diſſolved, and A. ſetting up for himſelf became bankrupt, and a commiſſion iſſu'd againſt him, and then B. failed and a commiſſion iſſu'd againſt him, the *joint creditors* were admitted to *prove their joint debts under the ſeparate commiſſions*, and cited 22 January 1728, the Caſe of Stephens v.

Brown

BROWN and ADLAMB, and that 22 April 1729, it was ordered, that the joint eſtate ſhould go to the joint creditors, and the remaining part of the joint eſtate, which reſpectively belonged to each, ſhould go to their *ſeparate creditors* upon a *joint commiſſion* ſu'd out againſt the then defendants, and cited HORSEY v. HEYHAM AND HEYHAM, and that 2 Geo. 2. in C. B. two being joint obligors, and after bankrupts, ſeparate commiſſions were taken out againſt them, and the ſeparate commiſſioners refuſing to let in the obligee, he brought an action againſt one of the obligors, but the defendant having got a certificate under the ſeparate commiſſion was diſcharged, MATHEWS v. ALAND; which proves that joint creditors may come in under ſeparate commiſſions, and by the ſame reaſon ſeparate creditors may come in under a joint commiſſion, and the law being ſo, *every aſſignee may recover* by ſetting forth the ſpecial matter; and beſides, if the *aſſignee of the other part will not join*, he may be ſummoned and ſevered. And the Court thought the laſt caſe cited came fully to the point of the principal caſe, and therefore inclin'd to give judgment accordingly. Sed adjornatur. Gibb, 282. Grace v. Heyham.

(B) *Diſputes between* the *Partners and* their *Debtors.*

1. ONE *joint factor may* with the expreſs conſent of his companion *account without him* by the law of merchants; for factors are often diſperſed ſo as they cannot be both preſent at their accompts; admitted 13 Eliz. in Scacc. 2 Le. 76. in Caſe of Goore & al. v. Dawbeney.

2. The *ſale by* one partner is the ſale by both, and therefore tho' one ſells the goods or merchandizeth with them, yet *action* muſt be brought *in both their names*, and in ſuch caſe the defendant ſhall not be received to wage his law, that the other partner did not ſell the goods to him as is ſuppoſed in the declaration. Godb. 244. Hill. 11 Jac. C. B. Lambert's Caſe.

3. If 2 be found in *arrearages of account* by the cuſtom of [245] merchants, one may be charged to pay all the debt as well as both; per Roll Ch. J. Sti. 243. Hill. 1650. in Caſe of Child v. Guiatt.

4. If there are *accounts* between 2 merchants, and *one becomes bankrupt*, the Court is not to make the other, who perhaps upon ſtating the accounts is found indebted to the bankrupt, to pay the whole that originally was intruſted to him, and to put him for recovery of what the bankrupt owes him, into the ſame condition with the reſt of the creditors, but to make him pay that only, which appears due to the bankrupt on the foot of the account. Otherwiſe it will be for accounts between them after the time of the other's becoming bankrupt, if any ſuch were; per North Ch. J. Mod. 215. Trin. 28 Car. 2. C. B. Anon.

5. A.

5. A. and B. were *joint farmers of the exciſe*; J. S. laid out money on their behalf. A. died. J. S. brought an action againſt B. and counted of money laid out to the uſe of the defendant. The defendant pleaded non-aſſumpſit. The whole Court were of opinion, that the action would not lie. For 2 partners being concerned the action will not lie againſt one alone. The plaintiff ought to have ſet forth the death of the other. But if judgment be had againſt one, the goods in partnerſhip may be taken in execution. 2 Mod. 279. Mich. 29 Car. 2. C. B. Tiffard v. Warcup.

6. If there be ſeveral joint traders, *payment to one* of them is payment to all. At Niſi Prius coram Holt Ch. J. 12 Mod. 447. Paſch. 13 W. 3. Anon.

7. *So, if* they *all, except him* to whom the payment was made, *were bankrupts*, the payment is only unavoidable as to his proportion. At Niſi Prius coram Holt Ch. J. 12 Mod. 447. Anon.

8. *And if* there be *four partners*, whereof *three are bankrupts*, and their ſhares aſſign'd, and a payment is made to him that was no bankrupt, it is a payment to all the aſſignees; for now they are all partners. At Niſi Prius coram Holt Ch. J. 12 Mod. 447. Anon.

(C) *One dies.* Diſputes between the *Executor or Adminiſtrator* of the deceaſed, *and the Survivor* &c.

1. *Adminiſtrator* to one partner ſueth the copartner for an *account* of the inteſtate's ſhare, which this Court accordingly decreed. Chan. Rep. 261. 17 Car. 2. Heyne v. Middlemore.—2 Chan. Caſes 129. Mich. 34 Car. 2. Anaud v. Honiwood.

2. Tho' the intereſt of partnerſhip *ſurvives*, yet the *executor* of the deceaſed partner may have an equitable intereſt by the *carrying in materials for the trade*, whereupon the ſurviving partner may be charged by bill in equity. Lev. 273. Trin. 21 Car. 2. B. R. Wells v. Wells.

The Caſe was thus, viz. A. and B. were partners in making of bricks for J. S.—A. died, leaving M. his executrix; B. promiſed M. in conſideration of her promiſing to relinquiſh her intereſt in the partnerſhip, that he would pay her ſo much money as ſhe had been out about the bricks; M. brought aſſumpſit againſt B. and had a verdict; but it was mov'd in arreſt of judgment, that here was no conſideration, for that M. had no intereſt in the partnerſhip, which being joint, muſt ſurvive to J. S. and that ſhe ought to have ſhewn how ſhe relinquiſh'd her intereſt. But the Court held it a good conſideration; for it might be that there were *covenants*, that no ſurvivorſhip ſhould be, (and after a verdict the Court will intend that there were) which tho' they *do not ſever the joint-intereſt in law, yet they give remedy in equity*, which to debar herſelf of, is a good conſideration, and being laid by way of reciprocal promiſe, there needs no averment of performance. Vent. 40. 41. Trin. 21 Car. 2. B. R. Wells v. Wells.

3. *Surviving* joint-merchant, *and the executor* of the deceaſed *join'd in aſſumpſit*, and held good. 2 Lev. 228. Trin. 30 Car. 2. B. R. Hall &c. v. Huffam.

4. An

4. An *account* of partnerſhip in trade ſhall not be *inſpected after the laſt balance*, and muſt not be carried on after the death of a partner, and from that time to be accounted as his ſeparate eſtate; and for ſuch debts as concern the partnerſhip, the plaintiffs the executors of the deceaſed partner ſhall be allowed their proportion of the benefit of *compoſitions* made by the defendant with his creditors for them, and where *abuſes to the books of account* were charg'd, 'twas ordered that defendant be examined on *interrogatories* relating thereto. Hill. 27 Car. 2. Fin. R. 191. Beake v. Beake.

5. *Surviving partner* trading on his own account with the debtors to the partnerſhip, it was ordered that an attorney be appointed to ſue for the debts, unleſs the ſurviving partner would *give ſecurity* to anſwer a moiety of the debts to the adminiſtratrix of the deceaſed partner. Hill. 1682. Vern. 118. Eſtwick v. Coningſby.

6. Two perſons had *mutual dealings*, but before their accounts ſettled one of them dies, and the ſurvivor brought a bill againſt his executors to have an account, and that the plaintiff might diſcount, what he was to pay, out of what the executors were to pay him; and it was decreed accordingly, altho' it was objected it might make a devaſtavit in the executors. Mich. 1701. Abr. Equ. Caſes 8. Beaumont v. Grover.

7. If there are two joint-traders, and one dies, and the *ſurvivor carries on the trade* after the death of the partner, he *ſhall anſwer for the gain* made by this trade. Per Lord Harcourt. Wms's Rep. 141. Paſch. 1711. in Caſe of Brown v. Litton.

(D) One dies. Diſputes between *Creditors* and the *Survivor* &c.

1. *Aſſumpſit* for 100l. for goods ſold by the plaintiff and B. whom plaintiff ſurviv'd; defendant pleads in *abatement*, that the plaintiff and B. were *joint-merchants*, and that by the law merchant there is no ſurvivor between them, and that B. made J. S. executor, who adminiſtred, and is now alive, and not party to the ſuit; and reſolved upon demurrer upon conſideration of Co. Litt. 172, 182. and F. N. B. 172 (E) that the bill ſhall abate. 2 Lev. 188. Hill. 28 & 29 Car. 2. B. R. Hall v. Huffam.

The ſurvivor, and the executor of the deceaſed joint-merchant join'd in action, and counted that upon the law merchant there is no ſurvivor,

and that the ſurvivor and the deceaſed ſold to the defendant &c. Judgment for the plaintiff. 2 Lev. 228. Trin. 30 Car. 2. B. R. Hall v. Huffam.—S. C. held accordingly. Freeman's Rep. 468.—3 Keb. 798. Trin. 29 Car. 2. S. C. reports, that the Court inclined the action ſurvives, and that upon recovery by the ſurvivor, the executors of the deceaſed ſhall come in, but cannot join. Hall v. Rougham.——In trover the defendant pleaded, that the plaintiff and A. and B. were joint-merchants, and were poſſeſſed of the goods as merchants, and that by the law of the land there is no ſurvivorſhip between joint-merchant, and concluded in bar. It was argu'd upon demurrer, that the action was well brought by the ſurvivor alone, becauſe the *action muſt neceſſarily ſurvive, tho' the intereſt does not*; otherwiſe there would be a failure of juſtice, becauſe the executor of the deceaſed and the ſurvivor cannot join; for their rights are of ſeveral natures, and there muſt be ſeveral judgments; beſides, 'tis clear this is not a plea in bar as it is pleaded here; and of that opinion was the whole

whole Court, and ſo the principal point, viz. the gift of the action was not adjudged. Carth. 170. 171. Hill. 2 & 3 W. & M. B. R. Kemp v. Andrews.——S. C. argued, and the Caſe in 3 Keb. 798. was cited; and per Cur. this can never be a good bar; ſo that they did not conſider whether the executors muſt or can join; and gave judgment for the plaintiff.——3 Lev. 290. S. C. adjudged for the plaintiff; for this at the moſt is only a plea in abatement, and defendant pleaded it in bar.——But this point of the executor and the ſurvivor's joining or not, was determined Paſch. 10 W. 3. B. R. in the negative, viz. two joint-merchants made B. their factor; one died leaving an executor; it was held that the ſurvivor and executor *cannot join*; for the remedy ſurvives, but not the duty, and therefore upon recovery he muſt be accountable to the executor for that. 2 Salk. 444. Martin v. Crump.

2. If there are two partners in trade, and *one buys goods for both, and the other dies*, the ſurvivor may be charged by indebitatus aſſumpſit generally, without taking notice of the partnerſhip, or that the other is dead, and he ſurvived. Per Holt Ch. J. Comb. 383. Trin. 8 W. 3. B. R. Hyatt v. Hare.

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3. Tho' there is no * *ſurvivorſhip* among merchants, yet if two *joint-merchants* contract with a bailiff, the contract is intire and joint, and by the death of the one ſurvives to the other. Now ſuppoſe a *factor* ſhould bring his action for his wages, it muſt be with the ſurvivor only. Per Holt Ch. J. Comb. 474. Paſch. 10 W. 3. B. R. Martin v. Crump.

* Winch. 52. Arg.—2 Salk. 444. S. C.

(E) *Inter ſe.*

1. IF there be two *joint-merchants*, *one* of them *naming himſelf* a *merchant* ſhall have an *account againſt the other*, *naming him* a *merchant*, and ſhall charge him as *receptor denariorum ipſius B. ex quacunque cauſa & contractu ad communem utilitatem ipſorum A. & B. provenient. ſicut per legem mercatoriam rationabiliter monſtrare poterit.* Molloy 457. cites 10 H. 7. 16. a. out of Co. Litt. 172. Lib. Intrat. 17. 18. 19.

2. A. and B. partners in trade *ſtated their account*, and A. gave B. a *note for the balance*, but at the ſame time B. *promiſed to rectify any error* or miſtake in the account; B. gets judgment againſt A. on the note at law; decreed a *new account* concerning their ſtock and trade, and payments and receipts, and each to produce their books of account on oath, and what ſhall appear due, to be paid with intereſt when and where the maſter ſhall appoint. Fin. R. 431. Mich. 31 Car. 2. Chandler v. Dorſet.

3. Tho' *length of time* is no bar between merchant and merchant, yet *dealings having ceas'd* many years between them, and after diſputes having acquieſced till the death of one of them, the Court will not decree an *account* with the ſurvivor, but leave the plaintiff to his remedy at law. 2 Vern. 276. Mich. 1692. Sherman v. Sherman.

4. Among merchants it is looked upon as an *allowance of an account current*, if the merchant that receives it does not object againſt it in a ſecond or third poſt; per Commiſſioner Hutchins. 2 Vern. 276. Mich. 1692. Sherman v. Sherman.

5. If any partner *borrows any of the partnerſhip-money*, his own

ſhare ſhall be anſwerable for it, and ſhall not be permitted to come into equity and pray an account without making a ſatisfaction for the debt. Abr. Equ. Caſes 9. Trin. 1728.

[For more of Partners in general, ſee Bankrupts, Bills of Exchange, and other proper Titles.]

Party.

(A) Parties *in Suits in Equity.* Of *the Neceſſity* of having proper Parties; *and Who* ſhall be in *general.*

1. *Garniſhee or vouchee are not parties till they have appeared and enterpleaded or entered into the warranty.* Br. Reſommons, pl. 1. cites 3 H. 6. 45.

2. *Several cauſes were brought to hearing together*, where ſome [248] that were parties to one bill were not ſo to another, *and decreed in one againſt one who has no party to that ſuit*; Finch C. ſaid, that on hearing of them together, the juſtice which was to be done on them all appeared, and you ſhall not ſever them now. 2 Chan. Caſes 234. Trin. 29 Car. 2. Turney v. Daws and Mayor.

3. The rule in equity is, where *two or more* are *liable to a demand*, you ſhall not proceed againſt one alone, but muſt *bring all* the perſons liable before the Court. 2 Vern. 195. Mich. 1690. in Caſe of Jackſon v. Rawlins.

S. P. in caſe of *ſeveral adventurers.* Fin. R. 96. Hill. 25 Car. 2.

Ireton v. Lewis.—But where a bill was brought by *ſome* proprietors *in behalf of themſelves, and all other proprietors except the defendants*, it was held good on demurrer by Ld Macclesfield without naming them, there being a great number of them, and ſo no coming at juſtice, becauſe of continual abatements by death &c. Chan. Prec. 592. Trin. 1722. Anon.—See (B) pl. 66. Brown v. Howard.

4. Where there were ſeveral *truſtees*, and all were dead, and a bill was brought againſt the repreſentative of A. the ſurvivor, it was objected, that the repreſentatives of the other truſtees ought to have been before the Court; but the plaintiff *inſiſting only to have an account of what came to the proper hands of A. and of his receipts and diſburſements only*, and not of any joint receipts or tranſactions by him with the other truſtees; the objection was

was over-ruled. Hill. 9 Ann. Abr. Equ. Cafes 74. Lady Selyard v. the Executors of Harris & al.

5. A *nominal perſon only that has no intereſt* is no neceſſary party; and a ſuit may go on without him. MSS. Tab. cites 12 March 1720. Butler v. Pendergraſs.

6. In a Court of Equity it may be neceſſary to make one perſon a defendant in a cauſe, *becauſe another is intitled to his aſſiſtance.* Barn. Ch. Rep. 361. ſays, it was ſaid by Ld. Chancellor. Hill. 1740. in the Caſe of Lowther v. Carlton.

Curſ. Canc. 460. S. P. ——Yet ſometimes, *for avoiding multiplicity of ſuits*, and to bring all parties, who may be affected by the decree, before the Court, the ſuit is by parties who have ſeparate rights and intereſts, as deviſees, legatees, creditors, and ſuch like. P. R. C. 262.—Curſ. Canc. 460. S. P.

7. Ordinarily, ſeveral plaintiffs may not join for *different cauſes;* nor may ſeveral defendants be put in one bill, where the cauſe and *charge* againſt them is *altogether different.* P. R. C. 262.

S. P. Curſ. Canc. 461.

8. Care ſhould be taken, that whoſoever ſues in his own right ſhould have no legal *diſability* upon him, as *outlawry, excommunication*, an *alien enemy* &c. for if he has any, it may be pleaded. P. R. C. 262.

S. P. Curſ. Canc. 460.

9. *But* where *alien enemies by permiſſion come here for refuge*, and live peaceably, the Court will greatly diſcountenance a plea of alien enemy. Ibid.

(B) Parties. To Bills in Chancery. *Who.*

Adminiſtrators.

1. A. Indebted by judgment, dies inteſtate, and leaves a wife and a ſon; the wife takes adminiſtration, and enters on the lands as guardian, and made J. S. her executor, and dies. J. S. poſſeſſed the perſonal eſtate of A. and the wife, and entered on the lands as guardian to the ſon. The ſon dies. The heir of the ſon pays 200 *l.* on the judgment, and brings his bill to be repaid. He ſhould make the *adminiſtrator de bonis non* of A. party. 2 Chan. Caſes 197. Trin. 26 Car. 2. Breſſenden v. Decreets.

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Ibid. 334. S. P. Hill. 30 Car. 2. Griffith v. Bateman.

2. Bill by a judgment creditor to *diſcover inteſtate's eſtate;* defendant *demurs*, for that the *adminiſtrator* is not made a party, he being the perſon to whom defendant ought to pay what (if any thing) is due, and that the plaintiff is not capable to demand or diſcharge the ſame, and then pleads the ſtatute of limitations. The plea and demurrer were allowed. Fin. R. 303. Trin. 29 Car. 2. Rumney v. Mead & al.

3. A. leaves 100 *l. legacy to B.*—C. claims this 100 l. as *a gift by B. to C. a little before B.'s death.* The *adminiſtrator of B.* muſt be made a party as well as the executor of A. Fin. R. 387. Trin. 30 Car. 2. Wall v. Eaſtmead and Hakes.

4. A bill is brought, and a decree had againſt *feme adminiſtrator*

ſtrator and her baron; the *feme dies.* Whether the plaintiff can proceed againſt the baron, without bringing the *adminiſtrator of the wife* before the Court? 2 Vern. 195. Mich. 1690. Jackſon v. Rawlins.

5. A bill was brought by creditors of the huſband againſt the widow who had an adequate jointure to her whole fortune, but was in conſideration of part only, and the remainder was out upon bond un-altered, and it was to ſubject the remainder to pay debts; it was objected, that the adminiſtrator of the huſband was not made a party; but the wife *being called adminiſtratrix in the bill,* and having by her anſwer *confeſſed that ſhe had poſſeſſed the perſonal eſtate and diſpoſed of it,* and being the perſon by law *intitled to adminiſtration,* though ſhe denied by anſwer that ſhe had taken adminiſtration, the Court over-ruled the objection. Ch. Prec. 63. Mich. 1696. Cleland v. Cleland.

6. Bill by the heir to avoid a leaſe made by his father, who was at the time a *lunatick*; the *attorney general* muſt be made a party. Fin. R. 135. Mich. 26 Car. 2. Leigh v. Wood and Leigh. *Attorney-General.*

7. B. was indebted to A. by bond, and was *outlaw'd before judgment at A.'s ſuit.* A. brought his *bill* in equity *againſt B. and one C. a truſtee of an annuity payable to B.* of 20 l. a year deviſed to B. out of a perſonal eſtate, to ſubject this annuity to A.'s debt. Ld. C. Parker directed the plaintiff to get a grant from the Exchequer Court, and make the attorney general a party, and then come back again hither. Wms's Rep. 445. Trin. 1718. Balch v. Waſtall.

8. A *decree* was made in the time of King Cha. 1. *for payment* of 40 l. a year *out of* particular *lands* formerly *part of the foreſt* of Bladen *to the vicar of C.* in Wiltſhire, *in lieu of tithes.* A *bill* was brought againſt the land-owners *to eſtabliſh a right to this* 40 *l.* a year. It was objected that theſe land-owners were *tenants to the Crown,* of lands lying within the bounds of the foreſt, which formerly paid no tithes, and that the attorney-general ſhould for that reaſon have been made a party. But it was anſwer'd, that it did *not appear* by the bill *that they are leſſees under the Crown,* and the defendants have not inſiſted upon it in their anſwers, and ſo that is out of the caſe. And the Court took no notice of the objection. G. Equ. Rep. 230. Paſch. 12 Geo. in the Exchequer. Cuthbert v. Weſtwood & al.

9. Bill for diſcovery of a bankrupt's eſtate; defendant demurr'd, becauſe the *bankrupt* was not made a party; and allow'd. Vern. 32. Hill. 1688. Sharp v. Gamon. *Bankrupt.*

10. The plaintiff being a *reſiduary legatee* brought his bill *againſt* the defendant, who was *one of the executors* (without his co-executor) *to have an account of his own receipts and payments.* Defendant inſiſted at the hearing, that his co-executor ought to be made a party; and that tho' a bill might be brought againſt *one factor* without his companion, if he were *beyond ſea,* yet that had been allowed only for neceſſity, and that it was other- Beyond ſea. *Perſons beyond ſea.*

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11. B. in 1661 made his will, and amongſt other legacies *deviſed an annuity* of 20 l. per ann. *to C.* to be paid quarterly, and gave other legacies, and then has this clauſe, *all the reſt of my real and perſonal eſtate not before bequeathed, (my debts being paid) I give to my brother* D. and makes him ſole executor. D. paid the annuity ſeveral years and made his will, and *charged all his real and perſonal eſtate with this annuity*, and deviſed all his real and perſonal eſtate in England (part of which was the eſtate of B.) to his 2 daughters who lived in England, and were defendants; and all his real and perſonal eſtate in Barbadoes to his *two other daughters* that *lived in Barbadoes*, and were no parties to this ſuit. The 2 daughters here paid the annuity ſeveral years, but then ſtopp'd payment, on pretence that the words of B.'s will did not charge his real eſtate with this annuity; or if they did, yet the perſonal eſtate ought to be firſt exhauſted, which did not appear to be. And the real and perſonal eſtate in Barbadoes being equally liable by the will of D. the daughters, who have thoſe, ought to be made parties; for they might have made ſatisfaction; or however they ought to have been before the Court, that the defendants might at the ſame time have a decree againſt them to pay their proportion; for tho' at law the party may take his remedy againſt which he pleaſes; yet in equity all muſt be parties, that right may be done to all at the ſame time; on the other ſide it was ſaid, admit it to be ſo in caſe it may be eaſily done, yet it is *impracticable* in this caſe, and therefore ought not to be required; and ſo held my Ld. Keeper, and that the lands were charged by B.'s will; and if any ſatisfaction has been made by thoſe in Barbadoes, it lay on the defendants' part to ſhew it. Paſch. 1702. Abr. Equ. Caſes 74. Quintine v. Yard.

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21. Two executors are plaintiffs, *one is excommunicated*, the other ſhall be ſevered and the defendant ſhall anſwer him. Toth. 137. cites Hill. 39 Eliz. Tomes v. Vaughan.

22. Executor *of a mortgagee* ought to be a party where the *heir ſues to have the money paid or to foreclose* the mortgage. Ch. Caſes 51. Paſch. 16 Car. 2. Freake v. Hearſey als. Horſey.

2 Ch. Caſes 29. Paſch. 32 Car. 2. Meeker v. Tanton.—

Nelſ. Ch. R. 93. S. C.—Where the heir of the mortgagee *foreclosed* the mortgagor, the executor of the mortgagee not being party, upon a bill by the executor againſt the heir of the mortgagee and mortgagor, the land was decreed to the executor. Arg. 2 Vern. 67. Trin. 1688, cites it as decreed in Caſe of Gobe v. the Earl of Carliſle.

23. Money after a decree inroll'd was certify'd due to the *executor of the plaintiff*, and upon exceptions to the report, becauſe he was no party it was diſallowed. Bill diſmiſs'd unleſs cauſe. 3 Ch. R. 63. 22 Car. 2. Cullam v. Dove.

24. *Obligee in a marriage ſettlement in truſt* and the *executors of the obligor* muſt be parties to the bill, either as plaintiffs or defendants. 3 Ch. R. 52. . . . . Car. 2. Bagg v. Foſter.

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25. 3 *Sureties*; one pays the debt, another *dies inſolvent*. In a bill againſt the 3d, the *executors* of him that dy'd inſolvent muſt be made parties. Finch's R. 15. Mich. 25 Car. 2. Hole v. Harriſon.

26. A. ſeiſed of lands in fee *raiſed a term of* 1000 *years* to B. *to be extinguiſh'd if* A. paid 80 l. per ann. to B. his executors &c. for 42 years, which being expir'd, and A. being dead, his heir brought a bill for a *ſurrender of the reſidue of the ſaid term*. Defendants *demur* becauſe the *executor* or adminiſtrator of A. was not made a party; but held inſufficient. Fin. R. 104. Hill. 25 Car. 2. Bampfield v. Vaughan.

27. Bill againſt defendants as *executors* to pay a legacy of 100 *l.* deviſed to plaintiffs by their father, and to *account for the ſurplus of his eſtate*; one of the defendants *demurr'd*; for that he and one J. D. were made *executors durante minore ætate of* A. the plaintiff's brother, *who attained his full age and dy'd*, ſo that the ſaid executorſhip being determined, *ſome other executor* or adminiſtrator ought to be call'd to anſwer who might poſſibly make out ſome ſufficient releaſe or diſcharge, and demurr'd as to the account of the ſurplus; becauſe there are *others to whom defendants are liable to account* as well as to the plaintiffs, and they not parties to this ſuit, ſo may be put to unneceſſary trouble and ſuit concerning the ſame. The Court ordered defendants to anſwer as to the 100 *l.* but allow'd the demurrer as to the demand of account of the ſurplus, and that plaintiffs might bring a new bill as to that. Fin. R. 113. Hill. 25 Car. 2. Atwood and Davis v. Hawkins.

P. R. C. 262. S. P. ——S. P. Curſ. Canc. 400.

28. A *legatee of a term* ſu'd for it, but made not the *executor* party, and therefore the bill was not good, tho' the plaintiff alleged in the bill, that the executor had aſſented to the legacy. Chan. Caſes 277. Trin. 28 Car. 2. Moor v. Blagrave.

29. A. gives *bond to B. in truſt for C. a feme covert*. A. after death of the huſband pays the money to the executor of the huſband.

huſband. Ordered to make the *executor of the huſband* a party. Fin. R. 330. Mich. 29 Car. 2. Flavel v. Ball.

30. If a judgment be had at law againſt one obligor, you may ſue the *executor* of him alone to diſcover aſſets &c. becauſe the bond is drown'd in the judgment. Quære. 2 Vent. 348. Mich. 31 Car. 2. Anon.

31. Defendant demurr'd for want of proper parties, *one of the executors* not being made a party, and the *demurrer overrul'd*, becauſe the plaintiff had alleged in his bill that he *knew not who was the other executor*, and pray'd that defendant might diſcover who he was and where he liv'd. Vern. R. 95. Mich. 1682. Bowyer v. Covert.

So if an executor in truſt is outlaw'd, and a witneſs prov'd that he had inquired after but could not find him, this was thought a full anſwer to the objection, that ſuch executor was not made a party. Wms's Rep. 684. Mich. 1720. in Caſe of Heath v. Percival.

32. A. *deviſed that his executors ſhould ſell his land*, and made 2 executors; *one executor died, and the other renounced*, by reaſon whereof *adminiſtration was granted to J. S. who brought a bill to compel a ſale*. It was objected, that there wanted parties, the executor not being made defendant; for tho' he had renounced, yet the power of ſale continued in him, and was altogether collateral to the executorſhip. But there being only a power and *no eſtate deviſed to the executors*, this objection was overrul'd. 2 Wms's Rep. 308, 309. Mich. 1725. Yates v. Compton.

But the Reporter adds a quære. Ibid. 309. —S. C. Caſes in Equ. in Ld. King's time 54. Hill. 11 Geo. 1. ſays, the bill was brought againſt the heir at law, and as to the executor's not being made party it was anſwered, that the *eſtate deſcended to the heir at law, and he is only a truſtee to the uſe of the will ſince the executor renounced*, and ſo there was no occaſion to make him party; and it was ſo held.

Foreigners.

33. Ld. Chancellor doubted, whether a foreigner can be ſerved with a ſubpæna *in a foreign country*. Hutchins ſaid, he remembred that the great Duke of Tuſcany had laid ſeveral perſons by the heels for executing a commiſſion to examine witneſſes in his dominions without his leave. Ch. Prec. 83, 84. Mich. 1698. Cowſlad v. Cely.

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Heir.

34. Where the executor ſues an account of the ſurplus money being deviſed to him, the heir ſhould be party, or elſe he is not bound. Per Ld. Coventry. N. Ch. R. 34. Gird v. Toogood.

35. A. ſeiſed of lands in fee *binds himſelf and his heirs in a bond, and deviſes his lands to J. S. in fee*. If the obligee brings a *bill upon the ſtatute* 3 & 4 *W. & M.* 14. to ſubject the deviſee to the payment of debts, he muſt make the heir of the deviſor a party; otherwiſe if there be no heir. And perhaps it may be otherwiſe too, if the bill had charg'd that the plaintiff had made inquiry, and could find or *diſcover no heir*. Wms's Rep. 99. 100. per Lord C. Cowper. Mich. 1707. Gawler v. Wade.

Joint-covenantors, factors &c. Vide (A) pl. 3 and in marg. and ſee pl. 54. 55. infra.

36. If *obligors* are *bound jointly and ſeverally*, and one dies, the executor of the deceaſed obligor may be ſued in equity for the debt, without making the ſurviving obligor a party. Per Lord King; for were it otherwiſe, what was intended to ſtrengthen the ſecurity would weaken it. 2 Wms's Rep. 313. Mich. 1725. Collins v. Griffith.

37. 'Twas admitted that if there are *three joint-factors*, and a man has a *demand againſt them jointly*, a bill againſt any *one of them* for the whole duty ſhall be good, and that there are divers precedents of it. Sed quære if it be not only where the factors are *beyond ſea*. Vern. 140. Hill. 1682. in Caſe of Barker v. Wild & al.

Joint tenants.

38. Two *jointenants* for life muſt both be parties plaintiffs in a bill, or the bill muſt ſhew that one is dead. Fin. R. 82. Hill. 25 Car. 2. Weſton v. Keighly.

39. *Joint-leſſees* of water-ſprings near the city of London brought a bill, and ſuggeſted the third to be dead, who was living, and held not well; and it being for an account, it was held per Cur. that bringing him before the Maſter would not be ſufficient. Wms's Rep. 428. Paſch. 1718. Stafford v. City of London.

Legatees.

40. Adminiſtrator of A. executor and legatee of B. brought his bill againſt D. for an *account of B.'s eſtate*, who was the father of D.—D. *demurr'd*, becauſe his brothers C. and E. who are *legatees* by the ſaid will, and are *charged to combine with defendant*, are not made parties; demurrer allow'd with the ordinary coſts of 5 marks. Fin. R. 202. Hill. 27 Car. 2. Galle v. Greenhill.

When legacies are given to diverſe perſons, each alone may ſue for his own legacy.

41. A. deviſes 100 *l. a piece to B. C. D. and E. and makes them reſiduary legatees*; if either of them ſues for the legacy, the other three need not be made parties; but if for the reſiduary part, they muſt be *all* made parties. Fin. R. 243. Hill. 28 Car. 2. Dunſtall v. Robet.

2 Chanc. Caſes 124. Mich. 34 Car. 2. Haycock v. Haycock——Tho' the legacies of each were to *increaſe or diminiſh* as the eſtate ſhould do in the hands of executor. Ibid. ——S. P. 2 Chan. Caſes 178. Mich. 2 Jac. 2. Attorn. Gen. v. Rider.

42. A *legacy* given *to two*, one cannot ſue for it. Per Sol. Gen. 2 Chan. Caſes 124. Mich. 34 Car. 2. Haycock v. Haycock.

43. If *reſiduum bonorum* be given *to divers*, they muſt all join. Ut ſup. per eundem.

44. If legatee brings a bill *againſt an executor* for diſcovery of aſſets, 'tis no objection that he has not made the *other legatees* parties. 12 Mod. 522. p. 13 W. 3. Anon.

London Caſes.

45. While the *judgment againſt the Charter of London* was in force, a bill brought for a debt due from the Chamber of London was againſt the old Lord Mayor and the Commiſſioners. Vern. 311. Hill. 1684. Naylor v. Corniſh & al.

Lord of a Manor.

46. The *plaintiff* by his bill *pretends title to certain lands* as freehold, which lands Arnold the *defendant claims to hold by copy of Court-roll* to him and his heirs, and *prayed in aid of S. the lord of the manor*; nevertheleſs the plaintiff ſerved the ſaid Arnold with proceſs to rejoin, without calling the ſaid S. thereunto, which this Court thinks not meet, therefore ordered the plaintiff ſhall no more proceed againſt the defendant beforehe have

[254] Bill was diſmiſs'd, becauſe the *tenants* were

have called the ſaid L. in proceſs. Cary's Rep. 81. 82. cites 19 Eliz. Lucas v. Arnold. *only parties and not the lord*, they having attorned to a new title againſt their firſt leſſor. Mſs. Tab. cites 7 March 1717. Ward v. Reily.

47. Where a third mortgagee to bar equity buys in the firſt, he is not obliged to make the *ſecond mortgagee* party to that bill and decree. 3 Ch. R. 86. 26 Car. 2.——N. Ch. R. 71. 24 Car. 2. Sherman v. Cox. S. P. and S. C. *Mortgagee, Mortgagor, Remainder-man of mortgage.*

48. A bill was to redeem or foreclose a *mortgage*. 'Twas objected that the defendant was only tenant for life of the equity of redemption, and the *remainder-men* over were not made parties. The Court directed a bill to be brought by the defendant to have a ſale made, the mortgagee's debt paid, and the ſurplus diſtributed amongſt the tenants for life and the remainder-men in proportion, according to their reſpective intereſts. 2 Vern. 117. Mich. 1689. Thynn v. Duvall.

49. The plaintiff's cauſe was heard before the Maſter of the Rolls, and the Maſter ordered that *for want of proper parties* (viz. for that the *mortgagor* was not made a party, the plaintiff being a ſecond mortgagee, and conteſting the validity of the firſt mortgage pretended to be made to the defendant, and to have account if a true one &c.) the plaintiff ſhould pay 5 marks coſts, and make the mortgagor a party. The plaintiff ſets down his cauſe as an original cauſe, and not by way of appeal, having indeed amended his bill, but *never ſerved the mortgagor with proceſs*, which he pretended he could not do, becauſe the *mortgagor* was *beyond ſea*, but that they left a ſubpœna at the laſt place of his abode, viz. at the King's Bench, where he had been priſoner, and eſcaped: but the Court would *not hear the cauſe*: for the plaintiff ought to have the mortgagor's anſwer, or run out all the proceſs of contempt to a *ſequeſtration*, before he can hear his cauſe againſt the defendant. 3 Ch. R. 215. Thompſon v. Baſkervill.

50. A *mortgagee* may *foreclose* another mortgagee whom he has brought before the Court, tho' there are ſome *intervening incumbrancers* not made parties, and without firſt foreclosing the mortgagor. 2 Vern. 518. Mich. 1705. Draper v. Jennings.

51. An *eſtate* is *charged with ſeveral incumbrances*, come ſemble, *one* incumbrancer *may ſue without making the reſt parties*; at leaſt it is cured by a decree directing an account to be taken of all the mortgages and incumbrances that affect the eſtate. MSS. Tab. 12 July 1721. Odell v. Graydon.

52. Where a *ſettlement is ſet up*, all the mean incumbrancers, and likewiſe the remainder-men muſt be made parties. MSS. Tab. 1721. Edgeworth v. Edgeworth.

53. *A. mortgaged to B. for* 500 *years to ſecure* 350*l.* Afterwards, and ſo long ſince as 1704, *B. made an under mortgage to C. for* 300*l.* B. *died. C. brought a bill againſt A. to redeem.* The repreſentatives of B. ought to be made parties to prevent another account as to what is due upon the original mortgage to B. 2 Wms's Rep. (643) Mich. 1731. Hobart v. Abbot.

Obligors and Obligees.—See pl. 36.

54. Bill on a counter-bond entered into by *a great number of obligors*, ſome of whom were dead and left aſſets, and others dead and left none, and others living. The Court may proceed againſt any, and make a decree, tho' *all the obligors* are not before the Court; and the reaſon why all the obligors are to be before the Court is a rule of conſcience, and to prevent further ſuits for *contribution*, but is not of neceſſity, and therefore may be *diſpenſed withal*, eſpecially where the parties are ſo many, and the *delays* ſo *multiplied* and continued. Fin. R. 105. Hill. 25 Car. 2. Lady Cranborne, Bowyer, and Dalmahoy v. Criſp.

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55. If one ſues in Chancery an executor of one obligor to diſcover aſſets, you muſt make *all the obligors* parties that the charge may be equal. 2 Vent. 348. Mich. 31 Car. 2. Anon.

56. Whether you may not ſue the principal, and leave out them that are bound only as *ſureties*? 2 Vent. 348. Mich. 31 Car. 2. Anon.

57. Bill for relief againſt a *bail bond fraudulently aſſigned* by the ſheriff. The plaintiff in the action at law muſt be made a party. Vern. 87. Mich. 1682. Iſrael v. Narbourn.

Occupiers or Poſſeſſors.

58. A bill was brought againſt land-owners *to eſtabliſh a right of 40l. a year inſtead of tithes, which by a decree in time of Cha. the Firſt was to be paid out of particular lands (formerly part of the foreſt of Bladon) to the vicar of Cricklade in Wilts.* It was objected, that the occupiers as well as the land-owners ought to be made parties to the bill; for that a decree againſt the land-owners would not affect the occupiers. To which it was anſwered, that it would be endleſs to make all the occupiers parties; and if that was neceſſary to be done, the plaintiff could never come at his right, for there were great numbers of them, and any ſingle one dying would put the plaintiff to his bill of revivor, and cited the Caſe of BISCOE v. THE UNDERTAKERS OF THE LAND BANK, before Ld. Keeper Wright, who ſaid, he would not oblige them to bring all before the Court, ſince the right might be determined by having a few, which the Court thought reaſonable. Per Cur. tho' we can decree only againſt the land-owners, who are before the Court, yet that will affect the lands; the 40l. per ann. ought to be apportioned among the owners, and the original decree may be carried againſt the occupiers. And decreed a commiſſion ſhould go to inquire into, and aſcertain the value of the lands, the owners and occupiers names, and what proportion of the 40l. per ann. each tenement ought to pay. G. Equ. Rep. 230. Paſch. 12 Geo. 1. Cuthbert v. Weſtwood & al.

59. If a man's *goods come into the hands of different perſons one after another*, an action of *trover* may be brought againſt any of the perſons that has ever had the poſſeſſion of the goods, without making the other perſons defendants. Barn. Ch. Rep. 325. cites it as ſo ſaid by Ld. Chancellor in the Caſe of Harriſon v. Pryſe.

60. *A. B.* who had been *Governor in the Eaſt Indies, purchaſed*

chaſed 1000*l. South-Sea ſtock*, and accepted it in the South-Sea books a ſhort time after he had bought it. *Another A. B. of R. who had likewiſe South-Sea ſtock, got this* 1000*l. ſtock placed to his account* in the South-Sea books under the deſcription of 1000*l.* ſtock belonging to A. B. of R. Some years after, *A. B. of R. transferred this* 1000*l. ſtock to J. S. his broker, in order to ſell it for him, and J. S. ſold it accordingly.* A. B. the governor died. The fraud was diſcovered, and ſatisfaction was demanded of A. B. of R. by M. the executor of A. B. the governor, which ſtruck A. B. of R. with ſuch confuſion that he died the next day. M. exhibited a bill againſt the adminiſtrator of A. B. of R. to be relieved on account of this fraud. It was objected on the hearing that J. S. ſhould have been made defendant. But Ld. Chancellor ſaid, his opinion was, that there was no occaſion for it. Barn. Ch. Rep. 324. Hill. 1740. Harriſon v. Pryſe.

Officers.

61. A *rector of one of the new churches brought* a bill *againſt the treaſurer of the money allotted for the building them*, praying to have his dividend &c. and that the remaining part of the money which had not already been laid out in the purchaſe of lands, might now be laid out in a purchaſe. Ld. Chancellor thought the treaſurer was nothing more than an officer or ſervant under the commiſſioners, and that he is bound to act according to their directions, and that the *commiſſioners ought to have been made parties.* And accordingly they were afterwards made defendants. Barn. Ch. Rep. 377. Hill. 1740. Vernon v. Blackerby.

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Parties intereſted &c.

62. Bill for relief againſt an award made by ſome members of the Eaſt India Company. Thoſe members and the arbitrators are made defendants; they may *demur to the whole bill* without anſwering to the fraud; for the *plaintiff can have no decree againſt them, nor can their anſwers be read againſt* the Company; but they ſhould be examined as witneſſes. 2 Vern. 380. Trin. 1700. Dr. Steward v. Eaſt India Company.

Purchaſors.

63. In caſe of *apportionment of rent* by reaſon of ſeveral purchaſes, it ſeems all the *purchaſors* ſhould be made parties, yet in caſe of circumvention, the want of ſuch parties was taken no notice of. Vern. Chan. Caſes 273. Hill. 27 and 28 Car. 2. . . . . v. Hawkes.

Remaindermen See pl. 48.

64. Lands were deviſed in truſt for two young ladies, and if they died within age, and before marriage, the remainder over; now the youngeſt being 16 years old, and the other 18, they brought their bill for execution of the truſt, but it was diſmiſſed for want of making the remainder-man party, per Ld. Wright. 12 Mod. 560. Mich. 13 W. 3. Anon.

65. Lands *on marriage* of A. with M. *were conveyed in ſtrict ſettlement*, but in the deed was a *proviſo, that A. ſhould have a power of diſpoſing of thoſe lands in ſuch manner as he ſhould think proper, in caſe he ſhould ſettle other lands of* 100*l. a-year to the ſame uſes.* They had iſſue one daughter. J. S. articled with A. for

for the purchaſe of the ſettled lands without having any notice of this ſettlement. He entered upon the premiſſes, and then hearing of the ſettlement, refuſed to pay the purchaſe money. A. brought his bill againſt J. S. to compel payment, ſuggeſting that *at the time of the contract, he had ſettled other lands of* 100*l. a-year to the ſame uſes.* Ld. Chancellor was of opinion, that the *wife and daughter ought to be made parties* to this ſuit; for otherwiſe they may bring a new bill, and overturn the title of the defendant, and the bill may be amended by praying that they may join in the conveyance to the purchaſor, and a decree may be made to the purpoſe. And decreed accordingly. Barn. Ch. Rep. 371. Hill. 1740. Lamplugh v. Hebden.

Tenants of a manor.

66. On a bill to ſettle the *cuſtoms of the manor as to fines upon deaths and alienations*, an iſſue was directed, and verdict given; Lord Keeper Wright held, that though *ſome only* of the tenants were parties to the bill, yet the reſt would be bound, Mich. 1701. Abr. Equ. Caſes 163. Brown v. Howard.——Ld. Keeper cited Ld. Gerard's Caſe.——And Ld. NOTTINGHAM's Caſe, and ſaid, that in theſe and 100 caſes more all were bound, and that no right could be done otherwiſe by reaſon of perpetual abatements,—and cited Sir WILLIAM BOOTHBY's Caſe, in the dutchy where ſuch bill was amended and made to be on behalf of the plaintiffs and all the reſt of the tenants.

Per Lord Macclesfield, Ch. Prec. 591. The Proprietors of Temple Mills Braſsworks v. the late Managers. S. P.

Tertenants.

67. To a bill for *charitable uſes* all the terretenants need not be made parties. 1 Salk. 163. in Canc. 1712. Attorney General v. Shelley.

A. charged all his lands in Chigwell in Eſſex, and Enfield in Middleſex, with 20*l. a year to the poor of Enfield*; in a *ſuit* on behalf of this charity *for the arrears of this rent-charge*, it is not neceſſary to make all the tertenants of the lands, out of which the rent iſſues, parties. Wms's Rep. 599. Hill. 1719. Attorney General v. Wyburgh & al.

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Truſtees.

68. Note, by the beſt opinion in Chancery, the *one* feoffee of truſt ſhall not anſwer without his companion. Br. Reſponder, pl. 37. cites 8 E. 4. 5.

69. Deviſe *of perſonal eſtate to truſtees* to pay to his wife during her life 100*l.* per annum *in lieu of dower*: the *executors in truſt* ought to be made parties, and leave to do ſo was given *at making the decree.* Fin. R. 134. Mich. 26 Car. 2. Leſquire v. Leſquire.

70. Bill for a ſpecifick performance of a *covenant with A. for the benefit of B.*—A. muſt be made a party to the ſuit; but if it had been only a *promiſe*, either A. or B. might have brought the action, according to ROLL and YATE in Yelv. 177. Hill. 1688, 2 Vern. 36. Cook v. Cook.

71. In directing an iſſue a *bare truſtee* ought not to be a party; for that might hinder his being an evidence. MS. Tab. cites 1703. Dawſon v. Franklin.

72. By a marriage ſettlement an eſtate was limited *to A. his heirs and aſſigns during the lives of the plaintiff and his wife, in truſt to employ the profits to their uſe*, with remainder over; upon a bill

a bill to ſet aſide a former ſettlement made by him as gotten by fraud, plaintiff had leave to amend his bill, and make A. who had the legal eſtate, a party, and without which he could have no decree. Hill. 10 Geo. 9 Mod. 80. Hobſon v. Staneer.

73. Where a truſtee *conveys over a real eſtate in his hands to another, who has no notice of the truſt*, and a bill is brought by ceſty que truſt, the truſtee muſt be made a defendant; per Ld. Chancellor. Barn. Ch. Rep. 325. Hill. 1740. in Caſe of Harriſon v. Pryſe.

74. On a motion at the Rolls after hearing, ſome of the plaintiffs got an order ex parte to *ſtrike out the name of one of the plaintiffs, and make him a witneſs* at a trial, which ſurpriſed the defendant, and the Court ſet aſide that trial, and made the witneſs a plaintiff again. 2 Chan. Caſes, 80. Mich. 33 Car. 2. Exton v. Turner. *Witneſs.*

(C) *Want of proper Parties.* The *Effect thereof.*

See Abatement.

1. IN all ſuits great care ſhould be had, that there be proper parties for and againſt whom the Court may reſpectively make a decree; and alſo, that there be all neceſſary ones; for if upon the face of the bill it appears that any of theſe are wanting, the defendant may for that cauſe *demur*; or if he does not, yet the Court many times upon hearing will *not* for want of them *proceed to a decree*; or if it does, the decree may be *revers'd*; or if it be not reverſed, yet none but the parties to the ſuit, and thoſe claiming under them, are *bound by it*. P. R. C. 261. S. P. Curſ. Canc. 459.

2. Appellant to pay the *coſts* of the day for want of proper parties, and to be at liberty to amend his bill. MS. Tab. cites 9 March 1718. Morriſon v. Neſbite.

(D) *Who* ſhall be ſaid to be Party. *When and by what praying Proceſs.*

1. A. A bankrupt brought a bill againſt B. his ſuppoſed debtor to compel him to account; B. inſiſted that the aſſignees ought to be made parties; A. by order *amended his bill, and charged the aſſignees, but the prayer of proceſs was (as before) only againſt B.* who again put in the ſame plea. And by Ld. C. Parker, they only are defendants againſt whom proceſs is pray'd, and no proceſs being pray'd againſt the aſſignees, they are ſtill not defendants, and conſequently the plea is good. Wms's Rep. 593. Mich. 1719. Fawkes v. Pratt. [258]

(E) Of

(E) Of *altering* the *Parties*.

By motion of courſe, either plaintiffs or defendants

1. LEAVE was given to amend a bill, and *add plaintiffs* as well as defendants parties. Fin. R. 114. Hill. 25 Car. 2. Hudſon and Fiſher & al. v. Fletcher.

may add parties before anſwer. P. R. C. 263.——S. P. Curſ. Canc. 461.——Any time before *examination*, the Court will ſuffer the plaintiff to amend his bill, and *add parties*, and without coſts, if there be no plea or demurrer, and ſo as the addition be not ſo great as the defendant will need a new copy of the bill, nor need put in a further anſwer, and that the plaintiff amend the defendant's copy according to the addition &c. P. R. C. 264.——S. P. Curſ. Canc. 461.

S. P. Curſ. Canc. 461. —*So a defendant* may be ſtruck out any time

2. *Plaintiffs* may be ſtruck out of the bill *any time before hearing*, ſo that thoſe left are ſufficient to anſwer the coſts; or if they be not, yet it may perhaps be allowed upon giving ſecurity to anſwer the coſts. P. R. C. 263.

before hearing; but if it be after appearance, it will be with coſts; the bill as to him being diſmiſſed. P. R. C. 263.——S. P. Curſ. Canc. 461.

S. P. Curſ. Canc. 461. *So if* a defendant by anſwer *diſclaim all intereſt*

3. *Before* a *defendant has anſwered*, his name may, upon the plaintiff's motion, be ſtruck out of the bill. P. R. C. 263.

in the matter in queſtion, or appears to be a diſintereſted perſon, his name may commonly be ſtruck out at the requeſt of either plaintiff or defendant. P. R. C. 263.—S. P. Curſ. Canc. 461.

S. P. But if a *defendant* be added after publication, the

4. The Court will, *after publication*, and any time *before hearing*, upon cauſe ſhewn, ſuffer parties to be added. P. R. C. 264.

cauſe as to ſuch defendant, muſt be heard upon bill and anſwer only. Curſ. Canc. 461.—— P. R. C. 263. S. P.

S. P. Curſ. Canc. 461.

5. *After a decree*, and *before it is enrolled, perſons intereſted may, by petition, be made parties*, and let into it, if their right be interwoven with the other plaintiffs, and ſettled (in the general) by the decree, they paying the plaintiffs a proportionable part of the charges of the ſuit &c. P. R. C. 264.

S. P. Curſ. Canc. 462.

6. If one be *named plaintiff without his privity* or order, he may come into Court and *renounce the ſuit*; or he may give a warrant under his hand and ſeal to counſel to move, and conſent that the bill be diſmiſs'd, or if there be more plaintiffs that it may be diſmiſſed as to him, and it will be diſmiſs'd accordingly. P. R. C. 264.

[For more of Party in general, ſee Abatement, Diſmiſſion, Faits or Deeds, Hearing, Jointenants, and other proper Titles.]

Paupers.

(A) *Who may be* admitted a Pauper.

1. 11 *H.* 7. 12. ENacts that *every poor perſon having cauſe of action, ſhall have original writs and ſubpœnas gratis; alſo the Judge or Judges of the Court where the ſuit depends, ſhall aſſign him counſel and attorney, who are thereby enjoined to diſpatch his buſineſs without fees.*

2. In 23 *H.* 8. *cap.* 15. of coſts, there is a *proviſo that all and every ſuch poor perſon or perſons, being* plaintiff *or* plaintiffs, *in any of the ſaid actions, bills, or plaints, which at the commencement of their ſuits or actions, be admitted by diſcretion of the Judge or Judges, where ſuch ſuits or actions ſhall be purſued or taken, to have their proceſs and counſel of charity without paying any money or fee for the ſame, ſhall not be compelled to pay any coſts by virtue and force of this ſtatute, but ſhall ſuffer other puniſhment, as by the diſcretion of the Juſtices or Judge, before whom ſuch ſuits ſhall depend, ſhall be thought reaſonable; any thing afore rehearſed to the contrary hereof notwithſtanding.*

A poor man, defendant, in a ſuit brought in the Court of Common Pleas, applied in the Treaſury to be admitted to defend in forma pauperis, but was denied. The *ſtatute* for admitting paupers *extends to plaintiffs* only, and *not to defendants*. Barnes's Notes in C. B. 227. Paſch. 8 Geo. 2. Anon.

3. It was mov'd to diſpauper a plaintiff, becauſe he *had a living of* 40 *l. a year;* but becauſe he *had ſworn that he was indebted more than he was worth*, Turton and Gould J. were againſt it: but Holt held that his being indebted, or his eſtate being mortgaged, is no reaſon, and that it is enough that he has a conſiderable eſtate in poſſeſſion. 2 Salk. 537. Mich. 11 W. 3. B. R. Anon.

4. The Court permitted one to *defend an indictment of conſpiracy* in forma pauperis. Paſch. 9 Geo. 2. The King v. Wright.

5. It has been complained of as an abuſe, that both parties, *plaintiffs and defendants*, have been admitted in forma pauperis *in the ſame cauſe*; for that it tends much to the trouble and diſquiet of the Court, and incourages the parties to be vexatious. Curſ. Canc. 489.

(B) *In what Caſes, and how.*

1. IF a man will *ſwear to the prothonotary that he is not able to pay* for the entring his pleas in the roll, the prothonotary ſhall enter it without taking any thing. 15 E. 4. 26. b. pl. 2.

L. P. R. tit. Forma Pauperis, ſays the ſame was ſaid by Wild at the bar.

2. In an action upon the *Caſe for ſlanderous words* none ſhall be admitted to ſue in forma pauperis; per Haughton J. 2 Roll. R. 237. Mich. 20 Jac. B. R. Anon.

S. P. Curſ. Canc. 488. Where a man will [260] ſwear that he hath *not* 10*l.* in the world, *except his wearing apparel, and the thing which he ſues for*; a *Judge* will, upon a petition, and ſuch an affidavit, admit him to ſue in forma pauperis, and aſſign him counſel, and an attorney. L. P. R. tit. Forma Pauperis.

3. The way for either party to obtain the admiſſion is, firſt for the party to make an *affidavit before a Maſter that he is not worth* 5*l.* then to draw a *petition to the Lord Chancellor* or Maſter of the Rolls, to be admitted to have a counſel and clerk aſſigned him, naming whom in the petition. P. R. C. 266.

S. P. Curſ. Canc. 488. *So at law* he muſt have a counſel's hand to his petition, certifying the Judge to whom the petition is directed, that he conceives the petitioner hath good cauſe of action; and he muſt alſo make oath *that he is not worth* 10*l. all his debts paid, except the matter in queſtion.* L. P. R. tit. Forma Pauperis.—The *defendant needs no certificate.* P. R. C. 266.

4. If the complainant petitions, he muſt at the bottom of his petition have a *certificate under the hands of two counſel*, ſignifying they conceive he has good cauſe of ſuit; except the bill be already filed, and then he needs no certificate. P. R. C. 266.

5. This being done, and the affidavit annex'd to the petition, he preſents the ſame; and if there appear no cauſe againſt it, my Lord Chancellor, or the Maſter of the Rolls, *underwrites an order* according to the petition. P. R. C. 266.

6. Rolle Ch. J. ſaid, that he did not uſe to admit any one *generally* to ſue in forma pauperis, that is, to ſue *in all cauſes*, but only to ſue ſo in one cauſe, by virtue of that admittance, 1654. B. S. So that if he had other cauſe to ſhew, he muſt petition again to be admitted to ſue in forma pauperis, & ſic toties quoties. L. P. R. tit. Forma Pauperis, cites 1654. B. S.

7. A *defendant* cannot be admitted to ſue in forma pauperis without *firſt moving the Court*; by a late rule. Comb. 77. Hill. 3 & 4 Jac. 2. B. R. Anon.

See Nonſuit (P).

(C) *Favour'd*, Indulged, *Puniſhed or Reſtrained*, how far.

1. A Plaintiff was *admitted at the commencement of an action* to ſue in forma pauperis, but *before iſſue he was diſcharged of it, and after was nonſuited.* It ſeems that he ſhall not pay coſts

coſts within the ſtatute 23 H. 8. 15. becauſe of the proviſo. But in this caſe Coke ſaid, that the ſtatute is that he ſhall have corporal puniſhment. Roll R. 88. Mich. 12 Jac. B. R. pl. 39. Anon.

2. A pauper ſhall not *find pledges*; per Mountague Ch. J. Roll. Rep. 447. Hill. 14 Jac. B. R. Huſſey v. Moore.

3. If one that is admitted to ſue in forma pauperis, will not proceed according to the rules of the Court, but *uſeth delays* to vex his adverſary, the Court will diſpauper him; for the law does not favour the poor to do injury to others, but to help them to recover their right, where they want ability of themſelves to do it. L. P. R. tit. Forma Pauperis, cites Mich. 22 Car. B. R.

If a pauper gives notice of trial, and does not proceed, he ſhall be diſpau per'd. 2 Salk. 506. 9 W. 3.

B. R. Anon.——So if he be *nonſuited*. Gibb. 161. Mich. 4 Geo. 2. Anon.

A motion was made for *coſts* againſt a pauper *for not proceeding to trial*; and the Court upon debate ordered coſts to be tax'd, and declared that a pauper ſhall *pay coſts for all defaults*, as an executor or adminiſtrator ſhould for their own defaults. Rep. of Pract. in C. B. Trin. 2 Geo. 2. 1728. Walker & al. v. Parker.

4. It was mov'd to *diſpauper* the plaintiff in an action of treſpaſs and ejectment, it being proved by *affidavit, that he was a very vexatious perſon*, having been *thrice nonſuited in this action*, and would never pay coſts, or make a ſufficient leſſee to pay them, *and had alſo ſign'd a general releaſe to the defendant*. Roll. Ch. J. ordered that he be diſpaupered, and that he put in an able leſſee to pay coſts, or otherwiſe he ſhall not proceed in this action. Sty. 386. Trin. 1653. Anon.

The Court will diſpauper him; for this will be a means to make him leſs contentious, and the law doth not favour unneceſſary vexatious ſuits. L. P. R. tit. Forma Pauperis, cites 1654. B. S.

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5. In caſe of a *nonſuit* of a pauper plaintiff, upon inquiry of the practice in ſuch caſe 'twas certified that the uſual way is to *tax coſts*, and if the coſts be not paid, that the plaintiff ſhall be whipt: but 'tis *in the diſcretion of the Court* to ſpare both, upon conſideration of the circumſtances of the cauſe, but in the principal caſe they awarded that the plaintiff ſhould make *election* to be whipt, or to pay coſts. Sid. 261. Trin. 17 Car. 2. B. R. Munford v. Pait.

If a pauper be *nonſuit*, there ſhall be *coſts taxed*, and he ſhall not go on after without paying the coſts, or ſhewing according to the act of parliament that he was *whipp'd*. Per Cur. Far. 114. Mich. 1 Annæ. B. R. Anon.

6. Where a pauper recovers, he ſhall pay the *box*: per Williams J. 1 Bulſt. 170. Trin. 9 Jac. in Caſe of Moor v. Moor.

7. A pauper ſhall not pay *coſts*, unleſs he be *nonſuited*; but then he ſhall pay coſts, or be whipp'd. Per Holt Ch. J. 2 Salk. 506. Mich. 9 W. 3. B. R. Anon.

But on a motion that a pauper might be whipp'd for nonpayment of coſts, Holt Ch. J. denied the motion, ſaying that he had no officer for that purpoſe, and that he *never knew it done*. Ibid. —— He was order'd to pay coſts for ſcandal. Toth. 237. 6 Car. Higham v. Ladd.

8. Tho' a pauper ſhall not pay coſts, yet he ſhall have *coſts*. Abr. Equ. Caſes 125. cites Paſch. 1701. Scatchmer v. Foulkard.

The plaintiff brought a bill in forma pauperis, *and had a decree to recover* the duty *with coſts*; the Maſter taxes coſts as uſual for perſons not paupers. Defendant

Defendant moves, that he tax only pauper-coſts, and ſaid it was unreaſonable the plaintiff ſhould have more coſts than he was out of pocket; that it would encourage paupers to be vexatious, to be aſſured if the cauſe went againſt them, they ſhould pay no coſts, and if for them, ſhould recover not only the thing in demand, but a good ſum of money too, which they never expended; and cited the Caſe of HARVEY v. TUDER, 22 December, 9 W. 3. where the plaintiff who was a pauper, having obtained a decree with coſts, and the Maſter having taxed coſts as uſual, on exceptions to the Maſter's report, for that cauſe the Chancellor allowed only pauper-coſts. On the other ſide it was ſaid, that the counſel, clerks and ſolicitors gave their labour to the pauper out of charity, and not to his adverſary, and therefore he ought to have coſts as others, where the decree is for coſts *generally*; though the Court may if they find him vexatious, order *pauper coſts* only; but that is by ſpecial order, in caſes of contempts, inſufficient anſwers &c. but where coſts are ſtated, and of courſe he is to have the ſame as thoſe that are not paupers, and cited the Caſe of HAUITON v. HAGER, where the plaintiff a pauper had a decree with coſts, and the uſual coſts were taxed; and on petition that it might be pauper-coſts only, the Lord Sommers would not allow it. My Lord Keeper ſaid it was unreaſonable any one ſhould have more coſts than out of pocket, and ordered the plaintiff and his ſolicitor to make oath before the Maſter; and *what they ſwore they had paid, or were to pay, was to be allowed*, but no further. Chan. Prec. 219, 220. Paſch. 1703. Angell v. Smith.

9. 'Tis a ſingular favour to *admit a defendant* a pauper; but if ſuch defendant will *plead a dilatory* plea, the Court will diſpauper him. 11 Mod. 84. Trin. 1706. 5 Ann. B. R. Anon.

S. P. Curſ. Canc. 488. cites Ord. Chan. 152. ——If they offend herein, they are to undergo

10. After admittance, *no fee*, profit or reward *ſhall be taken* of the pauper by any counſel or attorney, for diſpatch of his buſineſs while it depends in Court, and he continues a pauper; *nor any contract* or agreement made for any recompence or reward afterwards. P. R. C. 266. 267.

the diſpleaſure of the Court, and ſuch puniſhment as the Court ſhall think fit to inflict; and for the pauper's offence herein he ſhall be *diſpaupered*, and never admitted again in the ſame ſuit in forma pauperis. P. R. C. 267.—S. P. Curſ. Canc. 488.—*But* tho' the clerks take no fees, ſtrictly ſo called, of a pauper, yet they *make him pay for* the *labour of writing*, which is after the rate of 1 *d. per ſheet*; and this is ſaid to be allowed by the Court. Ibid.

S. P. Curſ. Canc. 488.

11. If it be made appear to the Court that any pauper has ſold or *contracted for the benefit of his ſuit*, or any part thereof, while the ſame depends, ſuch cauſe ſhall be thenceforth totally *diſmiſs'd* the Court, and never again retained. P. R. C. 267.

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S. P. Curſ. Canc. 489. —Therefore where it was ſhewed

12. As a party may be admitted in forma pauperis at any time during the ſuit; ſo if at any time 'tis made *appear* to the Court *that he is of* ſuch *ability*, that he ought not to be in forma pauperis, the Court will diſpauper him. P. R. C. 268.

the Court, that a pauper *was in poſſeſſion of the lands in queſtion*, the Court ordered him to be diſpaupered, though the defendant had a verdict at law, and might take a writ of poſſeſſion. P. R. C. 268.——S. P. Curſ. Canc. 489.

12. No proceſs of *contempt* at a pauper's ſuit ſhall be ſealed, until ſigned by his ſix clerk, who is to take care it be not vexatious or needleſs. Curſ. Canc. 489. cites Ord. Chan. 153.

14. Plaintiff being admitted to ſue in forma pauperis *was nonſuited, and taken in execution for the coſts* thereof, *he having an eſtate fallen to him ſince.* It was mov'd to diſcharge him, becauſe by the law he that ſues in forma pauperis ſhall pay no coſts, but ſuffer ſuch puniſhment as the Court ſhall think fit. But the Court was of opinion, that if the plaintiff *was a pauper when the cauſe was tried*, he ſhall not pay coſts, and that the deſcent of lands ſhall not have relation to that time. And ſo a rule was made

made to discharge him. 8 Mod. 344. Hill. 11 Geo. 1725. Ancel v. Sloman.

15. In ejectment *after issue join'd, defendant mov'd for a trial at bar*, which *plaintiff* opposed, but afterwards *consented* to upon these terms, viz. that *in case of a nonsuit or verdict against the plaintiff*, he *should pay such costs only as* are *usually allow'd* in trials *at Nisi Prius*. After making this rule, *plaintiff got himself admitted* in forma pauperis; and then the cause was tried at the bar, and a verdict *found for defendant*. Upon the plaintiff's bringing a *second ejectment* it was mov'd, that it should be referr'd to the Master to tax the costs of the first according to the plaintiff's agreement, which he could not waive by admitting himself a pauper afterwards; and that his bringing a new ejectment (after being cast at the bar) was a strong instance of vexation, which the Court will never encourage. But the Court held, that this agreement of the plaintiff could not preclude him from the benefit of a subsequent submission in forma pauperis, (which may be had *at* * *any part of the proceedings*); for it means only, that *if any* costs should be judged due, *then* he should pay Nisi Prius costs only, and not that he should pay costs in all events. Now the only instance in which a pauper shall pay costs is where he has been vexatious, and then the usual way is to dispauper him; but the plaintiff's bringing this *second ejectment* only *cannot of itself be called vexatious*; for by the law of England, a man may bring as many ejectments as he pleases, as appears in Jenk. 67. And tho' this is there taken notice of as an inconvenience, yet it appears, that even by the *old law*, where 2 persons were contesting the title of land, the *possession was suffer'd to be changed twice* (1. by a real action, 2. by a writ of right), tho' no oftner. And accordingly the rule of taxing costs was discharg'd. Mich. 13 Geo. 2. B. R. Britton on the demise of Webb v. Grenville.

* One may be admitted in forma pauperis *at any time before trial*. Hill. 12 Geo. 2. Langley v. Blackerby.

(D) Of the *Demeanor of Counsel* &c.

1. THE *counsel or attorney assigned* to assist a pauper, either to prosecute or defend, *may not refuse* so to do, except he satisfy my Lord or the Master (who ordered the admission) with some good reason for such refusal. P. R. C. 267. S. P. Curs. Canc. 489. cites Ord. Chan. 152.

2. The counsel who moves for a pauper ought to have the *order of admittance* with him, and to move for him before he makes any other motion. P. R. C. 267. [263] S. P. Curs. Canc. 489. cites Ord. Chan. 152.

—And that hinders not, but that he may have another motion, or as many as he might have without it. P. R. C. 267.——S. P. Curs. Canc. 489.

3. If the register finds that any, for whom a counsel moves as a pauper, was not admitted in forma pauperis, he shall not draw out the second motion of such council; but the fruit of it shall be lost for his abuse to the Court in the other. P. R. C. 268. S. P. Curs. Canc. 489. cites Ord. Chan. 153.

S. P. Curſ. Canc. 489.

4. All *maſters, counſellors*, officers, miniſters, clerks and ſolicitors in the Court are to *obſerve theſe rules* in favour of paupers. P. R. C. 268.

5. The *admiſſion* muſt always be *produced in the office* where the pauper has occaſion to paſs. P. R. C. 268.——S. P. but this ſeems not now ſo ſtrictly neceſſary. Curſ. Canc. 489.

[For more of Pauper in general, ſee Nonſuit (P) pl. 4. f. 2. and the Notes there, and other proper Titles.]

Pawn.

See (C) pl. 1.

(A) *What.* As to the Intereſt of Pawnee or Pawnor; *and how conſidered.*

S. P. Becauſe *neither of them has the abſolute property* in the goods ſo gaged; per Doderidge J. 3 Bulſ. 17. Hill. 12 Jac. in Caſe of Waller v. Hanger.——But the King may redeem by paying the money. Yelv. 178. cites 13 R. 2. 31. Br. 31. & 22 E. 4. 10 & 26 H. 6. Fitzh. Barr.

1. IF A. *gage goods to B. and after A. is attainted of felony*, yet the King ſhall not have the goods thus gaged, without paying of the ſum for which they were gaged. Br. Pledges, pl. 31. cites 13 R. 2. 13.

Pledging does not make an abſolute property, but is a delivery only till payment &c. and may be re-demanded at any time upon payment of the money; for it is delivered *only as a ſecurity for the money lent*; and there is a *difference between mortgaging of land and pledging of goods*; for the mortgagee has an abſolute intereſt in the land, whereas the other has but a ſpecial property in the goods, to detain them for his ſecurity; per Fleming Ch. J. & al. Cro. J. 245. in Caſe of Sir J. Ratcliff v. Davies.

The delivery is nothing but the bare cuſtody, and it is not like to a mortgage; for there he that has intereſt ought to have the money; but in the caſe of a pledge, it is only a ſpecial property in him that takes it, and the general property continues in the firſt owner; per Fleming Ch. J. quod non fuit negatum. Yelv. 178. S. C.

* S. P. Br. Pledges, pl. 20. cites S. C. becauſe he had not poſſeſſion of it before. S. P. Yelv. 178. Arg. cites 22 E. 4. 11.——

2. A *pledge cannot be but where the thing is delivered by command of the other to take it, and at the ſame time*, and this is properly a pledge; *but if a man commands another to take and retain it till he be ſatisfied of ſuch a debt, this is* * *no pledge.* Per Brian Ch. J. and this diverſity was granted by the Court. Br. Treſpaſs, pl. 271. cites 5 H. 7. 1.

3. If a man delivers goods in pledge *for* 40 *l. borrowed*, and after the *debtor is convicted in* 100 *l. in debt to another*, thoſe goods ſhall

ſhall not be put in * *execution* till the 40 l. be paid; for the creditor has intereſt in it. Br. Pledges, pl. 28. cites 34 H. 8.

As leaſe of land, and ſtock of ſheep for

years, ſhall not be put in execution during the leaſe. Br. Pledges, pl. 28. cites 22 E. 4. 10.

4. He who has goods at pawn has a *ſpecial property* in them, ſo that he may *work* ſuch pawn if it be a *horſe* or ox, or may take the *cow's milk*, and may uſe it in ſuch a manner as the owner would; but if he *miſuſes* the pawn an action lies; and he has ſuch intereſt in the pawn, as he may *aſſign* it over, and the aſſignee ſhall be ſubject to a *detinue* if he detains it on payment of the money by the owner. Owen 124. Mich. 7 Jac. C. B. Moor v. Conham.

S. P. 2 Salk. 522. Paſch. 5 W. & M. Anon.

5. Upon the *tender* of the money ſecur'd by the pawn, by the pawner or his executor, the *property* notwithſtanding the refuſal, *is reduc'd* inſtantly to the pawner &c. without claim; but per Curiam, the executor ſhall have * debt for the money againſt the pawner, for upon the redemption it remains a duty. Yelv. 178. Trin. 8 Jac. B. R. Sir J. Ratcliff v. Davies.

1 Bulſ. 30. S. C. —— And he may bring *trover and converſion* for them. Arg. Roll. R. 60. ſays it was

ſo adjudged in Ch. J. Fleming's time. —— It was ſo held, Cro. J. 245. Ratcliff v. Davis. —— Upon tender of the money, and refuſal to deliver the pawn, an action of treſpaſs on the caſe lies; per Doderidge J. 2 Bulſ. 309. in Caſe of Iſaac v. Clark. —* The Reporter adds a quære, and ſays, Mirum mihi, in as much as there never was any contract for the money between the parties. Yelv. 179.

(B) *Redemption. At what Time; and on what Terms.*

1. WHere no time of redemption of a pawn is agreed, he that pawns may *redeem during his life*; but his *executor cannot redeem*; for it is a condition perſonal. Yelv. 178. Trin. 8 Jac. B. R. Ratcliff v. Davis.

Cro. J. 244. S. C. that it may be redeemed after the death of the

pawnee, but not of the pawner. —— 3 Salk. 267.

2. A man pawns goods, and after is *outlawed*; during this his outlawry he cannot *redeem* them; per Williams J. 1 Bulſ. 29. Trin. 8 Jac. Ratcliff v. Davis.

Yelv. 178. S. C.

3. A. pawn'd jewels of 600 l. value for 200 l. to B. and takes a *note acknowledging the jewels to be in B.'s hands for ſecuring* 200 *l.* and afterwards *A. borrows more money on ſeveral notes*, without taking notice of the jewels, and dies. *Executors brought a bill to redeem* on payment of 200 l. But Cowper C. decreed *payment of the notes, as well as the* 200 *l.* the day of payment being lapſed; but Mr. Vernon ſaid, if there had been any *bond-creditors*, or a commiſſion of bankruptcy againſt A. the notes muſt be poſtponed, and B. could not have tack'd them to the pawn. Mich. 1715. Ch. Prec. 420. Demandray v. Metcalf.

G. Equ. R. 104. Trin. 1 Geo. S. C. and is only a copy of the other.

(C) Redemption. *Where the Pawn is transferr'd* or delivered over.

Nov. 137. S. C.—— Cro J. 244. Trin. 12 [265] Jac. B. R. S. C.—— * Contra per Fleming Ch. J. Bulf. 30, 31. S. C.—— The *tender* muſt be made to the bailee, and not to the executor of pawnee; per Fleming Ch. J. 1 Bulf. 31. Trin. 8 Jac. Ratcliff v. Davis.

1. THough the perſon that takes the pawn delivers it over to a ſtranger, yet if *pawnee dies*, the *tender of the money* muſt be to his executor, and not to the ſtranger; for the delivery makes but naked cuſtody of it; and if the *delivery* had been * *on conſideration*, it does not alter the caſe; for the ſtranger is not privy to the firſt contract of pawning, nor to the condition, and ſo not like to a mortgage; and in caſe of a pawn there is only a *ſpecial property* in the pawnee, and the general property continues in the firſt owner. Yelv. 178. Trin. 8 Jac. Sir J. Ratcliff v. Davis.

Trin. 1728. Abr Equ. Caſes 9. S. C. cited in Caſe of Sir Juſtus Beck.—— S. C. Abr. Equ. Caſes 3-4.

2. A. pawns jewels to B.—B. *pawns them over to C. for a greater ſum*, and after B. borrows *more money of C. on promiſſory notes*; if A. will redeem he muſt pay C. all the money borrowed on the notes by B. as well as the money for which B. pawn'd them to C. Quere tamen. 2 Vern. 691. Trin. 1715. Demainbray v. Metcalf and Knight, & al.——Ibid. 698. S. C. Decreed. Mich. 1715.

(D) *Redemption. Of Deeds* pawned.

1. A Truſt of a term for raiſing younger children's portions was diſcharged all but 200l. to M. who was one of the daughters, and of whom the heir at law borrowed 500l. and left the deed of truſt in her hands as a pawn for ſecuring the 500l. and 200l. and died, leaving four daughters his heirs, who bring their bill againſt the pawnee, and the executors of the ſurviving truſtees to deliver the deed, and aſſign the term, which was *decreed on* payment *of the* 700*l.* Fin. R. 10. Mich. 25 Car. 2. Fitzjames v. Fitzjames.

(E) Redemption. Where Goods are *pawned by one* that is *not Owner.*

1. IF a man *finds the goods* of another man, and pledges them for money, the owner may retake them. Br. Pledges, pl. 28. cites 35 H. 6. 25. Simon Eyre's Caſe.

2. A country clothier ſends cloths to his *London factor* to ſell.

Factor pawns them. Pawnee by anſwer admits factor pawn'd ſome cloths, but knows not if they were the plaintiff's; ordered that the clothier in the preſence of two or more might have the *view* of them, which was that the plaintiff might be thereby enabled to bring an action at law. Vern. 407. Mich. 1686. Marſden v. Panſhall.

(F) *How* it may be *uſed. And in what Caſes* it may be *ſold.*

1. WHEN a man hath a *ſpecial intereſt* in a thing *by act in law*, he cannot work or otherwiſe uſe it; but where he has *it by act of the party*, he may; as in caſe of a pawn; per two Juſtices. Owen 124. Mich. 7 Jac. C. B. Moor v. Conham.

See (A) pl. 1. marg.— If the pawn be of ſomewhat *which will be the worſe for wearing*, as cloaths &c. the pawnee cannot uſe it. But if it be ſomewhat that will not be the worſe for wearing &c. as jewels &c. the pawnee may uſe them, but then it muſt be at his peril; for if the pawnee is robbed in wearing them, he is anſwerable; and the reaſon is, be- [266] cauſe the pawn is ſo far in the nature of a depoſitum, that it cannot be uſed, but at the peril of the pawnee; and the uſing occaſioned the loſs. But if the pawn is laid up, and the pawnee is robbed, the pawnee is not anſwerable. Alſo if the pawn be of ſuch a nature that the keeping it is of charge to the pawnee, as if it be a cow or a horſe, the pawnee may milk the cow or ride the horſe; and this is in recompence of the keeping. 2 Salk. 522. Paſch. 5 W. & M. B. R. Anon.

2. Where goods are pawned *redeemable at a day certain*, the pawnee in caſe of failure of payment at the day may ſell them. 3 Salk. 267. pl. 2.

3. A. borrowed money of B. and for a ſecurity *abſolutely transferred an Exchequer annuity defeaſanced to be void on payment ſuch a day*. After the day B. demanded the money frequently, and gave notice that he would ſell at ſuch a time, and that A. might be preſent to ſee it ſold at the full value. A. deſired forbearance. B. died, and his adminiſtrator ſold it by a ſworn broker for the full value at that time, tho' afterwards they roſe in value. A. prayed redemption, or to compel the purchaſe of another like annuity to be transferred in lieu of it. And ſo it was decreed by Ld. C. Harcourt. But upon appeal to the Houſe of Lords, ſetting out the circumſtances of the caſe, as that ſuch annuities were uſually ſold as well as ſtocks at the exchange, and that it was but a pawn, that the requeſt of forbearance was a ſubmitting to the ſale after that time, that among merchants, after day of payment paſt, they were taken as ready money, that it would occaſion multiplicity of ſuits in like caſes, and that this being the caſe of an adminiſtrator, who was obliged to diſpoſe of the aſſets to pay debts and legacies, it was the ſtronger; the decree was reverſed, nemine contradicente. Wms's Rep. 261. Trin. 1714. Tucker v. Wilſon.

(G) *Loſt or Damaged.*

Putſee that, per Fleming Ch. J. if a man takes bona perituraas a pawn, at his own peril be it, if he cannot re-deliver them again on tender and payment of the money borrowed. 1 Bulſ. 32. Ratcliff v. Davis.

1. IF the pawn be *of a periſhable nature*, as oil, corn &c. and no time of redemption limited, the loſs will be to the pawner if the goods periſh naturally, and the pawnee will have *debt* for his money, and the other no remedy for his pawn. Yelv. 179. per Fleming Ch. J. and not denied, in Caſe of Ratcliff v. Davis.

4 Rep. 83. b. in Southcote's Caſe. ——But if the pawnor *tendered the money before the ſtealing*, and the other refuſed to deliver them, then pawnee ſhall be charged. Co. Litt. 89.—S. P. For now his property is determined, and he is a wrongful detainer, and he that keeps goods by wrong muſt anſwer for them at his peril at all events, for his detainer is the reaſon of his loſs. 2 Salk. 523. Trin. 2 Annæ B. R. Coggs v. Bernard.—Rol. R. 129.—* Co. Litt. b. 123. 89.—4 Rep. 83. b. in Southcote's Caſe.

2. If the pawn is laid up, and the *pawnee is robb'd*, the pawnee is not anſwerable, but if he wears them, * he is anſwerable for the loſs. 2 Salk. 522. Paſch. 5 W. & M. B. R. Anon.—He may indict the robbers for taking the goods; for he has property againſt all ſtrangers. See Kelw. 70. b. pl. 7. Mich. 21 H. 7.

3. If a *creditor* takes a pawn, he is bound to reſtore it on payment of the debt; but if his care in keeping it be exact, and the pawn is loſt, he ſhall be excuſed; for there is no default in him. 2 Salk. 523. Anon.

4. If the pawn be loſt, *the pawnee has ſtill his remedy for the money*; for the law requires nothing extraordinary of the pawnee, but only to uſe an ordinary care for the reſtoring of the goods. 2 Salk. 523. Anon.

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(H) *Actions, Proſecutions, and Pleadings.*

Jenk. 83. pl. 62. cites 35 H. 6. 35. but this ſeems miſprinted (35) for (25.)

1. *INformation* was made in the Exchequer by J. B. *that the King was poſſeſſed of a jewel* at W. and ſhewed what, which was in the keeping of N. P. warden of the jewels of the King ſuch a day and year; and that after ſuch a day and year in London, *it came to the hands of S. E.* and proceſs iſſued againſt him, who came and *ſaid* that the city of *London* is an ancient city, and has been time out of mind, in which there has been a *cuſtom* time out of mind, *that if any put goods in pledge for any duty whatſoever, that he who receives it ſhall retain it till he be ſatisfied of the debt*, by which &c. and *that O. R. was poſſeſſed, and* the day and year in the information, *delivered the goods in pledge to the defendant for 60l. borrowed* of him; *abſque hoc, that the jewel came to his hands in any other manner, and* ſaid *that the ſum is not yet paid*, & hoc &c. and

and *ſaid by proteſtation* that *the property was not in the King, nor was it ſigned with the print or arms of the King*, and the King demurr'd in judgment; and upon long argument it was held by the beſt opinion that the cuſtom is not good; for it cannot have lawful commencement, and if it was good between ſubjects, yet it ſhall not bind the King; and after it was agreed in the Exchequer that the King ſhall be reſtored, and proceſs by capias awarded againſt the defendant. Br. Cuſtoms, pl. 5. cites 35 H. 6. 25.

2. In debt, the *defendant ſaid that he has infeoffed him of certain land in pledge, and if he will re-infeoff him he is ready, and always has been to pay him*; and the beſt opinion was, that it is a good plea; but ſeveral were of opinion, that where contract is ſimple at the commencement, and after pledge is given for the debt, that it ſhall not be pleaded in debt, that the plaintiff has pledg'd &c. Contra where pledge is deliver'd for the debt at the making of the contract; for in the other caſe, the one ſhall have debt, and the other the detinue of the goods; contra where it is given in pledge at the making of the contract. Br. Dette, pl. 111. cites 9 E. 4. 25. Br. Pledges, pl. 10. cites S. C.

3. Debt for 200l. and *counted that the defendant delivered ſilks to him to ſell, meliore modo quo poterit at his pleaſure*, and ſo much as he might receive for the ſilks, *to retain* for the 200l. *in ſatisfaction* &c. and ſo much as ſhould remain, the defendant ſhould pay to him; and that he ſold for 150l. and for 50l. which remained he brought his action. Pigot ſaid, *A. B. offered* you 200*l. for the ſilks, and you refuſed*; and yet, per Cat. and Brian, this is no plea; for the plaintiff had authority to ſell them at his pleaſure, and if he had ſold them for 12d. tho' they were worth 1000l. the defendant has no remedy; but Brooke ſays, it ſeems to him that this is not reaſon; for he was to ſell them meliore modo quo poterit, which is, for the beſt price. Br. Dette, pl. 164. cites 18 E. 4. 5.

4. Treſpaſs by A. againſt B. *of a chain of gold taken*, the *defendant ſaid that the plaintiff*, before the taking, *licenced him to take* the chain, *and retain it in pledge till* 100 *marks which he owed to him were paid*, by which licence he took it, judgment &c. Keble demurred for three cauſes, 1ſt. Becauſe he *pleaded licence, and it appeared by his own plea that he took it as a pledge*, by which he ought to ſay, that he took it as a pledge, and that the plaintiff impignoravit &c. and not quod licenciavit. But to this it was ſaid, that he cannot take it as a pledge, becauſe he had not poſſeſſion thereof before, but that he may take it and retain it quouſque &c. Per Brian Ch. J. a *pledge cannot be but where the thing is delivered by command of the other to take it, and at the ſame time*, and this is properly a pledge. *But if a man commands another to take and retain it till he be ſatisfied of ſuch a debt, this is no pledge*, and this diverſity was granted per Cur. and ſo it ſeems the plea good as to this. Keble inſiſted, 2dly, Becauſe *it is not alleged, for what cauſe the debt was due*; and per Townſend and Davers juſtices the debt is not traverſable. And 3dly, Becauſe [268] the

the *defendant did not ſay that the* 100 *marks were not paid* at the time when he took the chain, and as to this the defendant amended his plea &c. et adjornatur. Br. Treſpaſs, pl. 271. cites 5 H. 7. 1. Ld Dudley v. Ld Powis.

5. *In treſpaſs of goods taken* the *defendant pleaded* how *he by accord of the plaintiff detained them in pledge for* 10*l. which the plaintiff ow'd him*, and *did not ſhew cauſe of the debt*; and well. Br. Pledges, pl. 13. cites 21 H. 7. 13.

A. was indicted in Middleſex, for being a pawnbroker, and it was moved to quaſh it, for that this *indictment* was in *nature* of an action *of trover*; for it was, that the defendant on ſuch a day &c. had lent M. the wife of T. S. 2s. 6d. and at the ſame time did receive of her an under petticoat of ſilk, as a pawn for the re-payment of the money, and that he (the defendant) had illicite & deceptive refuſed to deliver the ſaid petticoat, notwithſtanding that the ſaid M. had tender'd to him the ſaid 2s. 6d. with intereſt for the ſame, ad damnum of the ſaid T. S. and in malum exemplum &c. ſo that at moſt this is only a breach of contract, which is actionable, but not indictable. But the Court (abſente Holt Ch. J.) would not quaſh the indictment, becauſe of the abuſe by pawn-brokers. Sed quære; for if the defendant had *demurred* to this indictment, it could not have been maintained by law. Carth. 277. Paſch. 5 W. & M. B. R. The King v. Gallwich.

6. 1 *Jac.* 1. *cap.* 21. *The ſale of goods wrongfully gotten to any broker, in London, Weſtminſter, Southwark, or within* 2 *miles of London, ſhall not alter the property thereof.*

If a broker, having received ſuch goods, ſhall not upon the requeſt of the true owner, truly diſcover them, how and when he came by them, and to whom they are conveyed, he ſhall forfeit the double value thereof to the ſaid owner.

This act ſhall not prejudice the ancient trade of brokers in London, being ſelected and ſworn for that purpoſe; it being only intended againſt fripers and pawn-takers, who for the moſt part keep open ſhop.

If the pawn-broker on tender of the money *refuſes to re-deliver* the goods pledg'd, he may be *indicted*; for being ſecretly pawn'd, it may be impoſſible to prove a delivery in trover for want of witneſſes; per Holt and Eyre J. 2 Salk. 522. Paſch. 5 W. & M. Anon.

7. A pawn-broker's *ſervant took* a pawn; the pawner came and *tenders the money to the ſervant*; he ſaid he had loſt the goods. On this pawner brought trover againſt the maſter; and per Holt Ch. J. *trover* lies. 2 Salk. 441. Mich. 10 W. 3. Jones v. Hart at Guildhall.

8. If I pawn goods to A. for ſuch a ſum, A. may have *debt* for the money *notwithſtanding his having a pawn*; per Holt Ch. J. at Niſi Prius. 12 Mod. 564 Mich. 13 W. 3. Anon.

[For more of Pawn in general, ſee Bailment, Property, and other proper Titles.]

Pawnage.

(A) *What* it is. *And what paſſes by* the *Grant of it.*

1. PAwnage *is* the profit of acorns, nuts, hawes, hipps, ſloes and beech maſts; per Welſh J. Quod Benlowes conceſſit, and ſaid, that ſo it is of apples and crabbs. Quod Brown J. negavit, and ſaid, that pannagium in the Exchequer is taken all one as herbagium. Mo. 46. pl. 139. Anon.

Pawnage or pannage, is that food which the ſwine feed upon in the woods; as maſts of beech, acorns &c. alſo it is the alimentum, quod in ſilvis colligunt pecora, ab arboribus dilapſum: money taken by the agiſtors for the feeding of hogs in the King's foreſt. Cromp. Juriſd. 155. Stat. Weſt. 2. cap. 25. Manwood ſays, Pannage ſignifies moſt properly, the maſts of the woods or hedge-rows. And Linwood thus defines it, Pannagium eſt paſtus pecorum in nemoribus [269] & in ſilvis, utpote de glandibus & aliis fructibus arborum ſilveſtrum, quarum fructus aliter non ſolent colligi. It is mentioned in the Statute 20 Car. 2. c. 3. Jac. Law Dict. verb. Pannage.

2. The Queen granted the cuſtody of a park for life &c. cum omnibus proficuis & commoditatibus &c. to the ſaid office belonging, to which the herbage and pawnage of the *park* appertains, and after grants the park to another and his heirs. The grantee *cuts trees* and carries them away, and it was held that this was injury done to the keeper, as to the herbage and pawnage, but not in reſpect of taking the trees; for which injury, the keeper is put to his remedy by aſſiſe or *action* on the caſe, and not by action of treſpaſs, which does not lie. For if ſo, it would lie againſt him who had franktenement in poſſeſſion for profit apprendre; and therefore aſſiſe or action on the caſe lies for the trees. It ſeems that *aſſiſe* does not lie becauſe he cannot have ſeiſin of the pawnage of thoſe trees being utterly taken away, and there is reaſon that he ſhall have action upon the caſe for his damage, but for the *herbage* he may have aſſiſe, for which action on the caſe does not lie. 2 And. 7. Anon.

3. A. by deed grants herbagium & pannagium within his lands *rendring rent*, and after the *grantor cuts the trees*. Dyer Ch. J. thought the grantee could not bring treſpaſs, nor could hinder the cutting them, but that he might have *aſſiſe;* for it is proficuum in certo loco capiend. As of eſtovers, if he cuts the trees aſſiſe lies, and he ſhall not diſturb him; for he has no intereſt in the trees. Mo. 46. pl. 139. Mich. 5 Eliz. Anon.

4. *By the grant* of pannagium, hogs may eat the graſs; but if a man grant his acorns, the grantee muſt gather them; and where pannagium is granted, the grantee may put in his hogs into

into the place granted. Sic dictum fuit. Ow. 35. Mich. 13 & 14 Eliz. Anon.

[For more of Pawnage in general, see Manwood of Forest Laws verbo Pannage; and see Common, Forest, and other proper Titles.]

Payment.

(A) *Good. In reſpect of the Thing* paid or given.

So another bill taken in the ſame manner, and the taker owing the banker 5l. had it indors'd on the back of the bill as paid, this was held by Pemberton Ch. J. a *negotiating*,

1. A. Being indebted to B. takes a receipt of B. in his (A.'s) books, and goes with B. to C. a *banker*; the banker aſks B. if he would have money or notes; B. ſays he muſt pay it away, and ſo takes 2 notes payable to the perſons he was to pay it to, and receives of the banker 7s. overplus, and *within 3 hours after the banker breaks*. It was agreed, if the banker had refuſed payment, A. had been chargeable notwithſtanding the receipt in B.'s books, but here was a negotiation of this matter, which diſcharg'd A. and ſo B. became nonſuited at a trial before Pemberton Ch. J. 2 Show. 296. Paſch. 35 Car. 2. B. R. Vernon v. Boverie.

and diſcharged A. Ibid. Cookſey v. Bovery.

12 Mod. 203. S. C.

2. A. ſells goods to B. and *B. is to give a bill in ſatisfaction.* B. is diſcharged tho' the bill is never paid; for the bill is payment. But otherwiſe a bill ſhould never diſcharge a *precedent debt* or *contract*; but if *part be received*, it ſhall only be a diſcharge of the old debt for ſo much. 1 Salk. 124. 3 W. & M. Clark v. Mundall.

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And if a man upon a contract made before, take ſuch a bill and *keep it 'till the party on whom* it is drawn *becomes inſolvent*,

3. If a man contracts for goods, and after his carrying them away gives the ſeller a *goldſmith's note* for the money, it does not amount to a payment; but if it were *given at the very time of the contract*, it would be prima facie evidence that it was taken in payment; per Holt Ch. J. 12 Mod. 408. Trin. 12 W. 3. Anon.

he ſhall be barred; but he ſhall recover the debt upon the original contract; per Holt Ch. J. 12 Mod. 408. Anon.

4. If

4. If A. buy a thing of B. and gives him a *goldſmith's bill* in payment, which *vendor accepts without exception;* if the goldſmith were *worth nothing*, and A. does not *know it*, it is a good payment; ſecus if A. knew him to be in a failing condition; per Holt Ch. J. 12 Mod. 517. Paſch. 13 W. 3. Anon.

5. If *A. owes B. money*, and he gives him a *goldſmith's note in payment*, the debt is not diſcharged 'till B. receives the money, if there be not *default* in him that it was not paid, or if he does not at the receipt of the note give an *acquittance for the debt* to A. Per Holt Ch. J. 12 Mod. 521. Paſch. 13 W. 3. Ward v. Sir Peter Evans.

But if B. had an *election to receive the money or a goldſmith's note*, and he choſe the note, it may be otherwiſe; and more eſpecially if he *gives up his former ſecurity* that he had for the original debt; per Holt Ch. J. 12 Mod. 521.

6. If A. and B. be two *goldſmiths*, and B. gives a note to C. for 100l. A. gets poſſeſſion of it, and brings it to B. and *takes a new note* for it, giving up his former, it is no payment; per Holt Ch. J. 12 Mod. 521. in Caſe of Ward v. Sir Peter Evans.

7. *Bond for a ſimple contract* is not payment of the original debt, but is a thing of an higher nature which extinguiſhes the debt; per Holt Ch. J. 12 Mod. 538. Trin. 13 W. 3. in Caſe of May v. King.

8. The Court held, that a *goldſmith's note* is *no payment*, being only paper, and received conditionally (if paid) and not otherwiſe, *without an expreſs agreement* to be taken as caſh. 2 Salk. 442. Hill. 2 Ann. B. R. Ward v. Evans.

6 Mod. 36. S. C.—— 3 Salk. 118. S. C.—— Upon a *general taking*, he that takes ſuch notes ſhall bear the loſs, unleſs he that gives the bill *warrants it* for a certain time; for then it is at his hazard during the time; per Ld. Wright. Chan. Prec. 200. Trin. 1702. Crowther v. Crawley.

9. The party receiving *a goldſmith's note* ſhall have a *reaſonable time* to receive the money, and is not obliged as ſoon as he receives it to go immediately for the money. 2 Salk. 442. Hill. 2 Annæ B. R. Ward v. Evans.

A * *bill of exchange*, or goldſmith's note, is not payment, unleſs the party omits receiving of it in a reaſonable time, as 3 days, when he might have received it; but if he gives a receipt and accepts the note as payment, this ſhall bind him; per Holt Ch. J. 11 Mod. 87. Trin. 5 Annæ B. R. Sir Charles Thorold v. Smith.—* S. P. Ibid. 72. in S. C.

10. Payment *of baſe money* in Ireland is no diſcharge, the *proviſo being for payment of* money in *ſilver*. MS. Tab. cites 20 March 1720. Bath v. Conley.

(B) Good; in reſpect of the *Perſon to, or by, whom.*

See Maſter and Servant (D).

1. THREE *covenant jointly and ſeverally*, and the plaintiff declares *quod defendens non ſolvit*, without ſaying (nor any of the others), and yet it was held well, becauſe the action was not brought againſt them all, in which caſe it would have been otherwiſe; and if any of the others had paid it, the defendant might properly have pleaded it; ſo it is in debt upon an obligation,

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tion, where two are bound jointly and ſeverally. Noy. 75. in Caſe of CONSTABLE AND CLOWBURY, cites 15 E. 3.

2. In debt upon an obligation, the condition was *to pay to the obligee, and others the pariſhioners of D.* 20l. at the feaſt of N. The defendant pleads, that he paid it to the obligee, and J. S. and R. K. others of the pariſhioners of the pariſh; the plaintiff replies, that J. S. and R. K. were not all the pariſhioners of the ſaid pariſh. But Dyer and Welch held the replication was ill; for it is not requiſite that the payment ſhould be to all the pariſhioners; becauſe the condition is not ſo; but if he *pays it to two of the pariſhioners*, it is ſufficient. Mo. 68. pl. 183. Trin. 6 Eliz. Anon.

3. Feoffment on condition to pay 10l. to the feoffee, his executors and aſſigns, within three years, that then &c. Feoffee has iſſue three ſons, whom he makes his executors, and dies before day of payment; the Ordinary grants *adminiſtration to J. S. during the minority of the executors*; per Dyer, it is the ſureſt way to pay the money to the executors, notwithſtanding the adminiſtration; for the adminiſtrator in ſuch caſes is but a bailiff or receiver to the executors, and accountable to them, which Harper conceſſit; and per Cur. if the monies be paid to *one of the executors, it is ſufficient.* 4 Le. 100. temp. Eliz. Anon.

But where a *wife*, who uſually received and paid money, received money due on *bond*; and the huſband got judgment on the bond; it was ordered, that he acknowledge ſatisfaction. Chan. Caſes 38. Mich. 15 Car. 2. Seaborne v. Blackſtone.

4. In debt upon a bond upon condition to ſtand to the award of J. S. the defendant pleaded, that the ſaid J. S. had arbitrated that the defendant ſhould pay to the plaintiff 10l. and he ſaid, he had paid it to the plaintiff's *wife*, and that ſhe *receiv'd it*; upon which the plaintiff demurr'd; and judgment was given for the plaintiff. Le. 320. Trin. 31 Eliz. B. R. Frond v. Batts.

In debt upon *bond to plaintiff's wives*, the declaration averr'd, that the money was *not paid to the ſaid wives* before the coverture &c. And it was objected, that it was not ſaid, *nec alicui eorum*; for it might be paid to one of them: but the Court held, that would have been ſuperfluous, and that it was ſufficient without it; for payment to one of them is payment to all the obligees. Noy. 69. Warner & Stone & Ux.

5. An award was for the defendant *to pay to the plaintiff and another*; in debt for non-performance the declaration ſaid, that defendant *had not paid to the plaintiff.* Per Glyn Ch. J. If I am bound to pay money to two, I can pay it actually but to one; for I cannot pay one and the ſame ſum to two ſeveral perſons at one and the ſame time; and afterwards, in the ſame term, the Court gave their judgment, that it was good cauſe to demur generally. 2 Sid. 41. Mich. 1657. Rot. 79. Abbot v. Biſhop.

6. In trover it appear'd, that the plaintiff's *ſon had a general authority from his father to receive and pay* out his father's money; the ſon took a bill for money due to his father; and *received it without a particular authority* for that purpoſe, with an intent to embezzle and ſpend it, but gave a receipt as for money had to his father's uſe, and the money was given to the defendant. Holt Ch. J. held that the action was maintainable by the father; for

for the general authority which the ſon had to take his father's money, made the receipt of the money to be to his father's uſe, and a good diſcharge of the debt, ſo as that the father could not avoid the payment, and charge the perſon that paid the money with an action, conſequently it became the father's money, the ſon, into whoſe poſſeſſion it was given, being to this purpoſe as his father's ſervant. Salk. 289. coram Holt Ch. J. at Niſi Prius. Anon.

7. He that has *power to ſell*, has power to receive the money; for if a man give power to his ſervant to ſell his horſe, he impliedly gives him power to receive the money; and payment to ſuch ſervant is payment to the owner. Per Holt. 12 Mod. 230. in C. B. Mich. 10 W. 3. Anon.

8. Payment *to the Treaſurer of Gray's-Inn* &c. is payment to the Houſe; as payment to the *Chamberlain of London* is payment to the City. 12 Mod. 413. Trin. 12 W. 3. in Caſe of Levins v. Randall. [272]

(C) Good. In reſpect of the Perſon to whom. A *Stranger*.

1. IF a *ſcrivener* is employed generally to put money to uſe for a year, and the money is paid to the ſcrivener, who *breaks* or does not pay the money, the payment does not excuſe the party; but if he receives it by ſpecial command, that is a good cauſe of equity. Hetl. 46. Mich. 3 Car. C. B. Anon.

Money paid to the ſcrivener of the mortgagee is good payment. MS. Tab. 20 November 1702. Sharp v. Thomas.——A man intruſts a *ſcrivener* to put out his money, he *takes bond* for it, *and* afterwards *delivered* the bond *to the obligee, but receives the intereſt* from time to time, and afterwards called in the principal; and the *obligor paid the principal to the ſcrivener*, and took a note from him to deliver up the bond (he having it not when the money was paid in) then the *ſcrivener writes to the obligee to ſend him the bond, which he accordingly does, but takes the ſcrivener's note, either to deliver back the bond or pay the money*; before the money paid, the ſcrivener breaks, and the obligee for a little money *gets* back *the bond* from the ſcrivener's clerk, and puts it into ſuit; and this bill was brought by the obligor to be relieved, and have the bond delivered up, which was decreed accordingly with coſts; for the Court held, that from the time the bond came into the ſcrivener's hands, he was truſtee for the obligor (the money being paid); and it is plain the obligee truſted the ſcrivener, not only with putting out his money, but with the cuſtody of his ſecurity. Paſch. 1691. Abr. Equ. Caſes 145. Abbington v. Orme.—Order'd the bond to be canceil'd. Toth. 273. Hill. 20 Jac. Huet v. De-la-Fountaine.

2. If a judgment is given in debt, and the money is paid *to the attorney of the plaintiff*, though the money miſcarry with the attorney, yet the payment is good. Het. 46. Mich. 3 Car. C. B. Anon.

But payment *to the ſheriff* on a ca. ſa. is not good; though on a fi. fa. ſome think it would be good. 2 Show. 139. Mich. 32 Car. 2. B. R. ..... v. Morton.

3. Payment of intereſt of a mortgage to *ſcrivener* is good if he * *has the bond* or mortgage deed; ſo of *principal* if he deliver up the bond; otherwiſe of † *mortgage deed* as to the principal; becauſe there muſt be a re-conveyance. But *if mortgagee agree*, it is well during mortgagee's life, though he *has neither bond nor mort-*

2 Chan. Caſes 77. Arg.——A *ſcrivener* puts out B's money upon bond to C,

and afterwards pays part of the principal money to the *ſcrivener*, who gave a receipt; but the bond being in B.'s cuſtody, the payment was not good. Vern. 150. Hill. 1682. Roberts v. Matthews.—* Chan. Caſes 93. Mich. 19 Car. 2. S. P. Hen v. Conitby.—S. P. Ibid. 111. Trin. 20 Car. 2. Dey v. Gibaſton.—If *obligor takes not up the bond* when he pays, and the obligee gets the bond, and ſo has remedy at law, there the *debtor truſts the ſcrivener*. Arg. 2 Chan. Caſes 77. Mich. 33 Car. 2. Taulurer v. Ward.—† Chan. Prec. 209. Mich. 1702. Martin v. Kingſley.

mortgage, and ſo if after his deceaſe executor agrees to it either expreſsly or by implication. 1 Salk. 157. Hill. 7 Ann. in Canc. Whitlock v. Waltham.

(D) Good. In reſpect of the *Manner*, *Fraud*, *Artifice* &c.

For though the money was actually paid, and ſo the condition perform'd in words, yet [273] that circumſtance will make it to be no payment nor performance *in law*. Cro. E. 383. Paſch. 37 Eliz. B. R. Goodale v. Wyatt. S. C.—And eſtates of third perſons ſhall not be deveſted by *colourable or covenous payments*, but by true and effectual payments. 5 Rep. 96. S. C.—Poph. 99. S. C. for it was not done *animo ſolvendi*.—Godb. 295. cites it as Packington's Caſe.

1. A. Makes a *feoffment to B. upon condition*, that *if A.* within a year after the death of B. ſhall *pay* 100 *l. to the heirs or executors of B.* that A. may re-enter. B. makes a feoffment of the land to C.——B. makes his will, and his wife and heir his executors, and dies; *A.* within a year after the death of B. *by agreement with the heir of B.* at a time and place limited for the payment *pays the* 100 *l.* to him; and by the ſaid agreement A. is immediately *to have back* 30 *l.* of this 100 l. which is done accordingly; adjudg'd and affirm'd in error, that this colourable payment is not ſufficient to reveſt the eſtate in A. for it is not a payment of the 100 l. but of 70 l. only. Jenk. 261. pl. 61. Goodal's Caſe.

2. It was held, that if *colourable payment* of money by a purchaſor is *recited* when none was paid revera, this eſtate is invalid againſt him that comes in bona fide for a valuable conſideration, and this may be given in evidence well enough without pleading it. Clayt. 32. Aug. 11 Car. Ballard v. Sitwell.

3. A. having notice of a decree to which he was no party, *pays contrary to* that decree; it was order'd, that he ſhould pay the money over again. Vern. 57. 122. Hill. 1682. Harvey v. Mountague ——This notice was only by being preſent in Court when the decree was pronounc'd. Ibid.

* 6 Mod. 147. Popley v. Aſhley. But if A. goes to buy goods of D. and offers a *note of a declining goldſmith* in payment, and D. ſays I will take it, if it be a good man, tho' he then knew him to be otherwiſe, that will not be good payment. Per Holt. Farr. 139. in Caſe of Hopkins v. Gery.

4. A. has *notes* of B. a *goldſmith*, and knows B. to be *in a* * *declining condition*; C. comes to A. to demand money due; A. aſks C. if he will take B.'s notes in payment; C. is willing to take it, and A. pays it him. Holt doubted if this was not a good payment, becauſe here was *no artifice* or ſurpriſe uſed. Farr. 139. Hill. 1 Ann. B. R. Hopkins v. Gery.

5. If a *banker* or goldſmith, who has many people's money, will *refuſe payment*, *but keeps his ſhop open*, and as often as he is *arreſted*,

arreſted, gives bail, he may by that means *give preference of payment to his friends*; and when he has done, if he runs away, yet ſuch payment ſhall ſtand againſt a commiſſion of bankruptcy. Per Holt Ch. J. Farr. 139. Hill. 1 Ann. B. R. in Caſe of Hopkins v. Gery.

6. A. bequeaths a *legacy* to M. the wife of J. S. who aſſigns it in truſt for his children, and after he deviſed it by his will likewiſe, for the benefit of his children, and made M. his wife executrix, who *compounds with A.'s executor, and accepts* 200 *l. in full for* 300 *l.* Decreed that the executor of A. ſtand charged to the children for the other 100 l. Mich. 1 Geo. G. Equ. R. 89. Atkins v. Dawbury.

(E) Good. *What amounts to* a Payment.

1. IF a *feoffment in fee* be made *on condition* to pay 100l. on ſuch a day, and at the day the feoffees *make an obligation* to feoffor for payment of it, the ſame is no performance of the condition. Le. 112. 1 Paſch. 30 Eliz. C. B. in Caſe of Stamp v. Hutchins.

2. A. *paid B.* 100 *l. in redemption of a mortgage*; B. *bids C. put it into his cloſet*, which C. did: then A. demanded his writings, which B. refuſed to deliver; whereupon A. *required his money again*; B. bid C. fetch it, to deliver it back to A. which C. did, and turned it out on the table for A. to take it in preſence of B. This was a good payment of the mortgage; but A. retaking the money is accountable to B. for the money as B.'s own money. Cr. E. 614. Trin. 40 Eliz. B. R. Hewer v. Bartholomew.

3. The plaintiff ſold goods to A. and the *defendant*, being there preſent, *promis'd that if A. did not pay* &c. *he would.* Afterwards the *plaintiff accepted of A. a bond* for all the ſum due upon the contract; and after a verdict for the plaintiff, this was moved in arreſt of judgment; for that by the bond the contract was determined and diſcharged; and by conſequence the aſſumpſit of the defendant, which depended upon it: and accordingly the Court was for arreſting the judgment, for that it is *all one as if A. had paid it, or* the *plaintiff had releaſed it*; but it being ſhewn that the bond was part of the firſt contract, and conſequently that the contract was not deſtroyed by it, judgment was given for the plaintiff. Noy 140. Oldfield's Caſe. [274]

4. A. brought 100 l. to pay to B.—C. who was B.'s *daughter, ſnatch'd* 20 *l.* out of the 100 l. and went away with it. A. ſhall not be chargeable with the 20 l. till he ſhall recover the ſame of the daughter; and an injunction was granted accordingly. Chan. R. 68. 9 Car. 1. Plomer v. Plomer.

5. *Giving ſecurity* for purchaſe money is payment; admitted. Chan. Caſes 99. Hill. 19 & 20 Car. 2. Sir Joſeph Douglas v. Wade.

6. 950 l. is to be paid by vendee to vendor; vendee, by vendor's

dor's order, *pays* 500l. part *to a bond creditor*, and *takes an assignment to himself* of the bond, and likewise pays other money to other creditors by vendor's order, but took security for repayment, on certain conditions. Decreed to be *no payment* to the vendor, so long as the assignment of the bond, and the security for repayment, were kept on foot, and not delivered up to be cancell'd. Fin. R. 84. Hill. 25 Car. 2. Magson and Sitwell v. Fane, Clayton & al.

7. A *note drawn* on A. to pay money for *value received* is a good discharge of a debt, tho' the note be not paid, unless the creditor *return* the bill *in convenient time*. Per Holt Ch. J. Show 155. Pasch. 2 W. & M. Darrach v. Savage.

8. A. gives B. a *bill of exchange* on C. in payment of a former debt; this is not allowable as evidence on non assumpsit, unless paid; for a bill shall never go in discharge of a *precedent debt*, except it be part of the contract that it should be so, 1 Salk. 124. 3 W. & M. coram Holt Ch. J. at Guildhall. Clark v. Mundall.

9. The plaintiff was indebted to the defendant upon two notes; and the defendant obtained judgment at law against him for the money; and then desiring the defendant's forbearance, he told him that if he *would procure one Defoy to give him his note for the money, he would accept of it*, and acknowledge satisfaction on the judgment, and deliver up the plaintiff's notes; and being to go forthwith out of England, he left the plaintiff's notes with his agent here, to be exchanged for Defoy's, in case the plaintiff procured them; and the plaintiff *accordingly procured two notes*, payable to the defendant, which he delivered to the defendant's agent, and took up his own notes, and the attorney at law staid all further proceedings, but would not acknowledge satisfaction on the judgment, having no orders for it from his client; and *before Defoy paid any of the money he failed*, and then the defendant proceeded at law on the judgment; whereupon the plaintiff brought this bill to be relieved, and *suggested that he had discounted the money with Defoy*, and made him satisfaction, *but* he *made no proof* of any such thing, and therefore at the hearing his bill was dismiss'd by the Master of the Rolls, and this decree was affirm'd by my Lord Keeper on appeal. Abr. Equ. Cases 146. Hill. 1700. Grubarr v. Gairand.

10. When a *merchant draws a bill upon a correspondent, who accepts it*, this is payment; for it makes him debtor to another person, who may bring his action. 10 Mod. 37. Trin. 10 Ann. B. R. Per Parker Ch. J. in Case of Louviere v. Laubray.

[275] (F) What amounts to a Payment. *Retainer.*

1. DEBT upon an obligation with condition that *if the defendant grants to the plaintiff before Whitsontide the lease and farm of the mill of D.* habend. &c. *till 6 l. be paid*, that then &c. and *said that before Whitsontide the defendant leas'd to the plaintiff the mill for term of ten years, rendring such rent per ann.* &c. *and that the plaintiff should retain in his hands all the rent which should amount*

amount to 6 l. And per Needham, this is good, tho' the rent and farm were not in eſſe at the time of the obligation made, but the leaſe was made after; but Laicon contra, and that the retainer of the rent till the 6 l. be paid, is as good as payment of the rent or grant to the plaintiff of the rent, till 6 l. be paid; et adjornatur. Br. Condition, pl. 81. cites 37 H. 6. 26.

2. In prohibition the ſuggeſtion was, that the Queen, and all thoſe whoſe eſtate &c. had us'd to pay to the rector of K. 2 s. 4 d. per ann. in ſatisfaction of *tithes*. In evidence it appeared that the Queen had the eſtate of the abbot of K. who was *owner of the land, and likewiſe rector* in fee in right of his abbey. And it was inſiſted that this did not prove the preſcription, becauſe neither the Abbot, nor the Queen who had his eſtate, could pay themſelves. But the Court held otherwiſe; for that the unity of the inheritance of both was not a diſcharge in perpetuum of the tithes or modus. And if ſo, then the *retainer* ſhall be ſaid *payment to himſelf*. Mo. 527. Mich. 40 & 41 Eliz. B. R. Chambers v. Hanbury. S. C. cited Mo. 532. in Caſe of Benton v. Trot.

(G) Made; *How it may be. By Parcels.*

1. IN Caſe the plaintiff declared that the defendant, in conſideration the plaintiff would forbear him a debt for a certain time, *promiſed to pay it at two ſeveral days*, and ſhewed which in certain. And it was mov'd in arreſt of judgment, that it is *not mentioned by what portions* the debt was to be paid. Per Clench J. the defendant has liberty to pay it *in what portions he pleaſes*. But, per Gawdy, he ought to pay it by *equal portions*; as a rent reſerv'd payable at two feaſts, without ſaying by what portions it ſhall be paid. The Court agreed that the objection was not good cauſe to arreſt the judgment. 3 Leon. 235. Mich. 32 Eliz. B. R. Brewin v. Mansfield.

(H) Made; *At what Time it ought to be.*

1. IF I *ſell my horſe* to you *for* 20 *l.* you ſhall not have the horſe *if you do not pay the money preſently*; for tho' I am content that you ſhall have him for 20 l. yet if it is not paid preſently, *but another comes and gives me* 20 *l. for him, and I accept it*, there the ſecond ſhall have it, and not the firſt, who did not pay me. Per Carell Serj. which Fitzh. J. and Brudnel Ch. J. agreed. Br. Contract &c. pl. 15. cites 14 H. 8. 19. *But if a future day of payment be agreed*, then 'tis a good bargain, and the vendee has poſſeſſion immediately; and the vendor ſhall have action at the day. Per Fitz. Br. Contract, pl. 15. cites 14 H. 8. 19.

2. *But* if you are in the market and offer me a piece of cloth for 20 s. and I agree, and *as I am telling the money another comes and gives you* 20 *s. for it, and you agree*, yet I ſhall have the cloth; [276] *But if I depart, and before my*

return you fell the cloth to another, there I ſhall not have the cloth, becauſe I did not pay preſently, nor no day of payment was given between us. Per Broke J. which Pollard J. agreed. *But otherwiſe* it ſeems, *if vendor had agreed to ſtay till the vendee had fetched the money from his houſe.* Br. Contract, pl. 15. cites 14 H. 8. 19.—*But if the vendor and vendee are agreed* for 20s. *and the vendor delivers the cloth to the vendee*, and he accepts it, this is a perfect bargain; and ſo ſee a *diverſity* between a *perfect bargain* and a *communication*. Per Broke J. Br. Contract, &c. pl. 15. cites 14 H. 8. 19.

for there is no default in me. Per Broke J. which Pollard J. agreed. Br. Contract, pl. 15. cites 14 H. 8. 19.

3. *But ſale* of ſtuff *for ſo much as J. N. ſhall arbitrate* is a good contract, if he arbitrates what, &c. and if he will not arbitrate any ſum, then the bargain is void; per Pollard, to which Brudnel Ch. J. agreed; and by him, *if J. N. was preſent, and would not ſay*, the bargain is void; but if he be *abſent*, the bargain is good 'till J. N. *refuſes to ſay what ſhall be paid*, and the party ſhall have *reaſonable time* to move J. N. what he ſhall ſay &c having regard to the diſtance of the place where he dwells. Br. Contract &c pl. 15. cites 14 H. 8. 19.

4. *And* a *man may ſell* his ſtuff for 10 *l. upon condition that he ſhall have it again when he comes to Paul's*, and by the performance &c. the bargain ſhall be void. Per Pollard. Br. Contract &c. pl. 15. cites 14 H. 8. 19.

5. *And* if a man ſells his horſe *for* 10 *l. and accepts* 1 *d. in earneſt*, it is a good contract; and the vendee ſhall have the horſe, and the other ſhall have an action for his money. Per Brudnel Ch. J. Br. Contract, pl. 15. cites 14 H. 8. 19.

6. A difference was taken, *where a day* of payment *is limited*, and where it is not: for in the firſt caſe the *contract is good immediately*, and an action lies for it without payment; but in the other caſe not. As if a man buys of a draper twenty yards of cloth, the bargain is void unleſs the money is paid immediately; but if a day of payment be limited by the parties, in this caſe one ſhall have an action of debt, and the other an action of detinue. Hill. 28 H. 8. Dy. 30. pl. 203.

7. If I *in conſideration of* 10 *l. to be paid at Michaelmas promiſe* you *a horſe*, it is no plea that the *money* is *not paid*. Dy. 76. pl. 30. marg.——And ſays it has been often ſo adjudged.

8. There are *four times* of payment of rent: 1. *voluntary, and not ſatisfactory*; 2. voluntary, and in *ſome caſe ſatisfactory*, in ſome caſe not; 3. *legal and ſatisfactory abſolutely, and not coercive*; 4. *legal, ſatisfactory, and coercive*. See 10 Rep. 127. b. Mich. 11 Jac. in Clunn's Caſe.

See Trial (U. g.) pl. 34.

(I) Made. At what Time it *may be*.

A promiſes to pay 100*l.* to B. 25*th of March, quand requiſitus foret.* A. is

1. A Bond was *to pay at, or before the* 25*th of* March, and the obligor *tender'd the money the* 24*th*. And the queſtion was, whether the bond was forfeited? Per Anderſon Ch. J. If he had tender'd in *the laſt inſtant of the* 24*th* day, he had ſav'd the obligation: for the word (*before*) continues the whole time

time from the date of the bond 'till the firſt inſtant of the 25th day; and where a man has liberty of time to do an act, he ſhall do it in the laſt inſtant of the time. But the other Juſtices were againſt him, and thought that the word *(before)* was to have no other conſtruction, than that thereby the obligor might be admitted to pay it before the day, *by agreement of the obligee.* Quære; for it ſeems that is no more than the law allows. Mo. 122. pl. 266. Paſch. 25 Eliz. Anon.

not bound to pay this till the laſt hour of the day, and B. ought not to requeſt it before; per Coke. Roll. R. 189. Paſch. 13 Jac. B. R. Hudſon v. Barton.—Roll. makes a quære.

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2. In debt upon *bond*, the condition was for payment of a ſum at a certain day and place. The defendant pleaded payment at the day and place, according to the condition; and upon iſſue taken it was found that he paid it *before the day*, and at another place, *and the plaintiff accepted it*. And the defendant had judgment by the opinion of the whole Court; for * payment before the day *is payment at the day*. Trin. 31 El. C. B. Cro. El. 142. Bond v. Richardſon.

Dy. 222. b. pl. 22. in marg. cites S. C.—— And. 198. S. C.—— Mo. 267. S. C.—— Ow. 45. S. C. —— 1 Leon. 311. S. C.—Sav. 96. S. C.—* Mo. 366. pl. 502. Anon. S. P.—Cro. J. 434. Hill. 14 Jac. B. R. Holms v. Brocket. S. P.—Godb. 10. pl. 14. Mich. 24 El. C. B. S. P. But that it not *being pleaded* ſpecially, but *generally*, that he paid it according to the condition, the jury muſt find againſt the defendant; for that the ſpecial matter would not prove the iſſue. And Dyer Ch. J. ſaid that the plaintiff's counſel might have demurr'd to the evidence.—Dy. 222. b. pl. 22. S. P.

3. In debt on bond, *defendant pleads payment before the day*, and iſſue being taken upon it, *it was found for the plaintiff:* but upon a writ of error the judgment was revers'd. For tho' if a verdict had been *for the defendant it would have been good*; becauſe payment before the day is payment at the day; yet being found *for the plaintiff*, it *is become* * *an immaterial iſſue;* for non-payment before the day, is no evidence of non-payment at the day; and it might be paid in the mean time. 10 Mod. 147. Hill. 11 Ann. B. R. Merryl v. Joſſelyn.

S. C. cited per Cur. 8 Mod. 345. in Caſe of MARTIN v. PRITCHARD.—And that becauſe ſuch iſſue would not end the matter, the plaintiff might demur. Ibid.—* Cro. Jac. 434. Hill. 14 Jac. B. R. Holms v. Brocket.

(K) Made, at what Time; where *the Day is uncertainly expreſſed.*

1. A *Bond* was to pay 20 *l. at the Feaſt of our Lady*, without limiting in certain what Lady-day, viz. the Conception, Nativity, or Annunciation. Per tot. Cur. The deed ſhall be conſtru'd to intend ſuch Lady-day which ſhould next happen and follow the date of the bond. 3. Le. 7. 6 Eliz. B. R. Anon.

2. A *ſtatute merchant* was acknowledg'd for the payment of 500 l. but *no day of payment was limited*, as mentioned in the ſtatute of Acton Burnel; and the lands being extended, an audita querela was brought, and inſiſted that the ſtatute was void for that omiſſion; and of that opinion was Hutton J. but the reſt of the Court held the ſtatute to be good. And they agreed

Bridg. 16. Meſkin v. Hickford. S. C.—— Winch. 86. Hickford v. Machin. S. C. And

agreed that a day of payment is matter of ſubſtance; becauſe without it the Mayor cannot tell when to make execution, which appears here upon this ſtatute; for as no particular day is limited for the payment of the money, it is payable immediately, and ſo it is as certain, as if a day had been mentioned in the ſtatute; and of this the Mayor is to take notice. And accordingly judgment was given againſt the plaintiff in the audita querela. Jo. 52. Mich. 22. Jac. C. B. Maſkelyne v. Higford.

Hobart Ch. J. makes a quære, if a ſtatute merchant be *to pay at ſeveral days*, whether it be payable till all the days of payment be paſt, as of a bond.—Hutt. 32. Davis's Caſe. S. C. but ſays, a ſuperſedeas was awarded upon the extent, the ſtatute being void for the omiſſion of the day of payment.

(L) Payment, *limited in the Diſjunctive.*

1. *BOND for payment of* 40 *l. annually during the life of* B. at the Feaſt of St. Michael and the Annunciation, *or within thirty days after* every of the ſaid feaſts. B dies within the thirty days. Held that this is a diſcharge of the payment due at the feaſt before his death. Cro. E. 380. Hill. 37 Eliz. in Scacc. Price v. Williams.

Het. 74. Anon. S. P. —So in caſe [278] of leſſee for life. Per Fleming Ch. J. Cro. J. 228. In Caſe of Barwick v. Foſter.

(M) *Application.* How. *Who ſhall apply* the Payment.

1. THE defendant being indebted to the plaintiff *upon bond, and* alſo *upon book*, for wares had of him, *tender'd the money due on the bond* at the day, which the plaintiff accepted, and ſaid it ſhould be for the book debt; but the defendant ſaid, he paid it upon his bond and not otherwiſe. The *plaintiff croſs'd his book* as diſcharg'd, *and brought debt on the bond*, but adjudged againſt him; for the payment is to be in the manner the defendant would make it, and not as plaintiff would accept it. Cro. Eliz. 68. pl. 19. Mich. 29 & 30 Eliz. Anon.

If one pays money *in ſatisfaction of a bond*, and the *party to whom* it is paid, *ſaith that he will receive it for another cauſe*, yet if he receives it, it ſhall be judged to be paid in ſatisfaction of the bond; for he muſt receive it upon ſuch terms as the other will pay it. Sic dictum fuit. Sty. 239. Mich. 1650. in Caſe of Bois v. Cranfield.

2. The manner of tender and of payment ſhall always be *directed by him who makes the tender or payment*, and not by him who accepts them. And therefore where a leſs ſum was paid in ſatisfaction of a greater before the day, tho' it was allowed to be a good diſcharge, yet becauſe the defendant did *not plead that he paid it in ſatisfaction, but that* he paid it generally, and that *plaintiff received it in ſatisfaction*, the plaintiff had judgment. 5 Rep. 117. Trin. 44 Eliz. Rot. 501. C. B. Pinnel's Caſe.

Mo. 677. Penny v. Core. S. C. ſays, the Court inclin'd it was a good plea; but does not mention the objection to the form of it.—A. owes B. 20 l. by award and 20 l. by bond. He pays 20 l. It ſhall be on which of both he pleaſes;

pleaſes; for he and not the receiver is the *firſt agent*. Farr. 123. Hill. 1 Annæ B. R. Stracy v. Sanders.

3. Money paid *before actual entry of judgment on bond* is to be taken as paid on the bond, tho' the judgment be entred after, as of a term before the payment. Chan. Caſes 24. Trin. 15 Car. 2. Criſp v. Blake. 2 Chan. Rep. 88. S. C. 25 Car. 2.

4. Where intereſt is due on a *bond*, and the debtor pays any *ſum leſs than the intereſt*, the payment is to be accounted intereſt only. Chan. Caſes 106. Paſch. 20 Car. 2. Arg.—Ibid. 24 Arg. in Caſe of Criſp v. Blake. So where it was *more*, it was to be charg'd to the intereſt firſt. 8 Mod. 242. Paſch. 10 Geo. Boſtock v. Boſtock.——*Judgment* was had *for principal and intereſt* due on a *bond*. Decreed per Bridgman K. on appeal, and confirm'd per Finch K. that what ſum the obligee had receiv'd prior to the entry of the judgment ſhould go in diſcharge of the intereſt, and what he *received after the judgment enter'd*, ſhould go firſt to diſcharge the intereſt and then the principal. Fin. R. 89. Hill. 25 Car. 2. Criſp v. Bluck.

5. A. is *bound as ſurety* for B. to C.—B. owes C. a *further debt of* 100 *l.* on *ſimple contract*.—B. and C. come to a ſtated account for all monies owing to C. as well for what was due on the bond in which A. is bound, as for what is due to C. on ſimple contract; and there being due to C. 85 l. B. makes a *bill of ſale towards ſatisfaction of the whole debt*; and decreed, that the money ariſing by the bill of ſale ſhall be applied towards diſcharge of both debts in proportion. Vern. 34. Hill. 1681. Perris v. Roberts. If there had been 2 *debts* and a *ſum of money generally paid*, the creditor may elect and chooſe after to what debt to apply it, when on payment the debtor made no diſtinction how he paid it, but the payment (in the principal caſe) being purſuant to a preceding account of both debts, the payment ſhall be intended according to the account, viz. *on* * *both debts*, and ſo ſhall be proportion'd ratably on both debts; per Ld. Chancellor, and ſo confirm'd an order of the Maſter. 2 Chan. Caſes 84. Hill. 33 & 34 Car. 2. Perry v. Roberts.——* S. P. but obſcurely expreſs'd. Show. 216. Paſch. 3 W. & M. Styart v. Rowland.

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6. A *creditor by judgment and alſo by bond* receives 200 l. of the purchaſor of the eſtate of the debtor, but gives no notice to the purchaſor, that it was to be apply'd towards payment of the bond debt. Per Cur. it ſhall therefore be apply'd towards ſatisfaction of the judgment, the 200 l. being part of the purchaſe money. Vern. 468. Trin. 1687. Brett v. Marſh.

7. A. whilſt a *trader* owes 100 l. to B. and *leaving off his trade*, borrows of B. 100 l. more—A. pays B. 100 l. not mentioning which. Per Holt Ch. J. it ſhall be apply'd to the *former*, ſo that the creditors ſhall never charge him with a commiſſion of *bankruptcy* for that 100 l. which remains. Cumb. 463. Mich. 9 W. 3. Anon.

8. A. was bound to pay B. 500 l. Afterwards *C. became ſurety with A. for* 100 *l. part of the* 500 *l.* and then *A. having a judgment for* 500 *l. againſt J. S. aſſigned it to B.* towards ſatisfying B.'s debt. B. received ſeveral ſums on the judgment, and *the ſheriff, by B.'s conſent, let A. have* 80 *l. of the money levied* on the judgment aſſigned to B. This will not any ways help C. and go in diſcharge of any part of the 100 l. he is ſurety for. But if B. had actually received any money, and had afterwards lent

it or any part of it to A. then C. would have been eaſed by it. Per Ld. Wright. Ch. Prec. 178. Mich. 1700. Halford v. Byron.

See Maxims. —5 Mod. 86.—S. P. 8 Mod. 236. Anon.—A. *indebted by mortgage and alſo for goods* to B. pays money generally. It ſhall be taken to have been

9. A. indebted to B. by *ſpecialty*, viz. articles under hand and ſeal, and alſo on *ſimple contract* on a running account, pays ſeveral ſums, and entered them on his own book, as paid on account of what was due on the articles. Per Cowper C. *Quicquid ſolvitur, ſolvitur ſecundum modum ſolventis*, is to be underſtood when the perſon paying *declares at the time of payment*, on what account he pays it; but if the payment is general, the application is in the receiver, and the entry in A.'s books is not ſufficient to make the application. 2 Vern. 606. Hill. 1707. Manning v. Weſtern.

paid towards diſcharge of the money due on the mortgage, which carry'd intereſt. Vern. 24. Mich. 1681. Heyward v. Lomax.—So if indebted by *bond and for goods*. 2 Brownl. 107.——If one owes 40 l. by bond for the payment of 20 l. at ſuch a day, and 20 *l. by contract* to the ſame perſon, *payable at the ſame day*; and at the day he pays 20 l. without telling for which it is, it ſhall be a payment in equity upon the bond, becauſe that is moſt penal upon him. 12 Mod. 559. Mich. 13 W. 3. Anon.

(N) Plea. *What is a good Plea* of Payment.

1. PAyment is no plea, unleſs where the *defendant cannot wage his law*. Br. Dette, pl. 96. cites 22 H. 6. 36.

Br. Condition, pl. 12. cites S. C.

2. *Payment to a ſtranger by command of the plaintiff* is no plea in debt of 10 l. to pay 5 l. but *contra* of *payment to the plaintiff by the hands of a ſtranger*. But in debt of the penalty or of the principal ſum ſpecified in the writ of debt, payment is no plea. Br. Dette, pl. 15. cites 27 H. 6. 6.

3. Debt of 10 l. the defendant *ſaid, that the plaintiff has received* 5 *l.* of it *pending the writ* and no plea, but ſhall anſwer to the debet; but *acquittance of part* ſuffices to diſcharge all the action. Br. Debt, pl. 137. cites 3 H. 7. 3.

4. And in debt *for rent* upon a leaſe for years, payment of parcel in another county is a good plea, and ſhall abate all the writ. Ibid.

Cro. El. 455. S. C. ——Mo. 692. S. C. Chamberlane v. Nichols.—— Jenk. 257 S. C.—Mo. [280] 11, 12. Stapleton & Bowet v. Trewlock.

5. In debt upon a *ſingle bill*, the defendant pleads *payment without acquittance*; upon which iſſue was taken and found for the plaintiff. It was held that payment without acquittance is no plea, and ſo iſſue was join'd upon a thing not material; for if the defendant had paid the ſum without an acquittance, yet the ſingle bill had remain'd in force. But there having been an iſſue join'd upon an affirmative and negative, and found for the plaintiff, it was held to be aided by the ſtatutes of jeofails; and plaintiff had judgment, which was affirm'd on a writ of error. 5 Rep. 43. Mich. 37 & 38 Eliz. B. R. Nichols's Caſe.

8. P.—Cro. El. 157. Etnam v. Tottam S. P.——Cro. E. 884. Colbrook v. Foſter. S. P.—Dy. 25. b. pl. 160. Anon. S. P. per Montague.—Dy. 51. Mich. 33 H. 8. B. R. Waberley v. Cockerel. S. P. Arg.—S. P. and a fortiori, it is not a good plea in a *ſcire facias upon a judgment*, which is a debt upon record. Reſolved per Cur. Trin. 35 Car. 2. C. B. Rot. 317. Kettelby v. Hales.—To a *bond with condition* indorſed payment is a good plea *before breach*, but *not afterwards*, no more than to an action of debt upon a ſingle bill; for the benefit of the condition is loſt when the breach is made. Per Holt Ch. J. Trin. 13 W. 3. 2 Salk. 508. Marle v. Make.

6. In

6. In debt upon *obligation* the *condition* was, *that* the *defendant ſhould pay from time to time the moiety* of all ſuch money as he ſhall receive, and give account; and per Cur. payment pleaded is good *without ſhewing the particular ſums*; but they agreed, that if the condition had been to pay the moiety of &c. without ſaying from time to time, it ought to be pleaded ſpecially. Quære the diverſity. Sid. 334. Paſch. 19 Car. 2. Church v. Brownewick.

7. 4 & 5 *Ann. cap.* 16. *ſ.* 12. enacts, That *in debt on ſingle bill, debt, or ſcire facias on judgment, defendant may* plead payment *in bar. In debt on bond, if the defendant before action brought hath paid the principal and intereſt due by the defeaſance or condition, tho' ſuch payment was not made ſtrictly according to the condition or defeaſance, yet it may be pleaded in bar, and ſhall be as effectual as if the money had been paid at the day and place, according to the condition, and had been ſo pleaded.*

(O) *Proof* of Payment. What is.

1. THE Court inclined, that a receipt in the *mortgage deed*, and condition of redemption on re-payment of the money, and defendant's oath that he had paid it, was evidence enough of payment *after ten years* againſt any perſon. Chan. Caſes 119. Hill. 20 & 21 Car. 2. Goddard v. Complin.

2. Bill againſt an executrix for performance of articles, by which her huſband was bound to pay 6000 l. to the plaintiff, who *acknowledg'd the receipt* of the whole, viz. 4000 l. in money, and the reſt by a conveyance of lands; decreed, that the acknowledgment is an *evidence* of the performance, ſince the plaintiff *made no further demand for ſeveral years*; and it is unreaſonable to put an *executor to prove a preciſe payment* after ſo long a time, and the acknowledgment under hand and ſeal ought to be concluſive, and diſmiſſed the bill. Fin. R. 246. Hill. 28 Car. 2. The Duke of Newcaſtle v. Cleyton.

(P) Payment. *Deviſe or Settlement for Payment of Debts. How. Pari Paſſu.*

1. WHERE an *equity of redemption or truſt eſtate* is deviſed for payment of debts, all debts ſhall be paid equally. * But if ſuch *deviſee be alſo made executor*, then do the lands ſo deviſed become legal aſſets, and then debts muſt be paid according to their precedency or ſuperiority at common law, and this is ſaid to have been reſolved in Caſe of HIXINE v. MORLY, and decreed accordingly here. Vern. 63. Mich. 1682. Girling v. Lee.

* S. P. Chan. Caſes 275. Paſch. 28 Car. 2. Whitton v. Lloyd.— S. P. 2 Vern. 248. Mich. 1691. Greaves v. Powel.— 2 Vern. 405. Mich. 1700. S. P. Anon.—Chan. Prec. 127. Mich. 1700. Cutterback v. Smith.—

Chan. Prec. 136. Mich. 1700. Bickham v. Freeman.—Lord Cowper thought the accident of being made executor (which Mr. Vernon inſiſted ſtrongly upon) ought to make no difference in equity, but that all creditors ſhould be conſidered equally, and would ſee precedents, though Mr. Vernon ſaid it had been a ſettled diſtinction, and that there were ſeveral precedents in point. Ch. Prec. 4 8. Trin. 1715. Challis v. Caſborn.

A diſtinction was taken Arg. that where a deviſe of lands to be ſold for payment of debts is made *to executors and their heirs*, they are legal aſſets, and debts muſt be paid in a courſe of adminiſtration; otherwiſe if deviſed *to truſtees who were not executors*, or *to executors and a third perſon a ſtranger*, in either of which caſes they would only be equitable aſſets; but at the firſt hearing the Maſter of the Rolls ſeemed not to agree, in regard generally all deviſes for payment of debts are to executors; but in the principal caſe, the premiſſes deviſed being mortgaged in fee by the teſtator, and he having nothing but an *equity of redemption*, it was reſolved by Lord C. King, that it could be only equitable aſſets, and conſequently muſt go amongſt all the creditors equally; for as much as a debt by judgment, and a debt by ſimple contract are in conſcience equal. 2 Wms's Rep. 414 to 416. Trin. 1727. Deg v. Deg.

Debts on judgments that in their own nature charge lands, ſhall have the priority where *lands* are *ſettled* for payment of

2. A. *having mortgaged his eſtate ſeveral times over*, and for near the full value to each mortgagee, and being likewiſe indebted on judgment bonds and ſimple contracts, ſettles his eſtate for payment of his debts; the *real ſecurities* ſhall be firſt paid, and then the bonds and ſimple contract debts in an *average*. Vern. 101. Mich. 1682. Child v. Stephens.—And a judgment not decreed to take place of the after-mortgagees. Ibid. 103. S. C.

debts; but where they are * *given to pay debts and legacies*, they ſhall be paid in equal proportion. Chan. Caſes 32. Mich. 15 Car. 2. Wollſtoncroft v. Long.——See Chan. Caſes 248. Mich. 26 & 27 Car. 2. S. P. but no judgment. Hixon v. Witham.——3 Chan. Rep. 12. S. C. —— * If lands are *deviſed or conveyed* to pay debts, the payment muſt be in proportion equally of debts by bond or otherwiſe. 2 Chan. Caſes 201. Mich. 26 Car. 2. Parker v. Dee.

And Lord Chancellor declared, that when lands are *ſettled for payment of debts generally*, all the creditors are equally intitled, and in ſuch caſe debts with

3. A. being indebted to B. C. D. E. and F. conveyed lands to the uſe of himſelf for life, and after the uſe of his will, and by his will *deviſed to B. and C. for the payment of his debts* and died. B. and C. ſold the lands and paid themſelves, and ſuch other creditors as were ſureties to for A. by which the aſſets were exhauſted and nothing left to pay D. E. and F. who brought their bill to have a proportionable ſatisfaction, which was decreed accordingly. 2 Ch. Caſes 54. Trin. 33 Car. 2. Gell v. Adderley & al. Truſtees of Agard v. Smith the adminiſtrator of Agard.

or without ſpecialty are equally regarded; for though there is a *difference in caſe of executors* who are to pay ſpecialties before promiſes, that is *an artificial preference* by law, but naturally a debt by contract without ſpecialty is as juſt as the other; and the conveyance to the truſtees (being themſelves creditors and ſureties for a guard) does not give them any preference. Ibid.—*And* though *ſome circumſtances* in this caſe might give hope or confidence to the truſtees, that they might prefer themſelves, viz. that B. was his ſervant, and C. lent his money at the time of the conveyance, and ſome ſpeeches tending to declare ſuch truſt, yet that alters not the caſe; beſides, that ſuch truſt was ſince the ſtatute of frauds and perjuries. Ibid.

4. A *term was in truſt to raiſe any ſum not exceeding* 1500 *l.* for payment of debts which he ſhould *owe at his death*. He borrows 1000 l. of J. S. and *by deed appoints his truſtees to pay that* 1000 *l.* out of the truſt eſtate, and dies indebted to ſeveral other perſons in more than the 1500 l. would pay, decreed the 1000 l. to be paid in the firſt place. Ch. Prec. 44. Paſch. 1692. Seymour v. Fotherby.

5. A.

5. A. deviſed his *real and perſonal eſtate* for payment of debts and legacies. B. a *creditor gets judgment* againſt the executor, and *then he and other creditors that had not judgment joined in a bill*, and had a decree for ſale of the eſtate and payment of the debts in proportion. B. proved his debt, received ſeveral dividends, and then petitioned for a re-hearing; for that he being a judgment creditor ſhould have preference to other creditors as to the perſonal eſtate. But the Court would not alter the decree for the reaſons above, and thought if any preferences were to be, B. ſhould bring what he had received into *hotch-pot*, and ſhould then take either *all law, or all equity*; per Ld. Wright. Ch. Prec. 190. Paſch. 1702. Shepherd v. Kent.

S. P. and Parker C. diſallowed the difference uſually taken between *aſſets in law and aſſets in equity*, as without any reaſon or [282] foundation, and contrary to the known rules of law; but in caſe of *land deviſed to be ſold for payment of debts*, this Court always decrees the profits ariſing from the ſale equally among all the creditors; but then this may be *conſidered as a gift* of teſtator among all the creditors, and this Court will make no diſtinction where teſtator did not, Chancery being as it were his truſtee. 10 Mod. 427, 428. Mich. 5 Geo. 1. Wilſon v. Fielding.

6. A *judgment obtained after a conveyance* made for payment of debts ſhall not affect the eſtate as a judgment, and ſhall only be paid in proportion; per Lord Harcourt. Chan. Prec. 310. Hill. 1710. Stephenſon v. Hayward.

7. A *term* is raiſed, and the truſt declared *to pay all debts in proportion, without preferring one debt to another*; the bond creditors were ſatisfied part of their debts by the executors out of the perſonal eſtate; notwithſtanding which, Lord Harcourt held, that they may ſtill come in for the remainder in proportion with the ſimple contract creditors; for the *law gives the fund of the perſonal eſtate to the bond creditors*, and the *party gives the fund of the truſt term*; and the clauſe that no debts ſhall have preference, muſt be intended only with regard to their ſatisfaction out of the truſt term. Wms's Rep. 228. Trin. 1713. Car v. the Counteſs of Burlington.

But ſee 2 Wms's Rep. 416. Trin. 1727. Dee v. Dee, where A. deviſed *all his real and perſonal eſtate to his executors and their heirs*, in truſt to be ſold for payment of all his debts; it was decreed by the Maſter of the Rolls, and affirmed by Lord C. King, that though the *ſpecialty creditors* might have the preference out of the perſonal eſtate, yet if they do ſo, and would afterwards come in upon the lands ſo deviſed, they ſhould firſt *bring into hotch-pot what they had received out of the perſonal eſtate*; for the teſtator had connected his real and perſonal eſtate with a view that all ſhould go equally, and he might give his equitable aſſets upon what terms he pleaſed.

8. A. *deviſed his lands for payment of all debts, but* did *not* deviſe them *to be ſold for payment* of debt, but permitted them to deſcend charged with the debt, and therefore it was inſiſted, that they were *legal aſſets by deſcent as to the bond creditors*, and charged only in equity by the will as to ſimple contracts, and Ld. C. Parker held, that the bond creditors ſhall be preferred to thoſe by ſimple contract. Wms's Rep. 429. Paſch. 1718. Freemoult v. Dedire.

But if the heir before any action brought had ſold the lands, and then the bond creditors had brought their actions, they ſhould have been paid only their ſhare out of the aſſets; per Ld. C. Parker; and he ſaid it is obſervable, that by the expreſs words of the ſtature of 3 & 4 *W. & M.* 14. *where there is any deviſe or appointment by a will of lands for payment of debts or portions to children, other than the heir at law, according to an agreement before marriage, ſuch will ſhall be of force.* Wms's Rep. 430, 431. Paſch. 1718. Freemoult v. Dedire.

9. There

9. There is a *difference* in equity, when a debt by ſimple *contract is turned into a debt of a ſuperior nature by a judgment confeſſed by teſtator*, and when *by the executor*; in ſuch caſe the former ſhall have a preference according to law, with reſpect to the equitable aſſets, but not the latter; per Parker C. 10 Mod. 426. Mich. 5 Geo. 1. Wilſon v. Fielding.

(Q) *What Debts* are to be paid *by Virtue of ſuch Deviſe* or Settlement.

1. A. Settles lands for payment of his debts; the lands ſo ſettled ſhall be liable *to debts of A. as he was executor of B. his father*. Chan. Rep. 249 16 Car. 2. Fleming v. Taylor.

2. A. was indebted 100 l. and made B. his executor and dy'd; B. made C. his executor, and deviſed to C. lands to pay his debts. J. S. to whom A. was indebted, prays ſatisfaction out of the perſonal eſtate of A. and B. and out of the lands. This
[283] proviſion of the deviſe of lands to pay debts does *not extend to debts of A.* nor to make ſatisfaction out of the lands if *B. had waſted the perſonal eſtate of A.* to the value of the debt. For this devaſtavit by B. tho' it is a charge upon him, yet is not within the will of lands charged for payment of debts; for it is not properly a *debt by contract*, but *ex maleficio*, which is not within the meaning of the will; per Finch C. 2 Ch. Caſes 215. Paſch. 28 Car. 2. Price v. Morgan.

3. Lands are ſettled for payment of debts, *amounting to a ſum in groſs*, viz. 1000 l they are liable to pay the *intereſt* as well as the principal, and ſhall make good what ſhall be paid out of the perſonal eſtate. Fin. R. 286. Hill. 29 Car. 2. Shipton v. Tyrrell.

4. A. makes a deed of truſt for payment of his debts, to take effect after his death; the words in the deed were (*monies owing by him*); and a *ſchedule* was annexed to the deed, wherein mention was made of 1000 l. owing to A. and 500 l. owing to B. and then there is this item, viz. the ſum of 3000 l. owing to other perſons. Decreed, that the lands ſhould ſtand charged only with ſuch debts as were owing *at the time of making the deed*; and Finch C. ſaid it was ſo in all caſes where a deed is made for *payment of debts owing*, unleſs it be expreſſed to be for payment of ſuch other debts as he ſhould after contract, or to that effect. Vern. 28. Hill. 1681. Purefoy v. Purefoy.

5. A. has a *decree* againſt B. for 2700 l. debt. B. *appeals* to the Houſe of Lords, where the decree is affirm'd; B. petitions and has an *order for re-hearing*, and being extremely affected with his ill ſucceſs falls ill, makes his will, and deviſes his lands for payment of his debts. Per North K. It cannot be ſuppoſed that B. who deny'd A.'s debt on oath, and dy'd his martyr in his cauſe, ſhould ever *intend* any benefit of this truſt to A. So in caſe of a verdict, and he had brought attaint and made ſuch ſettlement,

tlement, the debt recovered by the verdict could never be intended to be satisfied. But at length decreed, that after all debts on simple contract were paid, A. should be paid his debt if he could find assets. Vern. 142. Hill. 1682. Norden v. Norden.

6. A. while a Student at Cambridge, and being but just come of age, was *drawn by circumvention into a covenant for payment of a sister's portion which he was not otherwise liable to*, and which he afterwards refused the payment of, and refus'd to levy a fine of his lands, though decreed so to do, to subject to the payment of it. Afterwards he *devised his lands for payment of his just debts*. The question was, whether this contested debt should be paid? and that it should not was cited the Case above, of NORDEN v. NORDEN. But Ld. C. Jeffries said, The law has said it is a just debt, and therefore it must now be taken as such; and had not the lands been devised, but have descended on his heir, they would be assets, and liable to the covenant; and decreed the debt with interest. Vern. 431. Hill. 1686. Lord Hollis v. Lady Carr.

7. A. by will *gives B.* 400 *l. in satisfaction of all monies owing to him*, and subjects his real estate to the payment of his debts. A. *owed B.* 800 *l.* but it was barrable by the statute of limitations. The Lords Commissioners decreed the payment of the *whole* 800 *l.* notwithstanding the words of the will and the **statute of limitations*. 2 Vern. 141. Trin. 1690. Gofton v. Mill.

Chan. Prec. 9. S. C.—So where A. recites in his will, *whereas he is indebted to B.* 300*l. to D.* 400*l.* &c. when he *really owed B.* 400*l.* and D. 500l. &c. and afterwards by that will subjects his lands to the payment of his debts, they would be liable to pay all that was due to B. and D. &c. notwithstanding the testator's *mistaken recital*; per Ld. Rawlinson. Ch. Prec. 10. Trin. 1690. in Case of Gofton v. Mills.—* S. P. 1 Salk. 154. 1707. + Anon.——+ 2 Wms's Rep. 374. Arg. cites this as the Case of Stagger v. Welby.—And upon producing this Case Ld. C. King over-ruled a plea of the statute of limitations. Trin. 1726.—But, on appeal to the House of Lords, this decree was reversed, and ordered the plea to stand for an answer. Ibid. Blakeway v. the Earl of Strafford.

8. The plaintiff had brought his action against M. *for lying with his wife*; and 13 January 1689, M. made a conveyance of his land to trustees, in *trust to pay his debts mentioned in a schedule* annexed to the deed, *and such other debts as he should appoint, within ten days in Hillary Term* following; the *plaintiff recovered* 5000 *l. damages* against M. and brought his bill to be relieved against the deed as fraudulent against him, and made to defeat him of his debt. Per Cur. This deed is not fraudulent either in law or equity for such debts as are named in the deed; for the plaintiff was no creditor at the making of the deed; and tho' it was made with an intent to prefer his real creditors before this debt, when it should come afterwards to be a debt; yet it was a *debt founded in maleficio*, and therefore it was conscientious in him to prefer the other debts before it; but the *plaintiff may come in upon the surplus* after the debts mentioned in the schedule, or appointed within ten days, pursuant to it, are satisfied. Mich. 1699. Abr. Equ. Cases 149. Lewkner v. Freeman.

[284] Freem. Rep. 236. pl. 303. Hill. 1699. S. C.

9. The plaintiff's relation (to whom he was heir) allowed his

his wife *pin-money*, which being in arrear, he gave her a note to this purpoſe, I am indebted to my wife 100 l. which became due to her ſuch a day; after, by his will, he makes proviſion out of his lands for payment of *all his debts, and all monies which he owed to any perſon in truſt for his wife*; and the queſtion was, whether the 100l was to be paid within this truſt? And my Lord Keeper decreed not; becauſe in point of law it was no debt, for that a man cannot be indebted to his wife, and it was not money due to any in truſt for her. Hill. 1701. But quære, for the teſtator looked on this as a debt, and ſeems to intend to provide for it by his will. Abr. Equ. Caſes 66. Cornwall v. the Earl of Mountague.

Ch. Prec. 502. Mich. 1718. Anon. ſeems to be S. C.

10. A. *gave M. his wife the foul diſtemper* twice, upon which ſhe left him, and *J. S. lent her* 30 *l. to pay doctors &c. and for neceſſaries*. Afterwards A. deviſed lands for payment of debts and died. On a bill by J. S. it was held by the Maſter of the Rolls, that admitting the wife cannot at law borrow money ſo as to bind the huſband, yet it being *applied to her uſe for cure and neceſſaries*, the plaintiff, who lent it, muſt in equity ſtand in the place of thoſe who found and provided ſuch neceſſaries; and therefore as ſuch perſons would be creditors of the huſband, ſo the plaintiff muſt ſtand in their place and be a creditor alſo, and directed the truſtees to pay his money and *coſts*. Wms's Rep. 482. Mich. 1718. Harris v. Lee.

11. A. an *infant married without his father's conſent, and being diſcarded* by him, *borrowed money to ſupport himſelf and wife* to the amount of 130l. and having a conſiderable eſtate in reverſion after his father's death, and ſoon after coming of age, he deviſed his real eſtate to truſtees for payment of his *debts with intereſt*. It was held by the Maſter of the Rolls, that there not being in this caſe any circumſtance of fraud, and the money not being advanc'd to ſupply the infant's extravagancies, and the money being but 130 l. and infant's eſtate conſiderable, and he being on his father's diſpleaſure left deſtitute, and obliged to borrow for his neceſſary ſupport, and conſidering alſo particularly, that he did not barely deſire that his debts ſhould be paid but with intereſt alſo (which is *unuſual*), it was decreed, that this money actually lent as aforeſaid, though during the teſtator's infancy, was within the truſt. Wms's Rep. 558. Trin. 1719. Marlow v. Pitfield.

12. If a man deviſes his lands for payment of his debt, this deviſe *makes the land as a ſecurity or mortgage for all the teſtator's debts*, as well thoſe *by ſimple contract* as otherwiſe, *and* the ſimple contract debts *ſhall carry intereſt*, as the land, which is the fund, yields annual profits; per Lord C. Macclesfield, who ſaid it was the daily practice. 2 Wms's Rep. 27. Trin. 1722. Maxwell v. Wettenhall.

[285] 13. If a *truſt* be created for payment of debts *without ſpecifying what debts, but as to one debt the party* intereſted in the eſtate charged *forbids the truſtees to pay it, as not thinking it a real or juſt debt;*

debt; if the truſtees ſhould afterwards ſpontaneouſly pay this debt, they ought not to be allowed it. Arg. 2 Wms's Rep. 454. Paſch. 1728. in Caſe of Balſh v. Hyham.

(R) Deviſe or Settlement for Payment of *Debts or Legacies.* Where they ſhall be paid *Pari Paſſu.*

1. WHERE lands are given to pay debts and legacies, they ſhall be paid in proportion; but in caſe of debts on *judgments* that in their own nature charge the land, it is otherwiſe. Chan. Caſes 32. Mich. 15 Car. 2. Woolſtencroft v. Long.

So where an *equity of redemption* was deviſed for payment of debts and legacies,

they ſhall be paid pari paſſu, unleſs the eſtate ſtood charged with the debts before. N. Ch. R. 202. Paſch. 1692. Powell's Caſe.—But if the *lands are then mortgaged*, prevents the judgment affecting the land. Arg. Vern. 64. 65. Mich. 1682. in Caſe of Girling v. Lee.——Yet after-judgments ſhall be paid before bonds and ſimple contracts. Vern. 101. Mich. 1682. Child v. Stephens.

2. *Legacy to an executor* is to be paid in proportion with others, ſo far as the eſtate will extend with damages, and it is not like the caſe at common law, where the executors pay their own debts and legacies firſt, or him that firſt* ſues, his whole legacy before others. 3 Ch. R. 54. 22 Car. 2. Butler v. Coote.

* And gets judgment. Nelſ. Ch. R. 142. S. C.

3. *Truſt* was for raiſing *portions* and *maintenance* of children, and for *payment of debts*; decreed per Bridgman K. to be paid pari paſſu; but on a re-hearing it was decreed by Finch K. that the children's maintenance ſhould be firſt paid, the debts in the next place, and the portions laſt. Fin. R. 88. Hill. 25 Car. 2. Sir Robert Bells v. Sir John Bells.

S. C. cited as SIR JOHN BOWLES'S CASE, and decreed by Bridgman to be paid pari paſſu, but reverſed by

Lord Nottingham, who ſaid, he would not make a man ſin in his grave, and that he thought in caſe of a truſt for payment of debts and legacies, the debts ſhould be preferred. 2 Vern. 248. Mich. 1691.

4. A. deviſes his lands *to his executors towards payment* of his debts and legacies. Per Finch C. Debts muſt be paid before legacies, and he took a difference between ſuch appointment made by *conveyance* and by *will*. Chan. Caſes 275. Paſch. 28 Car. 2. Whitton v. Lloyd.

5. Where land is *deviſed to be ſold* for payment of debts and legacies, Jeffries C. was of opinion, that the debts and legacies ſhould be paid in equal proportion, without any preference to the debts; and ſo it was reſolved in the Caſe of SIR JOHN BOWLES by the † Ld. Nottingham, that debts and legacies ſhould be paid pari paſſu; but the Lord North reverſed that decree, and gave preference to the debts; and ſo likewiſe Ld. North decreed the debts to be firſt paid in the Caſe of * HIRON v. WHITHAM; but Ld. Jeffries declared he was not ſatisfied with that opinion, and would conſider of it. Vern. 482. Mich. 1687. Goſling v. Dorney.

The money raiſed by ſale ſhall *be legal aſſets*, and the debts and legacies paid in proportion; per Lords Commiſſioners. 2 Vern. 133. Hill. 1690. Anon.——

* Fin. R. 196. Hill. 27 Car. 2. S. C. and ſo decreed per Finch K. cited 2 Vern. 406. Mich. 1700. Anon.——† But ſee pl. 3. and the note there.

2 Vern. 247. Mich. 1691. Callingham v. Mellith.

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6. A. makes his nephew his ſole *executor, and deviſes to him and his heirs all his lands in truſt to ſell, and pay* all his debts and his children's portions with the monies to be raiſed by the ſale, and perſonal eſtate; and gave 100 l. to each of his children, of which there were nine. Per Lds. Commiſſioners, the deviſe being *to him and his heirs*, the lands muſt go in a courſe of deſcent, and he muſt take as a truſtee and not as an executor, and therefore decreed the debts and portions to be paid *in proportion*. 2 Vern. 133. Hill. 1690. Anon.

So if it was *only a truſt*. See ſup. pl. 3. 5. Sir John Bowles's Caſe.—— Where the *deviſees are made executors*, the money raiſed by ſale of the lands becomes *legal aſſets*, and the debts muſt be firſt paid; but it is otherwiſe where the *deviſees are not executors*. Per Ld. Wright. 2 Vern. 405. Mich. 1700. Anon.

7. Deviſe was *to truſtees* for payment of debts and legacies, and the *truſtees are made executors*. The eſtate is deficient. Per Cur. No doubt the truſtees being made executors, when the eſtate is ſold, the money becomes legal aſſets; and debts therefore muſt be preferr'd. 2 Vern. 248. Mich. 1691. Greaves v. Powell.

So where the charge was *with the payment of all ſuch debts as I ſhall owe at my death, and alſo with the ſeveral legacies herein after mentioned*; and after giving ſeveral legacies, the teſtator deviſed ſeveral copyhold lands, which he had ſurrendered to the uſe of his will, to his eldeſt ſon and his heirs, ſubject to, and charged with all his juſt debts, and the ſeveral legacies therein before bequeathed, and he made his ſaid ſon executor. Ld. C. King ſaid that the words *(and alſo)* were not material; but what was moſt material was the deviſe to the executor, which muſt be taken to be to enable him to pay the debts and legacies, and his aſſets; and whether *legal or equitable aſſets, are the ſame thing*; for equitable aſſets *in the hands of the executor* muſt be applied as legal aſſets are, *firſt to pay debts, and then legacies*; and decreed accordingly. 2 Wms's Rep. 550. Trin. 1729. Walker v. Meager.

But where there is *a bare truſt* for payment of debts and legacies, Ld. C. King ſaid it might be otherwiſe, and the legatees might then have a right to be paid equally. 2 Wms's Rep. 552. Trin. 1729. In Caſe of Walker v. Meager.

N. B. The Editor adds a *quære*, whether it is not now the practice, in caſe of a truſt for a payment of debts and legacies, to prefer the former? and refers to 2 Vern. 248. Greaves v. Powell.

8. A. before the ſtatute againſt fraudulent deviſes, *deviſed a freehold eſtate to his ſecond ſon and his heirs*, ſubject to the payment of debts and a legacy of 500 l. And the queſtion being, whether the debts ſhould be preferr'd to the legacy? Ld. Harcourt ſaid he would expound the teſtator's meaning to be what it ought to be, viz. to pay his debts before he was charitable; and decreed the debts to be firſt paid. 2 Wms's Rep. 551. cited Arg. as the Caſe of Petre v. Bruen.

S. P. Chan. Caſes 32. Mich. 15. Car. 2. Woolſtencroft v. Long.—— which ſee at (P) pl. 2. marg.

9. A mortgagee, who had nothing left but an *equity of redemption* of the mortgaged lands, deviſed the ſaid equity of redemption for the payment of his debts and ſome legacies which he had bequeathed to ſeveral perſons by his ſaid will. It was decreed, that if the eſtate did not ſtand charged with the debts before, but only by the will, in ſuch caſe, both *creditors and legatees* ſhall come in *pari paſſu*. N. Ch. R. 202. Paſch. 1692. Powel's Caſe.

S. C. Cited in Chan. in L. C. King's time. 23. S. C.

10. One who had formerly *compounded debts with his creditors*, and thereupon was *releaſed by them*, proving afterwards fortunate in the world, made his will, and thereby *gave* ſeveral *legacies*; and among others, *to ſuch of his creditors as had compounded his debts with him* &c. The Court thought that by the releaſe the debts

debts became extinct, and so these compounding-creditors legatees were out of the case as creditors, and must now claim as voluntary legatees, and could have no other title than to the legacies in such manner given by the will, and not to be preferr'd in payment, the personal estate not being sufficient to pay all. 2 Wms's Rep. 291, 293, 296. Trin. 1725. Coppin v. Coppin.

(S) *What* is *a good Devise, or* good *Settlement* for Payment of Debts. [287]

1. DEED in trust to pay debts, tho' the *creditors* are *not parties*, and *no certainty of debts* therein appearing, yet is good against an *after purchasor*, who had notice of this trust. 2 Chan. Rep. 30. 21 Car. 2. Langton v. Tracy.

It is not good against a purchasor, per Ld. K. Finch. Chan. Cases 249. Hill. 26 and 27 Car. 2. Leech v. Leech.—[But in this case nothing is mentioned of notice.]

2. A. *seised* of land *in fee-simple, bequeathed it to his executor to pay debts.* The executor has no estate of freehold; for if he should, it must be either for life, which might soon determine before debts paid, or in fee-simple, which would carry away the land from the heir for ever; when perhaps a few years profit might suffice to satisfy the debts: and also by death of the executor, the land should descend to his heir, and not to go to his executor, who would be executor of A. the first testator. Went. Off. Execu. 253.

(T) *What* shall be *liable* to the Payment, or shall be said charged.

1. *Reversion after an estate tail* (the estate tail being determined for want of issue) is subject to trustees for payment of debts. 2 Chan. Rep. 208. 32 Car. 2. Bruce v. Gape.

2. *I will all my debts shall be paid before any of my legacies or gifts herein after mentioned*; and then devised several pecuniary legacies; and after, in the same will, devised lands to J. S. on condition to pay a certain rent to J. N. and other lands to J. S. on condition to pay 5 l. per ann. to J. D. Quære if these lands are by the will subjected to the payment of the testator's debts, or only to the payment of the particular rents thereunto devised? Per Cur. The lands are not *subjected to the payment* of testator's debts. The general clause in the beginning of the will shall be intended only of the personal estate, and the pecuniary legacies thereout devised. Vern. 457. Pasch. 1687. Eyles v. Cary.

3. A personal estate not *specifically devised* is to be applied to payment of debts, and the *real estate* shall not be subjected thereto,

thereto, but only *ſupplementarily*. 2 Chan. Rep. 382. 1 Jac. 2. Middleton v. Middleton.

4. A. ſeiſed in fee, deviſed his lands to B. and the heirs of his body; and in the ſame will *deſired* B. to pay all his debts. Ld. C. Jeffries decreed the lands ſhould ſtand charged with payment of the debts, tho' it was *but a kind of deviſe for that purpoſe* after an eſtate tail; and affirmed in domo proc. N. Ch. R. 178. Mich. 1691. cited as PELHAM's Caſe in the Caſe of Webb v. Sutton.—But it ſeems that a deſire to pay a *money legacy* is no charge on the land. Ibid.

5. A. ſeiſed of *freehold and copyhold* land, ſurrenders to the uſe of his will; and then deviſes to B. *all his goods, chattles and eſtates whatſoever, upon condition* that ſhe pay his debts and legacies, and makes B. executrix and dies, leaving C. the defendant his ſon an infant. B. dies before probate of the will. On a bill by the creditors for the ſale of the eſtate, the perſonal eſtate being deficient, the Court thought the words, with other circumſtances of the caſe, would paſs the lands, and decreed a ſale, and the *heir to join* when he comes of age; but he being an *infant*, day was given him to *ſhew cauſe*, after he comes of age. Ch. Prec. 37. Mich. 1691. Lumley v. May.

[288] 6. If a man deviſe an annuity to a child to be iſſuing out of certain lands, and by the ſame will he deviſes the ſame lands for the payment of his debts and legacies; the deviſe of the *annuity is* a *ſubſiſting charge* on the lands, and ſhall be good. This was ſo held N. Ch. R. 202. Paſch. 1692. in Powell's Caſe.

[For more of Payment in general, ſee Charge, Condition, Tender, Trial, and other proper Titles.]

Peculiars.

(A) The *ſeveral Sorts*; and *Pleadings*.

1. THE Court of Peculiars *is that which dealeth in certain pariſhes, lying in the ſeveral dioceſſes, which pariſhes are exempt from the juriſdiction of the biſhops* of thoſe dioceſſes, *and are peculiarly belonging to the Archbiſhop* of Canterbury, within whoſe province there are 57 ſuch peculiars; for there are certain peculiar juriſdictions belonging to ſome certain pariſhes, the inhabitants

bitants whereof are exempt ſometimes from the archdeacons, and ſometimes from the biſhop's juriſdictions. Godolp. Rep. 119. cap. 11. ſ. 16.

2. If a man *be ſued* out of his dioceſs; yet if it be within his proper peculiar, it is not within the ſtat. of 23 *H.* 8. Per Coke. Roll. R. 329. Hill. 13 Jac. B. R. Moore v. Cockein and Sanderſon.

3. It cannot be intended peculiars have any authority, unleſs it be *ſhewn*; but the archdeacon is oculus epiſcopi, and de jure ordinario he is to commit adminiſtration. Cro. J. 556. Mich. 17 Jac. B. R. Chiberton v. Trudgeon.

The biſhop's official ſhall be intended to have juriſdiction, but the authority of a peculiar muſt be ſet forth. 2 Mod. 65. Hill. 27 & 28 Car. 2. C. B. Dawes v. Harriſon.

4. Upon a declaration in prohibition, and the pleading to it upon demurrer, 2 queſtions were argued; 1ſt, upon the remiſit curiam by the dean of Saliſbury, who had a peculiar, and he made letters of requeſt to the dean of the arches; upon which it was objected, that this was per ſaltum, and that he ought to have made his requeſt to the immediate ordinary, and Hob. 16. 186. and Cro. Car. 262 &c. were cited for this purpoſe, but non allocatur; for tho' this is true, if it was a peculiar of an archdeacon or any other ſubject to the juriſdiction of the ordinary, that then the objections made, and the caſes cited would hold. But to this Holt Ch. J. ſaid, that there are three ſorts of peculiars. 1. The firſt, which is when archdeacon &c. have a peculiar *within the dioceſe* and *ſubject to the juriſdiction of the ordinary*. Second, when one has a peculiar *not ſubject to the ordinary, but to the archbiſhop*. And the third is, when one has a peculiar ſubject *neither to the ordinary nor to the archbiſhop*, as there are ſome. And he ſaid, that tho' the dean of Sarum is to ſome purpoſes ſubject to the juriſdiction of the biſhop, yet as to this peculiar it is all one as if it was in a ſtranger; and it is not under the juriſdiction of the biſhop of Sarum, more than of the biſhop of London; and if he had made requeſt to the biſhop of Sarum, and the party had been cited upon it, ſuch citation had been a citation out of his dioceſe within the ſtatute of 23 H. 8. and it does [289] not appear that he is within the juriſdiction of the biſhop of Sarum; and therefore it ſhall not be intended, per Holt Ch. J. Skin. 589. Mich. 7 W. 3. B. R. Johnſon v. Ley.

5. A citation was in the conſiſtory of . . . . . and a prohibition was mov'd upon three ſeveral points; and of which one was, that the ſaid church was within ſuch a peculiar, and conſequently not within the juriſdiction of the conſiſtory court, not even by letters of requeſt. And by Holt Ch. J. all peculiars are *not inferior to the ordinary* of the dioceſe in which they are; and ſuch, as are not, cannot tranſmit any cauſe to the ordinary, and ſuch *tranſmitting muſt always be to the immediate ſuperior*: the dean and chapter of Saliſbury have a large peculiar within the limits of the dioceſe, but as much out of the juriſdiction of the dioceſe of S. as the dioceſe of London is. The peculiar

If a peculiar be *ſubordinate to the biſhop*, then *he cannot refer a cauſe to the archbiſhop*, but to the immediate ordinary, as archdeacon or commiſſary muſt do; otherwiſe it

culiar *juriſdiction of an archdeacon is* not properly a peculiar, but rather *a ſubordinate juriſdiction*. Vid. Hob. 185, 186. and the remiſſion of the cauſe muſt be to that juriſdiction, to which the appeal would lie, in caſe the cauſe had not been remitted: and a *peculiar prima facie is to be underſtood of him that has co-ordinate juriſdiction with the biſhop:* and therefore what ſort of peculiar this is, would be improper to determine upon motion; and if your ſuggeſtion were right, it were fit for a prohibition, and the matter to come in debate on a declaration therein. 6 Mod. 308. Mich. 3 Ann. B. R. Treil v. Edwards.

's if the peculiar has his immediate reſort to the archbiſhop; but if the peculiar be freely a general exemption from all ordinary juriſdiction (which was common in the caſe of monaſteries both by the grants of Kings and Popes) then *the cauſe muſt be remitted to the King*, as appeals muſt be alſo in ſuch caſes; and ſo it is provided by the ſtatute of 25 H. 8. cap. 31. Per Hobart Ch. J. Hob. 186. Jones v. Jones——If a ſentence is given in a peculiar, the appeal is to the archbiſhop, and not to the biſhop of the dioceſe; which proves it to be of *exempt juriſdiction*. 11 Mod. 6. Paſch. 2 Annæ B. R.

[For more of Peculiars in general, ſee Executors and Adminiſtrators, Prohibition, and other proper Titles.]

Peer.

(A) *Peerage.*

1. IN ancient time, none might be a *baron* who had not 13 knights fees, and he that had ſo much might come *without writ* to the parliament to give advice. And now when barons have been called to the parliament by the King, or created by patent, they are barons of ſome place and ſeigniory which is intended great command and revenue, and their *tenants of thoſe ancient baronies* are diſcharged of contribution to the *wages of knights in parliament*, becauſe their lords ſerve for them in parliament; and Ld. Chancellor ſaid, if a *baron waſte his eſtate*, ſo that he is not able to ſupport the degree, the King may *degrade him*. Mo. 768. Mich. 3 Jac. in the Caſe of the Counteſs of Rutland.

2. Dignity of peerage is not barrable by *fine*. Parl. Caſes 11. The King v. Viſcount Purbeck.

(A. 2) His Duty and Power.

1. THE ſtatute of Marlebridge 52 H. 3. *cap.* 10. *excuſes biſhops and peers from paying attendance at the tourn unleſs their preſence be ſpecially required for ſome cauſe.* Vid. 2 Inſt. 120, 121.

2. Upon conſtruction of ſtatute 13 H. 4. cap. 7. with the ſtatute of 17 R. 2. 8. and alſo with the ſtatute of 2 H. 5. 8. it has been held, that even noblemen are *bound upon pain of fine and impriſonment*, upon reaſonable warning *to attend the juſtices in execution of the ſaid ſtatute*, and not only *to arreſt rioters*, but even to conduct them to priſon. Hawk. Pl. C. 161. cap. 65. ſ. 20.

3. No duke, earl or baron, *as ſuch*, have any greater authority *to keep the peace* than mere private perſons. 2 Hawk. Pl. C. 32. cap. 8. ſ. 1.

(B) *Attendance* in Parliament.

1. LORDS Mordant and Sturton were *fined* in the Star-Chamber, *for not attending the firſt day of the Parliament*, having been ſummon'd under the Great Seal, viz. 10,000 marks Mordant, and 6000 marks Sturton, and remanded to the Tower of London during *the will of the King*.

N. B. This was at the time of the Powder Plot, to which they were thought to be privy.

N. B. The excuſe of Ld. Sturton for his not coming was, that *he was indebted* 130*l. and dar'd not come to Parliament.* Mo. 780. 3 June, 4 Jac. Ld. Sturton and Mordant's Caſe.

Noy. 102. S. C.——It is not treaſon nor felony, but it is treſpaſs to *depart from the Parliament without the king's leave.* Standf. Pl. C. 38. (A) ——Hawk. Pl. C. 59. cap. 22. ſ. 2.

(C) *Privilege.*

1. *Mag. Chart.* 9 *H.* 3. *cap.* 14. ENacts, That *Earls and Barons ſhall be amerced, but by their equals, and after the quantity of their treſpaſs.*

2. Capias does not lie againſt an * *abbot nor a biſhop, tho' he be return'd nihil in the firſt county, and* is returned nihil *upon a teſtatum in a foreign county alſo;* and *the ſame* law of *a* † *lord of parliament.* Br. Exigent, pl. 3. cites 27 H. 8. 22.

*S. P. Ibid. pl. 2. cites 26 H. 8. 7. ——†S. P. Ibid. pl. 2. cites 26 H. 8. 7.—*But* if *reſcous* be *returned upon a lord of parliament*, capias lies for the *contempt.* Br. Exigent, pl. 3. cites 27 H. 8. 22.——S. P. per Popham. Mo. 767. Mich. 3 Jac. in the Counteſs of Rutland's Caſe——S. P. Cro. E. 170. Lord Stafford v. Thynne.——S. P. Fin. Law, 8vo. 355.

Serjeant Hawkins ſays, it ſeems that even peers of the realm, whether ſpiritual or temporal, are *liable to an attachment* for ſome contempts, as *for reſcuing a perſon arreſted* by due courſe of law, *or* for *proceeding* in a cauſe *againſt the King's* writ of *prohibition*, or for *diſobeying other writs* wherein the King's prerogative or the liberty of the ſubject are nearly concerned; but it ſeems clear,

clear, that it is a certain general rule, that a peer is punishable in this manner for disobedience of all writs whatsoever; and it seems certain, that no peer is liable to an attachment for not *appearing on a jury*; therefore it seems, that what is said in some books in general, that an attachment lies against peers for *contempts*, ought to be understood of such only as are *of an enormous nature*, as those above mentioned, and others of the same kind, about which it is difficult to lay down any certain particular rules. 2 Hawk. Pl. C. 15[illegible]. cap. 22. f. 33.

[291] 3. And upon *recovery against a bishop*, a man shall have elegit, and not Ca. Sa. But exigent lies against a lord of parliament, if he *be not certified lord of parliament*. Ibid.

Exigent does not lie against an *earl, duke, baron, nor countess*. Ibid. pl. 37. cites 14 H. 6. 2.

4. And *day of grace* shall not be given against a lord of parliament. Ibid.

5. And lord of parliament shall not be *sworn in an inquest*. Ibid.

6. And where a lord of parliament or baron *is at issue*, he *shall have 1 or 2 or more knights of his inquest*, or otherwise the array shall be quash'd. Ibid.

7. Noy attorney-general in lectura Mr. Atkins, 1632. held that baron or earl ought to *appear at the sessions of the forest*, and that no immunity by common or statute law privileges him; and the reason is, because *it is suit real*, of which no subject shall be discharged, and the *statute of Marlebridge mentions only tourne of sheriff*, and it shall not be intended for forest. D. 314. b. marg. pl. 98.

8. Roll. Ch. J. said it is questionable whether *a countess by patent only for her life* be priviledged from arrests or no. Sti. 234. Mich. 1650. Countess of River's Case.——Ibid. 254. S. C. Hill. 1650. Held not allowable; but adjornatur.

* See Homine Replegiando.

9. Peerage is no *privilege* for *taking an orphan* contrary to the custom of the city of *London*. And in * *Hom. replegiando* where he retains the body, he shall be committed. Lev. 163. Pasch. 17 Car. 2. B. R. Wilkinson v. Bolton.

10. A bill of Middlesex was issued out of B. R. by an attorney of the Court against the countess of H. which was discharged by *superfedeas without pleading*; because it appeared by the record, that she was a *peeress*, and the attorney was committed for suing out the process. Vent. 298. Trin. 28 Car. 2. Anon.

11. *Widows of peers* are to have the priviledge of peers *not to be arrested*; but as to privilege of parliament, it was determined both ways in 1676. See 2 Chan. Cases. 224. Anon.

A *peer brought ejectment* against some of his tenants, and mov'd for a trial at bar. The *defendants mov'd that be* being a peer, and

12. In *ejectment* a special verdict was found on a trial at bar, and thereupon *judgment for the defendant, and costs taxed*; and after affidavit of the demand of the costs, a *motion* was made *for an attachment* against the dutchess (the duke being dead), she being one of the lessors, *for non-payment of the costs*; and it was alledged, that if the Court did not grant it, the defendant would be remediless; for tho' in other cases a distringas issues against peers, yet in this case no process can go but an attachment. But the Court refused to grant an attachment against the

the perſon of the dutcheſs, but *ordered* her *to ſhew cauſe why an attachment, as to her goods and chattels, ſhould not be iſſued*; which rule was afterwards made abſolute. Rep. of Pract. in C. B. 7. 8. Hill 12. Ann. 1713. Thornby, on the demiſe of the Duke and Dutcheſs of Hamilton v. Fleetwood.

conſequently not to be attach'd if the verdict ſhould be againſt him *might be obliged to make ſome reſponſible perſon his leſſee, or* otherwiſe would *waive his privilege*. But the Court rejected the motion; for if the plaintiff was worth nothing, he could not be compell'd to do ſo; and it would be unreaſonable that his peerage ſhould be a loſs to him, ſince every ſubject has a right by birth to ſue in the King's Courts where no diſtinction is to be made of perſons. 8 Mod. 20. Mich. 7 Geo. 1721. Ld. Coningſby's Caſe.

13. A peer, or lord of parliament, cannot *be an approver*; for it is againſt Magna Charta for him to pray a coroner. 3 Inſt. 129. cap. 56. 2 Hawk. Pl. C. 205. cap. 24. ſ. 3.

(D) *Proceedings at Law, and in Equity.*

[292] See (C).

1. IN *debt* and *treſpaſs* againſt a lord or a peer, *capias* does not lie; contra upon *contempt*. Br. Replevin, pl. 19. cites 11 H. 4. 15.

Br. Contempts, pl. 3. cites S. C. —— Br. Proceſs, pl. 35. cites S. C.

2. An *attachment* (was granted) againſt the Lord Cromwell. Toth. 76. cites 14 Eliz. Tavernor's caſe.

The like againſt the Lord Dacres. Toth. 76. cites June, 37 Eliz. —— *So* an attachment (was granted) againſt the Lord Barkley, at the motion of the Counteſs of Warwick. Toth. 76. cites June, 37 Eliz.

A peer of the realm *appeared to a bill in Chancery, but did not anſwer*; it was ſaid, that formerly an attachment lay, but now, by order of the parliament, *no proceſs lies but ſequeſtration*. Comb. 62. October 23, 1687. in Chancery. Anon.

3. In caſe of goods of a peer taken on a *foreign attachment*, and removal of the cauſe into C. B. he *muſt find bail*, and the bail ſhall be liable to pay the condemnation. And for execution on a *Stat. Staple* Merchant, on the Stat. of Acton Burnel, or on the Stat. of 23 H. 8. the body of a baron ſhall be *taken in execution*; for by theſe ſtatutes ſuch perſons were not exempted. 2 Le. 173. pl. 209. Trin. 29 Eliz. C. B. Harris v. Lord Mountjoy.

4. It was held that a nobleman ſhall be *bound with his bail in a recognizance* to render his body; and that upon the Stat. of 13 E. 1. if he hath not goods or lands, his body ſhall be taken in execution; for the law in ſuch caſe excepts only clerks. 4 Le. 6. 29. Eliz. in C. B. Anon.

5. If a *bill in Chancery* be exhibited againſt a peer, the courſe is firſt for my Lord Keeper to write a letter to him; and if he doth not anſwer, then a ſubpæna; then an order to ſhew cauſe why a ſequeſtration ſhould not go; and if he ſtill ſtands out, then a ſequeſtration. Becauſe there can be no proceſs of contempt againſt his perſon. 2 Vent. 342. Mich. 22 Car. 2. Anon.

6. If, *during the time of priviledge*, you want to proceed immediately

mediately againſt a privileged perſon, you muſt *either get him to* agree to *waive his privilege*, which in moſt caſes (if he be a man of honour &c.) he will not refuſe; *or* you may *petition the Houſe* where he ſits, that he may do ſo, and then he ſeldom refuſes it; or if he does, the Houſe, if it ſee cauſe, will order him to waive his privilege. Curſ. Canc. 499. cap. 18.

7. Note, If the *waiver* of privilege be of his own generoſity, or a voluntary act, it is neceſſary that you have it made *under his, or his ſolicitor's hand*, for your indemnity; for parol waiver, in ſuch caſe, will not be ſufficient. Curſ. Canc. 499. cap. 18.

8. It is ſaid, if a *truſtee* be *made a defendant* here, he ſhall not have privilege, though he be a member of parliament. Quære. Curſ. Canc. 499. cap. 18.

9. *Diſtringas* is the firſt proceſs againſt a peer on an information for an *intruſion* on the King's lands, or for a *trover and converſion of the King's goods*. 2 Hawk. Pl. C. 284. cap. 27. ſ. 12. cites Co. Ent. 387.

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(E) Sworn. In what Caſes.

1. IN the pleas of parliament, 18 E. 1. between the Earl of Gloucester and Earl of Hereford, John de Haſting a baron, upon long debate whether he ought to be ſworn becauſe he was a peer of the realm, it was reſolved, that he ought to lay his hand to the book. The like was reſolv'd 10 Car. in B. R. by the Court where the Lord Dorſet's teſtimony was requiſite. See D. 314. b. marg. pl. 98.

2. A bill was againſt a peereſs to *diſcover deeds*, ſhe anſwers on her *honour* and confeſſes deeds. She ſhall produce them only upon her honour and not on oath. Ch. Prec. 92. Paſch. 1699. Duke of Hamilton v. Lady Gerrard.

This privilege is reſtrained to an anſwer. Wms's Rep. 146. Trin. 1711. S. C.

3. Where a peer is to *anſwer to a bill*, his anſwer put in *on his honour* is ſufficient; but where a peer is to anſwer *interrogatories*, to make an affidavit, or be examin'd as a *witneſs, he *muſt be on his oath*, per Harcourt Ld. Keeper. 2 Salk. 513. in Canc. Sir Tho. Meers v. Ld. Sturton.

*In cauſes between party and party a peer that is *a witneſs muſt be ſworn*. 2 Mod. 99. Trin. 28 Car. 2. C. B. Earl of Shaftſbury v. Ld. Digby——3 Keb. 621. S. C.——If he is not ſworn, whatſoever he ſays is no evidence. But he cannot be compell'd to be ſworn; per tot. Cur. Freem. Rep. 422, 423. Paſch. 1676. S. C.

(F) *Degraded.*

S. C. cited Arg. Show. Parl. Caſes 4. in Caſe of the King v. Ld. Purbeck.

1. GEORGE Nevill, Duke of *Bedford*, was degraded by force of an act of parliament, 16 June, 17 Ed. 4. which act, reciting the making of the ſaid Sir George duke, doth expreſs the cauſe of his degradation, in theſe words viz. *And foraſmuch as it is openly known, that the ſaid* George *hath not*,

not, nor by inheritance may have any livelyhood to ſupport the ſaid name, eſtate and dignity, or any name of eſtate; and oftentimes it is ſo ſeen, that when any lord is called to high eſtate, and hath not convenient livelyhood to ſupport the ſame dignity, it induceth great poverty and indigence, and cauſeth often-times great extortion, embracery and maintenance to be had, to the great trouble of all ſuch countries where ſuch eſtate ſhall happen to be. Wherefore the King, by advice of his Lords Spiritual and Temporal, and by the Commons in this preſent parliament aſſembled, and by the authority of the ſame, ordaineth, eſtabliſheth and enacteth, that from henceforth the ſame creation and making of the ſaid duke, and all the names of dignity given to the ſaid George, or to John Nevil his father, be from henceforth void and of none effect &c. In which act theſe things are to be obſerved. Firſt, *That although the duke had not any poſſeſſions to ſupport his dignity, yet his dignity cannot be taken from him without an* * *act of parliament.* Second, *The inconveniencies do appear, where a great ſtate and dignity is, and no livelyhood to maintain it.* Third, *It is a good reaſon to take away ſuch dignity by act of parliament, and therefore the ſaid act of the* 28 *H.* 8. *ſhall be expounded, according to the general words of the writ, to take away ſuch inconvenience.* 12 Rep. 106, 107. in the Earl of Shrewſbury's Caſe.

* Peer cannot be degraded but *by attainder or act of parliament.* 12 Mod. 56. Trin. 6 W. & M. the King v. Knowles.

(G) *Pleadings.* [294]

1. IF a man be to plead his peerage, it is *not neceſſary to have a writ, or* to *ſay* that he is *unus pariũm regni*, but to plead the *letters patents* or *writ of ſummons* of his anceſtor, and ſhew that he ſat in parliament, and derive his pedigree from ſuch anceſtor. *But a biſhop* who is *ſeiſed* of his barony *in jure eccleſiæ*, and is not noble in his blood, he ought to plead that he is unus pariũm regni &c. Skin. 521. Trin. 6 W. & M. B. R. in Caſe of the King and the Earl of Banbury.

(H) *Trial of Peers* and Peereſſes. *By whom.* In what Caſes per Pares.

1. *IN appeal* againſt a lord, peer of the realm, he *ſhall* not *be try'd* by his peers, but *as a common perſon* ſhall be, and ſo it was adjudged before Forteſcue againſt the Lord Grey of Codner. *But upon indictment of felony, or of treaſon*, he ſhall be try'd by his peers; for this is the ſuit of the King. Br. Corone, pl. 152. cites 10 E. 4. 6.

Br. Appeal, pl. 27. cites S. C.—— Br. Trial, pl. 103. cites S. C.—— S. P. And ſo it was done in the Lord Dacre's Caſe, 33 H. 8. who was hang'd for felony, for the death of a man who was found in his company at a hunting in Suſſex. Br. Trial, pl. 142. cites 33 H. 8.——There is a diverſity between an appeal and an indictment; for *appeal* receives certain trial, which *indictment* refuſes, viz. in appeal trial by *battle* is allowed, where in indictment it is not allowed. Alſo in indictment of treaſon or felony againſt a peer of the realm, the trial is *by his peers*, which manner of

of trial in appeal is not grantable. By which it appears that this trial by peers is the proper trial which belongs to a peer of the realm, when upon indictment of treaſon or felony he has pleaded Not guilty. Staunf. Pl. C. 153. cap. 1 ——In a *præmunire* he ſhall be try'd by freeholders, notwithſtanding it is at the King's ſuit. And ſo in appeal at the ſuit of the party for petit treaſon, murder, robbery, or other felony. 3 Inſt. 30———For the appeal cannot be brought before the Lord High Steward of England, who is the only Judge of noblemen in caſe of treaſon or felony. 2 Inſt. 49———And alſo it is not within Magna Charta, cap. 29. which extends only to the King's ſuit. Ibid.

At the common law in theſe four caſes only a peer ſhall be *try'd by his peers*, viz. in treaſon, felony, miſpriſion of treaſon, and miſpriſion of felony; and the ſtatute law which gives ſuch trial, having reference unto theſe or to other offences made treaſon or felony, his trial by his peers ſhall be as before. But in caſe of a *præmunire*, the ſame being only in effect a contempt, no trial in this ſhall be of a peer by his peers; per Fleming Ch. J. 1 Bulſ. 198. Patch. 10 Jac. the King v. Ld. Vaux.

2. *This manner of trial is given*, as it ſeems, *by the* ſtatute of *Magna Charta, cap.* 29. which is in this manner. *Nullus liber homo capiatur, vel impriſonetur, aut diſſeiſietur de libero tenemento ſuo vel libertatibus vel liberis conſuetudinibus ſuis, aut utlagetur, aut exuletur, aut aliquo modo deſtruatur, nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum, vel per legem terræ. Nulli vendemus, nulli negabimus aut differemus juſtitiam vel rectum.* In this ſtatute there is this word (homo) which includes as well male as female, and yet it has been intended of males only, as appears by a *ſtatute* made anno * 20 *H.* 6. *cap.* 9. the letter of which is thus. *Whereas it is contain'd in the Great Charter among others in the form following: Nullus liber homo capiatur, aut impriſonetur, aut diſſeiſietur de libero tenemento ſuo, aut libertatibus ſuis, aut liberis conſuetudinibus ſuis, aut utlagetur, aut exuletur, aut aliquo modo deſtruatur, nec ſuper eum mittemus, nec ſuper eum ibimus, niſi per legale judicium parium ſuorum vel per legem terræ. In which ſtatute there is no mention how* femes, *dames of great eſtate, by reaſon of their barons, peers of the land, coverts or ſole, viz.* dutcheſſes, counteſſes or baroneſſes, *ſhall be put to anſwer, or before what Judges they ſhall be judg'd, upon indictments of treaſons or felonies by them committed; for which cauſe there is a doubt in law, before whom and by whom ſuch dames ſo indicted ſhall be put to anſwer and be judged. Our Lord the King willing to ouſt ſuch ambiguities and doubts has declared by the authority aforeſaid, that ſuch dames ſo indicted, or after to be indicted of any treaſon or felony by them done or after to be done, though they are covert of baron or ſole, that they thereof are put in anſwer and put to anſwer, and adjudged before ſuch judges and peers of the realm as peers of the realm ſhould be, if they were indicted or impeached of ſuch treaſons or felonies done, or after to be done, and in ſuch manner and form and in no other.* But none of thoſe ſtatutes have been put in uſe to extend to a † *biſhop or* an *abbot*, though they have the name of the lord of parliament; for they *have not this name* of biſhop or abbot *ratione nobilitatis, but* ratione *officii*; nor have place in parliament in reſpect of their nobility, but in reſpect of their poſſeſſions viz. *the ancient baronies annex'd to their dignities.* And according to this there are diverſe precedents, of which the one was in the time of H. 8. and ſee ‖ P. 10 E. 4, 6. that one of the peers indicted

of

* 2 Hawk. Pl. C. 455. cap. 44. ſ. 30. cites the ſame ſtatute, and in ſ. 11. there the ſerjeant ſays, it ſeems agreed that a Queen, the King's conſort, and alſo a Queen-dowager, whether ſhe continue ſole after the King's death, or take a ſecond huſband, be he peer or commoner; and alſo all peereſſes by birth, whether they be ſole, or

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married to peers or commoners, and alſo all marchioneſſes or viſcounteſſes, are intitled to a trial by the peers, tho' none of them be expreſsly mentioned in this act, or in Magna Charta. But it is agreed, that a peereſs by mar-

of treaſon or felony, *may if the King pleaſes be arraigned* thereof *in parliament, and* then the *Lords Spiritual ſhall make a procurator* for them, *inaſmuch as by the canonical law they themſelves ought not to condemn any to death.* And tit. Corone, in Fitzh. P. 3 E. 3. P. 161. the BISHOP OF WINCHESTER was arraign'd in B. R. becauſe he came to the parliament by ſummons, and departed without licence. Shard ſaid, that a parliament is aſſembled for the profit of the King and of his people, then when one of the peers does not come or departs without leave, this is a treſpaſs as well to the Peers as to the King; and of things touching parliament, they ſhall be judg'd in parliament, judgment if you will take conuſance here, which is a place more baſe. Scrope ſaid, thoſe who are judges in parliament are judges of their peers. But the King has not a peer in his own land, by which he ought not by them to be judged, nor elſewhere make his ſuit againſt him who treſpaſſes againſt him but there where it pleaſes him, by which &c. And note, that this trial by the peers holds place alſo where one of the peers of the realm is *indicted only of miſpriſion of treaſon or felony*, in which trial the ſame form is to be obſerved, as ſhall be where any peer is indicted of treaſon or felony, and arraigned thereof. Staunf. Pl. C. lib. 3. 152. b. 153. cap. 1.

riage loſes her dignity by marrying a commoner. † A biſhop is a peer of the realm, and ſhall be tried by his peers upon arraignment of a crime. Br. Trial, pl. 142. cites Fitzh. Challenge. 115. But ſays, that the BISHOP OF ROCHESTER was not tried by his peers in the time of H. 8. Ibid. — 2 Hawk. Pl. C. 434. cap. 44. ſ. 12 in the Notes in the margin (b) ſays, in Fitzh. Corone 161. it ſeems admitted, that a biſhop ſhall be tried by his peers in caſes proper for ſuch trials. But as to the Note out of Fitzh. Challenge 115. the Serjeant ſays it is miſtaken; for that no ſuch opinion is holden there.—And there ſ. 12. cites Staunf. 152. & 3 Inſt. 30. that thoſe who are lords of parliament, not in reſpect of their nobility, but of their baronies, which they held of the Crown, as biſhops now do, and ſome abbots and priors did formerly, are not within the intent of Magna Charta, to be tried by the peers. And Selden ſeems clear, that this is the only privilege which biſhop have not in common with other peers. And thoſe, who ſeem moſt for the contrary opinion, admit that the law hath been generally ſo taken. Neither do they produce any precedent where a biſhop or abbot has been tried by the peers upon a commiſſion; but on the contrary admit that there are two precedents of their being tried by the country. And it is ſaid by others, that there are diverſe precedents of this kind; yet Selden with his utmoſt diligence, ſeems able to produce but two, which clearly and fully come up to his point, viz thoſe of Archbiſhop Cranmer and Biſhop Fiſher. However, it ſeems to be agreed, that while the parliament is ſitting, a biſhop ſhall be tried by the peers.——‖ Br. Corone, pl. 152. cites S. C.

3. *Alſo* this trial by the peers is given in caſe of *indictment* upon the ſtatute, *for ſpeaking of ſeditious news, rumours or tales of the King or Queen*, as appears by the letter of the ſtatute made anno 1 & 2 *P. & M. cap.* 3. Staunf. Pl. C. 153. b.

4. *And* note, that in every caſe or caſes of *treaſon or felony newly made by ſtatute*, the lords ſhall have their trial by their peers, notwithſtanding that the ſtatute does not provide for it by expreſs words; ſo that the proviſo inſerted by the lords in every new ſtatute, which makes treaſon or felony, ſeems only ſurpluſage. Ibid.

5. *And* note, that the *number* of peers who are to try every lord is *twelve, and more as the King pleaſes, but not leſs* than the number of twelve, as common experience informs us. Ibid.

6. *And* note, that by the ſtatute made anno 33 *H.* 8. *cap.* 23. *it is ordained, that the King may award commiſſion to hear and determine*

determine treaſon or murder in another county than where the treaſon or murder was perpetrated and done: In which ſtatute there is a proviſo for the lords to be tried by their peers; and ſuch a proviſo is in the ſtatute made anno 35 H. 8. *cap.* 2. concerning treaſons done out of the realm; which proviſoes in thoſe ſtatutes are neceſſary, in as much as thoſe ſtatutes are out of the courſe of the common law; and ſee the ſtatute made *anno* 33 H. 8. *cap.* 20. for trial by the peers in caſes of lunacy which is come to him who has committed treaſon, but this ſtatute ſeems to be abrogated by the ſtatute made anno 1 & 2 *P. & M.*; and ſee the ſtatute of anno 33 *H.* 8. 12. concerning treaſons, murders, or manſlaughters, perpetrated *within the verge*, where there is a proviſo alſo for the peers to have their trial as they have had before the ſaid ſtatute. Staunf. Pl. C. 153. &c. cap. 1.

2 Hawk. Pl. C. 424. cap. 44. ſ. 13. The ſerjeant ſays, he takes it to be agreed, that he has a right to be ſo tried upon an indictment of treaſon or felony, whether ſuch treaſon or felony be made ſuch by the common law or by ſtatute; and alſo upon an indictment for a miſpriſion of treaſon or felony; but ſays it ſeems that regularly he is to be tried by the country for all other crimes out of parliament, as præmunire, riot, ſeducing a young lady from her parents in order to debauch her &c.

7. 1 *E.* 6. *cap.* 12. *ſ.* 15. enacts, That *if any lord of parliament, or peer of the realm be indicted of any of the offences limited in this act, they ſhall have their trial by their peers.*

8. 7 *W.* 3. *cap.* 3. *Whereas by law in caſes of life a commoner ſhall be tried by a jury of twelve freeholders, who muſt all agree before they can bring in a verdict to acquit or condemn the priſoner, but on the trials of peers or peereſſes a major vote is ſufficient.*

S. 10. *It is enacted, that upon the trial of any peers or peereſſes, either for treaſon or miſpriſion of treaſon, all the peers who have a right to ſit and vote in parliament, ſhall be duly ſummoned* 20 *days at leaſt before the trial, and every peer ſo ſummoned and appearing ſhall vote in the trial, firſt taking the oaths of allegiance and ſupremacy required by* 1 *W. & M. and ſubſcribing and repeating the teſt enjoined by* 30 *Car.* 2.

S. 11. *Provided that this act ſhall not extend to impeachments, or other proceedings in parliament.*

S. 12. *Nor to the treaſons of counterfeiting the coin, the great ſeal, privy ſeal, ſign manual, or privy ſignet.*

9. *By* 6 *Annæ, cap.* 23. *ſ.* 12. *Peers ſhall be indicted in Scotland as in England.*

10. If a peer be *impleaded by a commoner*, yet *ſuch cauſe ſhall* not *be tried* by peers, but *by a jury of the country*; for though the peers are the proper pares to a lord of parliament in capital matters, where the life and nobility of a peer is concerned, yet in matter of property, the trial of fact is not by them, but by the inhabitants of thoſe countries where the facts ariſe, ſince ſuch peers living through the whole kingdom could not be generally cognizant of facts ariſing in ſeveral counties, as the inhabitants themſelves where they are done; but this want of having noblemen for their jury was compenſated as much as poſſible, by returning perſons of the beſt quality; therefore a knight

knight is neceſſary to be ſummoned in any cauſe where a peer is party. G. Hiſt. C. B. 78, 79. cap. 8.

11. It has been adjudged, that if a peer on an arraignment before the lords, *refuſe to put himſelf on his peers*, he ſhall be dealt with as one that ſtands *mute*; for it is as much the law of the land, that a peer be tried by his peers, as a commoner by commoners; yet if one who has a title to peerage be indicted and arraign'd as a commoner, and plead not guilty, and put himſelf upon his country, it has been adjudged, that he cannot afterwards ſuggeſt that he is a peer, and pray a trial by his peers. 2 Hawk. Pl. C. 425. cap. 44. ſ. 19.

Yet it is ſaid that there is a record in 4 E. 3. that T. Ld. Berkley put himſelf on his country, and was [297] tried by a jury of knights. Ibid. in marg.

(I) Of *the Order* and Proceſs *of Trial* of Peers.

1. THE *order and proceſs* of this trial appears anno 1 H. 4. 1. & anno 13 H. 8. 13. That when a lord of the parliament is to be arraigned of treaſon or felony, of which he is indicted, *the King by his letters patent ſhall make* one great and ſage lord to be the * *High Steward* of England *for the day* of the arraignment, who before the ſaid day *ſhall make precept to his Serjeant at Arms* (who is appointed to ſerve him during the time of his commiſſion), *to cauſe to come* before him *twenty or eighteen lords of the parliament* at the ſame day; and after at the day when the Steward ſhall be under the cloth of ſtate upon the arraignment of the priſoner, and has cauſed to be read his commiſſion, the ſaid *ſerjeant ſhall return the ſaid precept, and the lords* ſhall be *thereupon demanded*, and when they have appeared, and are ſeated in their places, the *Conſtable of the Tower ſhall be demanded to bring his priſoner* to the Court, who ſhall be conducted by him to the bar, and then the ſaid High Steward ſhall ſhew to the priſoner the cauſe for which the King has aſſembled there the lords and him, and command him to anſwer without any dread, and thereupon ſhall cauſe the *Clerk of the Crown* to *read the indictment* to him, *and to demand* of him if he be †† *guilty or not*; to which after he has anſwered Not guilty, the clerk ſhall demand further of him, How he will be *try'd*? to which he may ſay, *By God and his Peers*; and immediately upon this the ſerjeants and King's attorney ſhall give evidence againſt him; to which when the priſoner has anſwered, the ſaid conſtable ſhall be commanded to retire with the ſaid priſoner from the bar to ſome place for the time that the Lords †† ſecretly ſhall talk in the ſaid court together: and thereupon the Lords ſhall riſe from their places and conſult together, and that which they do they do *upon their honour* without any oath to be adminiſtred to them; and when all of them, or the greater part of them are agreed, they ſhall return to their places and ſeat themſelves; and then the High Steward ſhall *demand of the* ¶ *youngeſt lord* by himſelf, if he who is arraign'd be guilty or not? and ſo of him who is next to the

The *indictment muſt be before commiſſioners of oyer and terminer or in B. R.* if the offence be done in that county where B. R. ſits. 2. [See * S.P.] and the commiſſion recites the indictment generally as it is found, and gives the High Steward power to receive and proceed on ſuch indictment *ſecundum legem & conſuetudinem*, and requires the peers to be attendant on him, and the Lieutenant of the Tower to bring the priſoner before him.

3. A *certiorari* is awarded *out of Chancery to remove the indict-*

ment itſelf before the High Steward *indilate*, which may either bear date the ſame day of the Steward's commiſſion, or any day after. the youngeſt, and ſo of the reſt ſeriatim, till he has perus'd all; and each of the lords ſhall anſwer by himſelf; and then the ſaid Steward ſhall ſend for the ſaid priſoner, who ſhall be brought back to the bar, to whom the ſaid Steward ſhall rehearſe the verdict, and give *** judgment accordingly. Staunf. Pl. C. 152. lib. 3. cap. 1.

4. The Steward directs his *precept under bis ſeal to the Lieutenant of the Tower, to bring the body* before him at ſuch a day and place as he ſhall appoint. 5. He makes *another precept* under his ſeal to the Lieutenant of the Tower, *expreſſing day and place when &c.* 6. He makes † *another* precept under his ſeal *to a Serjeant at Arms to ſummon tot & tales dominos, magnates, & proceres hujus regni Angliæ prædicti R. comitis E. pares, per quos rei veritas melius ſciri poterit, quod ipſi perſonaliter compareant coram prædicto Seneſchallo apud Weſtm. tali die & hora, ad faciend. ea quæ ex parte domini regis ſorent facienda &c.* 7. At the day, the Steward with *ſix ſerjeants at arms* before him takes his place under a cloth of ſtate, and then the Clerk of the Crown delivers to him his commiſſion, who re-delivers the ſame unto him. And the Clerk of the Crown cauſes a *ſerjeant at arms to make three Oyez*, and commandment given in the name of the Lord High Steward of England to keep ſilence, *and then is the commiſſion read.* And then the *uſher delivereth to the Steward a white rod*, who delivereth the ſame to him again, who holdeth it before the Steward; then another *Oyez* is made, and commandment given in the name of the High Steward of England *to all juſtices and commiſſioners to certify all indictments and records &c.* which being delivered into Court, the Clerk of the Crown readeth the return. Another *O yes* is made, that *the Lieutenant of the Tower &c. return his writ and precept, and to bring the priſoner* to the bar; ‡ which being done, the Clerk reads the return. Another *Oyez* is made, that the *ſerjeant at arms return his precept with the names of the barons* and peers by him ſummoned, and the return of that is alſo read.

[298] Another *Oyez* is made, that all earls, barons and peers (which by the commandment of the High Steward are ſummoned) *anſwer to their names*, and then they take their places and ſit down, and their names are recorded. And when they are all in their places, and the priſoner at the bar, the High *Steward declares to the priſoner the cauſe of their aſſembly.* Then the *Clerk of the Court reads the indictment*, and ‖ proceeds to the arraignment of the priſoner, and if he pleads Not guilty, the entry is, Et de hoc de bono & malo ponit ſe ſuper pares ſuos &c. Then the High *Steward giveth a charge to the Peers*, exhorting them indifferently according to their evidence. 8. The Peers are not ſworn, but are charged ſuper fidelitatibus & ligeantiis domino regi debitis, for ſo the record ſpeaketh. 9. Then the *King's* learned *counſel give evidence* and produce their proofs for the King againſt the priſoner. 10. There are always either all or ſome of the *Judges* ever attendant upon the High Steward, and *ſet at the feet of the Peers*, or about a table in the middle, or in ſome other convenient place. 11. *After* all *the evidence given* for the King, and the priſoner's anſwers and proofs at large, and with patience heard; then *is the priſoner withdrawn* from the bar to ſome private place, under the cuſtody of the Lieutenant &c. And after that he is withdrawn, *the Lords* that are triers of the priſoner *go to ſome place to conſider of their evidence*; and *if* upon debate thereof, *they* ſhall *doubt of any matter*, and thereupon ſend to the High Steward to have conference with the Judges, or with the High Steward, they *ought to have no conference* either with the Judges or High Steward, *but* ¶ *openly in Court, and in the preſence and hearing of the priſoner.* 12. A nobleman** *cannot waive his trial by his peers, and put himſelf upon the trial of the country*, that is, of twelve freeholders; for the ſtatute of Magna Charta is, that he muſt be tried per pares. And ſo it was reſolved in the Lord DACRE's Caſe. 13. The *Peers ought to continue together* (as juries in caſe of other ſubjects do) *untill they are agreed of their verdict.* And when they are agreed, they all come again into the Court and take their places, and then the Lord High *Steward* publickly *in open Court, beginning with the puiſne Lord* (who in the Caſe of the LORD DACRE, was the Lord Mordant), *ſaid* unto him, My Lord Mordant, *Is William Lord Dacre guilty of the treaſons* whereof he hath been indicted or arraigned, or of any of them? And the Lord ſtanding up ſaid, Not guilty, and ſo upward of all the other Lords ſeriatim &c. 2 Inſt. 28. 29. 3.

† This is to be intended when the parliament is not ſitting, but is either diſſolved or prorogued. 2 Hawk. Pl. C. 421. cap. 44. ſ. 3. marg.

‡ The gentleman goaler of the Tower carrying the axe before him. 2 Hawk. Pl. C. 422. cap. 44. ſ. 4.

‖ But is not to inſiſt on his holding up his hand. 2 Hawk. Pl. C. 422. cap. 44. ſ. 5.

¶ It was reſolved by all the Judges in the Lord DACRE's CASE, who was tried by commiſſion, that *no queſtion ought to be aſk'd of the Lord Steward or of the Judges in the abſence of the priſoner.* And it was adjudged by the Lord Steward, in the Earl of WARWICK's CASE, who was tried by the Houſe of Peers in parliament, that no queſtion ought to be aſk'd of the Judges in the abſence of the priſoner. But in the Lord AUDLEY's CASE, who was tried by commiſſion, the *Lords triers, after they were withdrawn, conſulted with the Lord Ch. J.* four ſeveral times, and alſo ſent to conſult with the Lord Steward. Yet, notwithſtanding this precedent, the Judges reſolved

in

in the Lord MORLEY'S CASE, who was likewiſe tried by commiſſion, that if after the Lords were withdrawn, they ſhould ſend for any of the *Judges* to deſire their opinions on a point in law, and the Lord Steward ſhould permit them to go, they would tell the Lords, if they ſhould aſk them any queſtion, that they *were not to give any private opinion without conference with the reſt of the Judges*, and that *openly in Court*. *But* they reſolved, that *if the Lord Steward ſhould aſk them any queſtion in open Court*, tho' *in the abſence of the priſoner*, they would anſwer it, becauſe they are called to aſſiſt the Court, and the demand of any queſtion in ſuch caſe is to be referred to the diſcretion of the Lord Steward. 2 Hawk. Pl. C. 425. cap. 44. ſ. 20.

** Contra Dal. 16. pl. 1. anno 1 & 2 Ph. & M. the Marquiſs of Dorſet's Caſe.

* Ld. Coke ſays, that in ſuch caſes there *muſt be a Steward* of England appointed. 3 Inſt. 31.

——But Serjeant Hawkins, 2 Hawk. Pl. C. 421. cap. 44. ſ. 1. in marg. ſays, that the neceſſity of making a High Steward *to try an impeachment of high treaſon*, was denied by the Houſe of Commons, in the EARL OF DANBY'S CASE, and cites State Trials, 2 Vol. 198, 199.

†† S. P. Br. Corone, pl. 152. cites 10 E. 4. 6.

‡‡ The Peers give their *verdict in the abſence of the priſoner* &c. 3 Inſt. 30. cap. 2.

¶¶ S. P. Br. Corone, pl. 152. cites 10 E. 4. 6.

*** The Ld. Steward gives judgment according to the determination of the majority being more than twelve, but gives no vote himſelf on a trial by commiſſion, but only on a trial by the Houſe of Peers while the parliament is ſitting. 2 Hawk. Pl. C. 422. cap. 44. ſ. 6.

2. If *execution* be *not done according to the judgment*, then the High Steward my *by precept* under ſeal *command execution to be done* according to the judgment; but in caſe of high treaſon, if all the reſt of the judgment (ſaving the beheading, which is part of the judgment) be pardoned, this ought to be under the Great Seal of England. 3 Inſt. 31.

3. And *when the ſervice is performed*, then is an *Oyez* made *for the diſſolving* of the commiſſion; *and* then is *the white rod*, which has been born and holden before the Steward, by him taken in both his hands, and *broken over his head*. 3 Inſt. 31.

4. When a peer is tried before the Houſe of Peers in parliament, the Ld. *Steward withdraws with the reſt of the Lords and conſults with them*. 2 Hawk. Pl. C. 425. cap. 44. ſ. 21.

5. It is agreed, that where a peer is *tried* by the Houſe of [299] Lords, *in full parliament*, the *Houſe may be adjourned as often as there is occaſion, and the evidence taken by parcels*; *alſo*, it has been adjudged, that *where* the trial is *by commiſſion*, the Lord *Steward, after a verdict* is given, *may take time to adviſe upon it*; and that his office continues till he has given judgment. Alſo it was ſaid to have been agreed by the Judges in the Ld. DACRE'S Caſe, that on ſuch a trial the *Court might be adjourned*, *and* that *if the Lords triers did not agree*, it was holden by ſome, *they ought to be kept together all night*, and by others, that they might go to their ſeveral houſes. But it is ſaid, that there is no precedent of the Lords triers ever having ſeparated upon a trial by commiſſion, after the evidence has been given for the King; and it is ſaid to have been reſolved by all the Judges in the Caſe of the DUKE OF NORFOLK, that the Peers in ſuch caſe muſt continue together till they agree to give a verdict; and the like was adjudged by the Lord Steward in the Lord DELAMERE'S Caſe. 2 Hawk. Pl. C. 425. cap. 44. ſ. 22.

(K) *What*

(K) *What Advantages they may take on their Trials.*

By this ſtatute a Ld of parliament ſhall have privilege of the clergy, where a common perſon ſhall not; as for houſe-breaking in the day or night, robbing any in the highway, and in all other caſes excepted in this ſtatute, except wilful murder. But in all other caſes, in which clergy is taken away by ſtatute

1. 1 *E.* 6. *cap.* 12. *ſ.* 14. ENacts, that *in all and every caſe and caſes, where any of the King's Majeſty's ſubjects ſhall and may upon his prayer have the privilege of clergy as a clerk convict, that may make purgation, in all thoſe caſes and every of them, and alſo in all and every caſe and caſes of felony wherein the privilege or benefit of clergy is reſtrained, excepted, or taken away, by this ſtatute or act (wilful murder and poiſoning of malice prepenſed only excepted) that lord and lords of that parliament, and peer and peers of the realm, having place and voice in parliament, ſhall by virtue of this preſent act* of common grace upon his *or their requeſt or* prayer, alledging that he is a *lord or* peer of this realm, *and claiming that benefit of this act, though he cannot read, without any burning in the hand, loſs of inheritance, or corruption of his blood, be * judged, deemed, taken and uſed for the firſt time only, to all intents, conſtructions and purpoſes, as a clerk convict, and* ſhall be in caſe of a clerk convict, which may make purgation, *without any further or other benefit or privilege of clergy, to any ſuch lord or peer from thenceforth at any time after for any caſe to be allowed, adjudged, or admitted; any law, ſtatute, uſage, cuſtom, or any other thing to the contrary in any wiſe notwithſtanding.*

made ſince this act, he is in the ſame degree as a common or inferior perſon is. And that by the words (be * *judged &c.*) it appears that he muſt make his purgation, and if ſo then he muſt be delivered to the ordinary to be kept 'till he has made it. Alſo if lord of parliament *confeſſes the offence upon the arraignment*, or *abjures*, or be *outlaw'd for felony*, he ſhall not in any of theſe caſes (as it ſeems) have benefit of this ſtatute, inaſmuch as he cannot make his purgation. Nor ought the Court to give him the benefit of this act, if the lord himſelf does not requeſt it &c. Staunf. Pl. C. 130.—2 Hawk. Pl. C. 358. cap. 33. ſ. 109. and 360. ſ. 115.

2. If a *queſtion* ariſe on the trial of a peer *concerning the courſe of parliamentary proceedings*, the Lords will *not ſuffer it to be argued by counſel*, but will debate it among themſelves. 2 Hawk. Pl. C. 401. cap. 39. ſ. 6. cites State Trials, 2 vol. 694. 699.

3. If a peer of the realm *bring an appeal*, the defendant ſhall not be admitted to *wage battel*, by reaſon of the dignity of their perſons. 2 Hawk. Pl. C. 427. cap. 45. ſ. 5.

[300]

(L) *Houſe of Peers*; Its *Power over other Courts, and* Power of *other Courts as to Peers.*

A peer of the realm may be *indicted in B. R.* of felony or treaſon, and they ſhall be

1. IF he be *indicted in the King's Bench, or the indictment removed thither*, the nobleman *may plead his pardon there* before the Judges of the King's Bench, and they have power to allow it; but he *cannot confeſs the indictment, or plead Not guilty* to the Judges of the King's Bench, *but before the Lord Steward*; and the reaſon of this diverſity, that the trial or judgment muſt

be before or by the Ld. Steward, but the allowance of the pardon may be by the King's Bench, is, becauſe that is not within the ſtatute of Mag. Chart. cap. 29. 2 Inſt. 49.

judges of the cauſe till he pleads Not guilty; for if he does not appear, he may be *outlaw'd* in this Court; but when he has pleaded Not guilty, B. R. is not judge of the cauſe, but the High Steward. But a peer may *plead his pardon in B. R.* in as much as B. R. is judge of the cauſe 'till he has pleaded Not guilty; per Coke, Roll. R. 297. Hill. 13 Jac. B. R. The King v. Ld. Norris.

2. If a nobleman be *indicted*, and *cannot be found*, proceſs of *outlawry ſhall be awarded* againſt him per legem terræ, *and* he ſhall be *outlaw'd per judicium coronatorum*, but he ſhall be tried per judicium parium ſuorum, when he appears and pleads to iſſue. 2 Inſt. 49.

3. It is no new thing for our common law courts to examine matters of this nature, which concern proceedings in parliament; we do but follow the examples of our predeceſſors. In 38 Ed. 3. 14. the *biſhop certified to this* Court, that the father and mother were *married*, but that the party was *born in adultery; the Lords ſent a writ to the Judges*, and ordered them *to judge on the ſpecial matter*; but the Judges did not obey. In STANTON's Caſe, 15 Ed. 3. F. Vouch. 109. the Lords commanded the Court of Common Pleas to give a judgment; the Ch. J. refuſed; after in his abſence the others complied, and gave judgment. B. R. afterwards examined the proceedings of the Lords, and adjudged them void, as appears 15 Ed. 3. 1. 2. in the Oxford Library. We are not to delay the juſtice of the land, and the law of it is our rule. Per Holt Ch. J. 12 Mod. 64. in Caſe of the King v. Knowles.

4. It ſeems clear, that if a peer be *attainted* of treaſon or felony, he may be *brought before the King's Bench, and demanded, what he has to ſay why execution ſhould not be awarded* againſt him? and if he plead any matter to ſuch demand, *his plea ſhall be diſcuſſed*, and execution awarded by the ſaid Court, upon its being adjudged againſt him. 2 Hawk. Pl. C. 424 cap. 44. ſ. 18.

[For more of Peer in general, ſee Error, Parliament, Preſentation, and other proper Titles.]

(A) Penal Bill.

1. IF I bind myſelf to pay 20 l. on ſuch a day, and in default to pay 40 l. the 40 l. muſt be paid *without any demand*; per Hale Ch. J. Mod. 89. Mich. 22 Car. 2. B. R. in Caſe of Bradcat v. Tower.

2. Debt for 20 l. plaintiff declares, that whereas the defendant by a certain bill obligatory *cognoviſſet ſe debere* &c. ſummam *viginti librar' ſolvere querenti* &c. ad vel ſuper 29 diem Septembris 1685, *pro vera ſolutione* 10 *l.* ipſe (the defendant) obligaſſet ſe firmiter per eandem billam, & in facto dicit quod de-
[301] fendens non ſolvit to the plaintiff the ſaid 10 l. upon the ſaid 29th of September, per quod actio accrevit; defendant demurr'd. Judgment pro quer.; for tho' it is *drawn properly as a penal bill*, for the payment of the 10 l. yet there is enough to ground an action of debt for the 20 l. and the day of payment ſeems to refer to the 20 l. 2 Vent. 106. Mich. 1 W. & M. C. B. Bond v. Moyle.

[For more of Penal Bill in general, ſee Conditions, Obligations, and other proper Titles.]

Penalty.

(A) *Penalty of Bonds*, &c. *Relieved or enlarged.* And what ſhall be ſaid a Penalty.

The like favour is extendable againſt them that will take advantage upon

1. IF a man be bound in a penalty to pay money at a day, and place, by obligation, and *intending to pay* the ſame, *is robbed by the way*, or hath intreated by word, ſome further reſpite at the hands of the obligee, *or cometh ſhort of the place by any miſfortune*; and ſo failing of the payment, doth nevertheleſs provide

vide *and tender the money in ſhort time after*; in theſe, and many ſuch like caſes, the Chancery will compel the obligee to take his principal, with ſome reaſonable conſideration of his damages (quantum expediat); for if this was not, men would do that by covenant, which they do now by bond. Cary's Rep. 1.

any ſtrict *condition for undoing the eſtate of another in lands upon a ſmall* or trifling de-

fault. Cary's Rep. 1.—So if two be jointly and ſeverally bound to pay money; and the *obligee* will *give longer day* (or other favour) *to the one, and then will ſue the other* for the debt, he who is ſued ſhall ſue in Chancery. Cary's Rep. 2. cites 9 E. 4. 41.

2. If the *obligee* have *received the moſt part of the money* payable upon the obligation, *at the* peremptory *time and place*, and will nevertheleſs extend the whole forfeiture immediately, refuſing to accept of the reſidue tendered unto him ſoon after the default, the obligor may find aid in Chancery. Cary's Rep. 2.

3. A. ſold a rectory to J. S. and his heirs, with warranty, and enter'd into a *recognizance of* 1000*l. for quiet enjoyment*; J. S. was diſturb'd, and ſo the recognizance was forfeited. Tho' (as it ſeems) J. S. ſuſtained greater loſs than 1000 l. yet Chancery cannot relieve *beyond the penalty* of the recognizance. Chan. Rep. 95. 11 Car. 1. Bidlake v. Lord Arundell.

4. The plaintiff and defendant were fiſhmongers, and had contiguous ſhops; and differences having been between them, they were made friends, and by that mediation the plaintiff was to give, and did give, the defendant a *bond of* 20*l. penalty* conditioned to behave himſelf civilly and like a good neighbour to the defendant, and *not to diſparage his goods*. The *plaintiff* afterwards *aſked the defendant's cuſtomer* whilſt *cheapning* a parcel of *flounders, why he would buy of the defendant, and told him thoſe fiſh ſtunk*, and ſo the defendant loſt that cuſtomer; and the defendant having ſued the bond, and aſſigned that for breach, had a verdict. And to be relieved againſt that verdict, and the penalty of the bond, the plaintiff brought his bill. The defendant *demurr'd*; for that the bond was not conditioned for payment of money, or performance of covenants, or for any matter for which damages in an action of debt, covenant, or any other action, was recoverable; nor was there any way to meaſure the damages but by the penalty, and the bond being to preſerve amity and neighbourly friendſhip, for the breach of which the plaintiff did ſubmit to pay that penalty, there *cannot be any trial had to meaſure the damages for breach of the condition, other than the parties have ſubmitted to*. His Lordſhip declared, that as this caſe was, the penalty being but 20 l. he did not think fit to put the defendant to anſwer, for that the coſts of ſuit here, and at law, would exceed the penalty; and ſo the demurrer was allowed. But he likewiſe declared this was *not to be a precedent in the caſe of a bond of* 100*l.* or the like; and though the demurrer was allowed, the defendant was to have no coſts. Chan. Caſes, 183, 184. Mich. 22 Car. 2. Tall v. Ryland.

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5. The factors of the Eaſt India Company enter into *covenants* to the Company with great penalties *to pay extravagant*

Ld. Keeper compared this to a co-

venant by a leſſee, that if he break up or plough ſuch lands, he ſhall *pay* 5 *l. for every acre*; and ſaid that there never was any relief yet given in this Court againſt ſuch a covenant. —Ibid. 122. —2 Chan. Caſes 198. Trin. 26 Car. 2. S. C. And bill diſmiſſed, tho' it was

prices for certain goods therein mentioned, if they ſhould trade in ſuch goods for themſelves, or for any perſon or perſons, except for the Company. A factor entered into ſuch covenant, and was ſued by the Company; and on a bill to be relieved, it was argued, that the payments theſe factors were to make for ſuch trading, contrary to their agreements and covenants, were not intended to be in the nature of penalties, but as *adjuſted damages* agreed on before-hand between the Company and them. The Lord Keeper declar'd that the natural end and deſign of this covenant was, to reſtrain the factor from trading at all in prohibited goods, and this was primarily intended; and that the ſums agreed on to be paid for trading, were next intended as a hedge for ſecuring that covenant. And tho' the ſum demanded at law by the Company amounts to 26,000 l. yet it is uncertain how much thereof the factor may pay. The Court would not relieve him, but diſmiſs'd his bill. Fin. R. 117 to 122. Hill. 25 Car. 2. Eaſt India Company v. Blake.—And e contra.

objected that this covenant was a greater penalty than a bond of double the value.—S. P. as to the exceſſive overvalue, and the defendant was ruled to anſwer, tho' it were a penalty. 2 Chan. Caſes 218, 219. Paſch. 28 Car. 2. Eaſt India Company v. Mainſton.

I have ventured to alter the ſtate of this caſe, but in ſuch a manner, that if the reader diſlike it, he may, if he pleaſe, take it as in the original, by leaving out what is marked within the crotchets.—Where an action is brought for *freight and damages*, and the ſame is laid *to double the ſum of the penalty* upon the charter party, tho' more is recovered than the penalty in damages, yet execution ſhall be ſtinted to that penalty. Fin. R. 435. Mich. 31 Car. 2. Bettiſworth v. Clerk and Archer.

6. D. [was] executor of C. [who was] imployed as a *maſter of a ſhip* by the Eaſt-India Company, [and enter'd into] *covenants* with them *to pay a certain mulct for every cloth carried* &c. in the ſhip, *and took* [E. the teſtator of] *the defendant to be his mate, who made an agreement mutatis mutandis with* [*C. the teſtator of*] *D. and gave a bond of* 50 *l. for due performance* on his part; but he, without [C. the teſtator of] D.'s knowledge, carried ſo many cloaths as the *mulct came to* 70 *l.* which the Company deducted out of [C. the maſter's] the wages, and [which] the 50 l. bond would not ſatisfy; and therefore [E. the mate being dead, D. as executor of C. the maſter] pray'd relief and diſcovery of [E.] the teſtator's eſtate. The defendant demurred; becauſe the relief [prayed was] of more than [the] ſecurity by bond [was given for, and that this was] not proper in equity; and ruled accordingly. Chan. Caſes 226. Paſch. 26 Car 2. Davis v. Curtis.

7. A. binds himſelf and his heirs in a *bond of* 40 *l. penalty conditioned to pay* 200 *l.* to B. B. ſu'd and was relieved; but it was too late objected that the heir could not be bound but by writing, and this writing binds him but in 40 l. and the executor could not pay it but by a decree without a *devaſtavit* to other creditors. Per Finch. C. when the plaintiff has judgment here he ſhall have the ſame advantage as at law. 2 Chan. Caſes 225. Hill. 28 and 29 Car. 2. Sims v. Urry.

8. The *plaintiff* was *in execution* upon a judgment obtained on a bond;

a bond; and being thus in execution, the *principal* ſum and *intereſt, and coſts were tendered* to the obligee, but he would not diſcharge him out of execution without paying the whole penalty of the bond; and thereupon * the plaintiff exhibited his bill to be relieved againſt the ſaid penalty, which he had paid to the ſaid obligee. The Court ordered him to *refund the overplus* of the money. Fin. R. 437. Mich. 31 Car. 2. Friend v. Burgh.

9. A *ſurety*, that is not bound by law, ſhall not be made liable in equity. 2 Chan. Caſes 22. Hill. 31 and 32 Car. 2. Simpſon v. Field.

10. A. acknowledged a *judgment of* 2000 *l. penalty defeaſanced for payment of* 1300 *l. principal money and intereſt.* No intereſt was paid in many years, and ſeveral proceedings were had in equity and at law; and on a bill now brought, the defendant *pleaded* the former bill and proceedings; and that after an account taken in the former cauſe, the plaintiff proceeded at law, and reviv'd his judgment by ſcire facias, and had taken *execution by elegit, and thereupon the defendant had brought the whole penalty of the bond into C. B. and* inſiſted *that a Court of Equity ought not to charge him beyond the penalty of the judgment.* And this plea was allowed by the Court. Vern. 349. Mich. 1685. Hale v. Thomas.

Not but that equity may, and *in many caſes doth, carry the debt beyond the penalty* of the ſecurity; as where the party hath been delayed by injunction of this Court, and the like; but it was obſerved, that where it has been ſo done, it has been always againſt a plaintiff, when he hath come for relief. But there is no precedent where a plaintiff in this Court ſhall charge a defendant beyond the penalty, and further than he could charge him at law. But in this caſe the Court allowed the plea, principally becauſe the plaintiff, after the account taken in the former cauſe, had ſurceaſed his proſecution in this Court, and proceeded at law, having ſued forth a ſcire facias on his judgement, and taken forth execution; and therefore having elected to proceed at law, he ſhould not now reſort back to equity; eſpecially as this caſe is, where he hath taken execution by elegit, which charged a moiety of the lands only, and now would come for a decree in equity for the ſame debt, which would charge the perſon and the whole eſtate, and therefore the Court allowed the plea. Vern. 350. Mich. 1685. Hale v. Thomas.——2 Chan. Caſes 182. S. C.

11. A. entred into *bond of* 140 *l.* penalty, conditioned *for payment of* 72 *l.* After many delays in ſuits by privilege &c. and relief prayed againſt the bond upon ſuggeſtions of fraud, want of conſideration &c. it was ordered upon the hearing, that the defendant ſhould not be relieved but againſt the penalty only; and that it be referred to the Maſter to compute the principal and intereſt due, and to tax the plaintiff's coſts both at law and in equity; and that what ſhould be found due, be paid, when and where the Maſter ſhould appoint. The *Maſter computed the principal and intereſt at* 154 *l. and the coſts at* 67 *l. and to be paid the* 20*th of October following.* Upon this the defendant appealed to the Houſe of Lords, where one queſtion was, whether Chancery could juſtly award *more than the penalty?* and objected, that the order being to ſave againſt the penalty, no more ought to have been decreed. But it was ſaid that, notwithſtanding that, when the ſame was referred to a Maſter to tax principal and intereſt, the order bound the party to pay both, tho' more than the penalty; and the meaning of the firſt part was only to relieve againſt the penalty in caſe the principal and intereſt came

to leſs than the penal ſum; eſpecially the ſame coming to be heard upon croſs-bills, and as this cauſe was circumſtanced after ſuch delay &c. And as to coſts, held that there was no cauſe for an appeal in this caſe; nor in truth was it ever known to be a cauſe, if the merits were againſt the party appellant. And ſo the decree was affirmed in the whole. Show. Parl. Caſes 15. Duval v. Terry.

12. A. has *judgment for* the penalty of a bond. The queſtion was, if payments formerly made to A. out of brigadier's pay aſſigned as a ſecurity to A. ſhould be applied firſt to pay the intereſt then in arrear, and afterwards the principal; and ſo A. to have now the benefit of the penalty to recover what remained due? Wright K. thought, that including what had been paid, tho' at *ſeveral payments, and many years ſince*, A. ſhould have in the whole no more than the penalty of the bond; ſaying, *a man can have no more than his debt*, and the penalty is the utmoſt of the debt. Tamen quære. 2 Vern. 509. Trin. 1705. Steward v. Rumball.

[304] 13. A. by marriage articles was to *pay* 50*l. at* 5 *l. per ann.* till the whole paid; and *in failure* of payment of any 5 l. then *to pay the whole*. Upon failure, the whole is due, and no part of it is a penalty, only defendant had time for payment by parcels, the benefit whereof is now loſt. 8 Mod. 56. Trin. 7 Geo. Anon.

[For more of Penalty in general, ſee Conditions, Obligations, and other proper Titles.]

Penſions.

(A) *In what Court* to be *ſued for, and againſt whom Action lies.*

1. ACcording to Ld. Coke's opinion, 32 *H.* 8. *cap.* 7. gives remedy in the Temporal Courts, not only for tithes, but for penſions alſo, and other eccleſiaſtical or ſpiritual profit, where the owner is diſſeiſed, deforced, wrong'd, or otherwiſe kept out, or put from the ſame; becauſe by their coming to the Crown by the ſtatutes of 27 H. 8. 31 H. 8. 37 H. 8. and 1 E. 6. they are become temporal inheritances in the hands of laymen, and

and ſhall be accounted aſſets, and huſbands ſhall be tenants by the curteſy, and wives endowed of them, and ſhall have other incidents belonging to temporal inheritances, only that they retain this eccleſiaſtical quality, that the owner of them may ſue for the ſubtraction of them in the Eccleſiaſtical Court. Watſ. Com. Inc. 8vo. 1049. cap. 53. cites Co. Litt. 159 a.

2. 34 *and* 35 *Hen.* 8. *cap.* 19. *ſ.* 4 enacts, That *if any occupier of any lands, or other hereditaments of the late monaſteries, out of which any portions, penſions, corodies, indemnities, ſynodies, proxies or other profits, have been paid to any archbiſhops, biſhops, archdeacons, and other eccleſiaſtical perſons, wilfully deny the payment, whereof the ſaid archbiſhops &c. were in poſſeſſion within ten years before the diſſolution of ſuch monaſteries, &c. it ſhall be lawful for the ſame archbiſhops &c. to make ſuch proceſs, as well againſt every ſuch perſon as ſhall ſo deny payment, as againſt the churches charged with the ſame, as heretofore they have lawfully done; and if the defendant be convict according to the eccleſiaſtical laws, the plaintiff ſhall recover the thing in demand, and the value thereof in damages, with coſts.*

This act enables ſpiritual perſons to *ſue laymen* for penſions *in the Spiritual Court*, Godb. 197. In Caſe of Sprat v. Nicholſon. ——Note, that this ſtatute gives remedy only for penſions, and other dues that did ariſe out of lands &c. which came to the Crown by the ſtatute of diſſolutions; and therefore damages and coſts are not to be had by the aid thereof, upon ſuits for other penſions &c. And it gives relief only for ſuch payments, of which biſhops, and other ſpiritual perſons were in poſſeſſion at, or within, 10 years next before the diſſolution of the houſe to which the thing belonged, by reaſon of which the duty is demanded; wherefore ſuch duties, which have not been uſually paid within memory, are not now recoverable, unleſs by the general ſaving in ſtat. 31 H. 8. c. 17. by Engliſh bill in the Exchequer or Chancery; (quære) But if they have been uſually paid, it will then be preſumed that they were due and paid at the time of the diſſolution, and ſo are recoverable with coſts and damages by this ſtatute; whence it follows, that biſhops &c. are not relieved by the ſtatute upon a title ſhewed by deed only, without preſcription. Watſ. Comp. Inc. 8vo. 1054. cap. 53.

S. 5. *If the cauſe be determinable at common law, the party grieved ſhall ſue at common law; and if the defendant be condemned, the plaintiff ſhall recover the thing in demand, and the value thereof in damages, with coſts.*

Provided, that if the King hath demiſed any of the ſaid lands with a covenant to diſcharge the tenant of ſuch charges, that then the party claiming the ſame, ſhall ſue for them in the Court of Augmentations, [305] *and not elſewhere.*

3. If a ſuit be to be brought for a penſion, or other thing, due out of a parſonage &c. it ſeems the *occupier, tho' a tenant*, ought to be ſued; and if *part* of the rectory *be in the hands of the owner, and part in the occupation of a tenant*, the ſuit is to be againſt them both. Watſ. Comp. Inc. 8vo. 1055. cap. 53. cites 1 Le. 11. Mich. 25 and 26 Eliz. C. B. Sutton v. Bowſel. Le. 10, 11. pl. 13. Sutton v. Dowſe.

4. The church of B. in the time of H. 3. was appropriated by the biſhop of Sarum, and the vicar was then endowed. And, upon the endowment, the biſhop made an ordinance by theſe words: *Statuimus & ordinamus*, that the vicar ſhall pay annually 20l. de fructibus vicariæ to the precentor in the church of Sarum, to the uſe of the vicars chorals within the ſame church. And for this penſion a ſuit being depending in the Spiritual

Court, and a prohibition thereupon brought, conſultation was now pray'd; becauſe it is a mere penſion ſuable in the Spiritual Court, and cited 11 H. 4. 85. Fitzn. N. Br. 51. Tanfield e contra, that it is an annuity, and that annuity lies properly for it in the King's Courts; and in proof thereof was cited 19 Ed. 3. Juriſdiction 28. that annuity lies for a penſion by preſcription: and that the ſtatute of Circumſpecte agatis, Prohibition third, is but an ordinance, as there it is ſaid. So Ed. 4. 12. of an annuity granted for compoſition for tithes, and 20 Ed. 3. Annuity 32. a writ of annuity was brought for ſuch a penſion as ours is, wherefore &c. But all the Court reſolved, that the ſuit was well brought in the Spiritual Court; for Popham and Fenner ſaid, that there would be a difference, where the ordinary ordains ſuch a payment as judge, there the ſuit ſhall be in Court Chriſtian; and where the patron and ordinary make a grant in the time of the vacation, for there they charge as an intereſt; and Gawdy ſaid, that for ſuch a penſion ſuit might be either in this, or the Spiritual Court. And that it is not denied by 20 Ed. 3. and ſo is Nat. Br. Whereupon conſultation was granted. Cro. E. 675. Trin. 4 Eliz. B R. Collier's Caſe.

5. Annuity *by preſcription* for a penſion iſſuing out of the church of S. it was reſolved without argument, that it lay *againſt the incumbent*, as well *for arrears due in his predeceſſor's time*, as in his own time; for the church itſelf is charged into whoſeſoever hands it comes. Cro E. 810. Hill. 43 Eliz. C. B. Trinity College in Cambridge, v. Tunſtall.

6. Sub-deacon of Exeter did libel in the Spiritual Court againſt N. parſon of A. pro annuali penſione of 30 l. iſſuing out of the parſonage of A. and in his libel ſhewed, how that tam per realem compoſitionem, quam per antiquam & laudabilem conſuetudinem, ipſe & predeceſſores ſui habuerunt & habere conſueverunt predictam annualem penſionem out of his parſonage of A. Dodderidge ſerjeant mov'd for a prohibition in this caſe, becauſe he *demands the* ſaid *penſion upon temporal grounds*, viz. *preſcription and real compoſition*. But Cook Ch. J. and the other Juſtices were of opinion, that in this caſe no prohibition ſhould be granted; for they ſaid, that the party had *election* to ſue for the ſame in the Spiritual Court, or at the common law, *becauſe both* the parties *were ſpiritual perſons*; but if the parſon had been made a party to the ſuit, then a prohibition ſhould have been granted, and cited Fitz. Nat. Brev. 51. b. acc. And they further ſaid, that if the *party ſueth once at the common law* for the ſaid penſion, *and afterwards ſues in the ſpiritual court* for the ſame, that a *prohibition* will lie; becauſe by the firſt ſuit he hath determined his election. Godb. 196 pl. 283. Trin. 10 Jac. C. B. Sprat v. Nicholſon.

7. Vicar ſues the parſon in the *Spiritual Court* for a penſion, and prohibition deny'd; for it is a ſpiritual thing, for which he
[306] may ſue in the Spiritual Court. Note, Defendants intitled themſelves to that parſonage by a grant of H. 8. who had it by the 31ſt of H. 8. of diſſolutions. Noy. 16. Goodwin v. the Dean and Chapter of Wells.

8. A

8. A penſion *out of an appropriation, tho' by preſcription*, is ſuable in the Spiritual Court; for it could not begin but by the grant and inſtitution of ſpiritual perſons, and therefore if the duty be traverſed, it may be tried there. Per Holt Ch. J. 1 Salk. 58. Paſch. 12 W. 3. B. R. Smith v. Wallis.——Ibid. cites Vent. 120. Cro. E. 675. where it is a penſion *by ordinance of the biſhop acting as judge*, ordinamus & conſtituimus; and where by concurrence of the *biſhop's co-operating with the patron*. ——See pl. 4.

But if a modus decimandi be *pleaded*, it ſhall be tried at common law, and if it be not found, a conſultation ſhall go; per Holt. 12 Mod. 397. Paſch. 12 W. 3. Anon.

9. In vacation, patron and ordinary may grant a penſion, and parſon ſhall be ſued there for it; and upon the ſtatute of *Circumſpecte agatis*, a prohibition was never granted in that caſe; tho' Co. in his comment. upon that ſtatute, be of a contrary opinion. Per Holt Ch. J. 12 Mod. 405. Trin. 12 W. 3. in Caſe of Stone v. Jones.

[For more of Penſions in general, ſee Prohibition, and other proper Titles.]

Perambulation.

1. *A WRIT de perambulatione facienda ought to be ſued with the aſſent of both parties.* Where they are in doubt of the bounds of their lordſhips, or of their towns, in ſuch caſe then they by aſſent may ſue the writ *directed unto the ſheriff* to make the perambulation, and to ſet the bounds and limits between them in certainty. F. N. B. 133. (D).

2. The *King may make his commiſſion to other perſons* to make that perambulation, *as well as to the ſheriff, and to certify the ſame in the Common Pleas or* in the *Chancery*, or *elſewhere*, &c. And ſuch commiſſion is oftentimes * granted to make perambulation of three or four counties, where they are in doubt as to the bounds and limits thereof; and this *perambulation made by aſſent ſhall bind all the parties and their heirs*. F. N. B. 134. (A).

* Note, a diviſion was made between the counties C. and H. by an enqueſt taken of four counties by force of a commiſſion; and reſolv'd, 1ſt. That if land lying in the town of A. but in truth within the county of C. be allotted to the county of H. that they ſhall ſtill remain of the town of A. as before. 2dly. That this ſhall not conclude any of the county of C. to ſuppoſe by writ, or otherwiſe, that the

lands are in the county of C. 3dly. If they are at iſſue on this point, it ſhall be tried by a venue of both counties. Quære. 29 E. 3. 45. F. N. B. 134. (A), in the notes there (a).

3. *But if tenant for life* be *of a ſeigniory, and* another who is *tenant in fee-ſimple* of another ſeigniory adjoining, *ſue forth ſuch* a *writ* or commiſſion, by reaſon whereof a perambulation is made, it ſeemeth the ſame ſhall *not bind him in reverſion*; neither ſhall the perambulation made with the aſſent of tenant in tail bind his *heirs*. F. N. B. 134 (B).

4. And the perambulation may be made for divers towns, and in divers counties, and the *parties ought to come in perſon into Chancery*, and there acknowledge and grant that a perambulation be made betwixt them, and the acknowledgment ſhall be enrolled in the Chancery, and thereupon a commiſſion or writ ſhall iſſue forth. And *if the parties cannot come into Chancery*, then *they ought to ſue forth a writ of dedimus poteſtatem directed to certain perſons to take their acknowledgment*, and to certify the ſame into the Chancery under his ſeal &c. and then upon that certificate returned into the Chancery, that commiſſion or writ may be granted, altho' the parties do not appear in perſon in Chancery to pray the ſame. F. N. B. 134 (C).

[307] 5. There is no queſtion but pariſhioners may juſtify *going over any body's land* in their perambulation. Per Anderſon. Owen 72, Goodway v. Michel.

Cro. E. 441. S.C. according to their uſage, and may abate all nuſances in their way, cites F. N. B. 185. (B), and Book of Entries 158.

6. A *libel* was in the Eccleſiaſtical Court, *that all farmers of ſuch a farm had uſed to find cakes and ale at the perambulation* of the pariſh *to the value of* 8*s*, *or thereabouts*; a motion was made for a prohibition, and the cuſtom denied; but adjudg'd, that no conſultation ſhould go. For a cuſtom for farmers is no more than a preſcription for occupiers, which is not good where it is to charge the land. But the objection of uncertainty as to the (or thereabouts) is not material; for all their proceedings are ſo. 2 Lev. 163. Hill. 27 & 28 Car. 2. B. R. Weiby v. Herbert.

[For more of Perambulation in general, ſee Manwood's Foreſt Law, tit. Bounderies of the Foreſt, and ſee Foreſt ſupra, and other proper Titles.]

Perjury.

(A) *At the* * *Common Law.*

* There was no courſe *at common law* to puniſh perjury, but yet before the *ſtat.* 3 *H.* 7. the

[1. IF a man makes a *falſe oath in any Court of Record*, this is perjury at the common law before the ſtatute, for which he may be indicted.]

King's council uſed to aſſemble and puniſh falſe oaths of witneſſes at their diſcretion; and it appears by D. 272. that at common law there was no puniſhment for perjury but in caſe of *attaint*; but in the Spiritual Court, *pro læſione fidei*, they are uſed to puniſh them. Cro. E. 521. Damport v. Simpſon.

[2. *If a man makes a falſe oath in any judicial proceeding in any Court, though it be not a Court of Record*, yet it is perjury at the common law, for which he may be indicted; becauſe it is a great offence, it being a great means of injuſtice.]

[3. If a man makes a falſe oath *extrajudicially, not in any Court of Record, nor in any judicial proceeding in any other Court*, this is not perjury at common law for which he may be indicted, though it be a falſe oath.]

[4. If a man makes a *bargain* for any thing, *and voluntarily ſwears the thing to be his own, or that he has good title to it*, though it *be falſe*, yet it is not perjury for which he may be indicted, becauſe it is not done in any judicial proceeding.]

[5. If a Juſtice of peace, or conſtable, or other *officer* who is *ſworn to execute his office duly, does not do it according to his oath*, yet it ſeems this is not perjury for which he may be indicted; but he *may be indicted for the offence againſt his oath.*]

If a *Mayor makes a falſe return*, the party may indict him for perjury

upon the general oath taken by him when he was admitted into his office; per Cur. Nov. 92. in the Caſe of Alderman Harris of Oxford. — And where, upon an information againſt a *ſheriff for a falſe return* of a knight of a ſhire, it appeared upon examination, that *he did not take the oath of office* at his entry upon it, being perſuaded by one H. not to do it by reaſon of the difficulty of the articles, [ſo that he could not be condemned as guilty of perjury, yet] he and H. were both puniſhed by fine and impriſonment for the contempt, and the ſheriff was further fin'd and impriſoned for the falſe return. D. 168. b. pl. 19. Trin. 1 Eliz. Bronker's Caſe.

[6. In an indictment of perjury, if it be alleged that there was a *ſuit in Chancery* between A. and B. and thereupon *a commiſſion iſſued to examine witneſſes* * *which was executed; and after the defendant made a falſe oath before* Maſter Page, *one of the Maſters of the Chancery*, who had power to take an oath, and ſo the defendant made corrupt and wilful perjury; this indictment is not good, becauſe it does *not appear that* Maſter Page *had power to take an oath in this caſe*, but only an oath which might be in other

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See (C)—

* Fol. 258.

Upon an indictment for perjury aſſigned *in an affidavit*

made before Sir Robert Rich, exceptions were moved for the quaſhing it. 1ſt, It is *not laid, that Sir Robert* Rich *was a Maſter in Chancery*. 2dly, That this is no perjury within the ſtatute of 5 Eliz. cap. 9. And 3dly, Becauſe he *concludes* this to be *contra formam ſtatuti* of 5 Eliz. for perjury in this affidavit, which is not within the ſtatute. Curia allowed of theſe exceptions, and for theſe exceptions, by the rule of the Court, the indictment was quaſh'd and the party diſcharged of it. 2 Buls. 322. Hill. 1 Car. B. R. The King v. Bell.—An action upon the ſtatute was brought upon this ſame oath: the *court was, that the defendant came to Rich a Maſter in Chancery having authority to take affidavits &c. and made a falſe affidavit*, but he did *not allege that the affidavit was in Chancery in curia cancellariæ*, which the Court ſaid he ought to have done, or otherwiſe it is no perjury within the ſtatute. Lat. 38, 39. Anon.

other caſes; for as a Maſter in Chancery he has no power, he being by his name only a Clerk of the Court to make writs, and it is not alleged that this oath was filed *of record* in the Court by which it might appear that it was a judicial proceeding, as the precedents are in ſuch caſes to ſay, *prout per recordum in curia &c. apparet*. Trin. 1652. in an indictment againſt *Ruddy and Howell Gwinn*. Adjudged per Curiam after verdict againſt them.]

S. P. At common law. *whether he be believed or not.* 1 Hawk. Pl. C. 172. cap. 69. ſ. 1.

7. Perjury is a crime committed when a lawful oath is adminiſtred by any, that has authority, to any perſon *in any judicial proceeding*, who ſwears *abſolutely and falſly in a matter material to the iſſue*, or cauſe in queſtion, by their own act, or by the ſubornation of others. 3 Inſt. 164.

——One was ſu'd in the Star-Chamber for *perjury in the Court of Requeſts upon a depoſition there, relating to a title of land and frankteneement* in queſtion *there*; and it was reſolv'd by all the Juſtices of England, that this perjury is not puniſhable; for this was *only a vain and idle oath*, and not a corrupt one, becauſe the Court of Requeſts *had no power to examine titles of lands*, which are real, and they are to be diſcuſs'd and determin'd in the King's Courts. Quod nota. Yelv. 111. Mich. 5 Jac. B. R. cited by Williams J. as Paine's Caſe.

If a witneſs be *examin'd after the demiſe of the King upon a commiſſion gran'ed in the King's life-time*, and he is perjur'd upon ſuch examination; tho' legally the commiſſion was determined by the demiſe of the King, yet the commiſſioners not having notice of ſuch demiſe the witneſs was held to be duly ſworn, and was puniſhable for perjury in ſuch examination by the ſtatute; for that what the commiſſioners did was legal being before notice. Cro. C. 97. Mich. 3 Car. Sir Randolph Crew v. Vernon.—1 Hawk. Pl. C. 174. cap. 69. ſ. 4.

S. P. 5 Mod. 348. Trin. 9 W. 3. the King v. Greep.—Serjeant Hawkins ſays, Perhaps the books wherein this opinion is holden, ought to be intended only of ſuch affidavits which no way relate to the cauſe depending in ſuit before ſuch Court; for if they be of ſuch a nature, that either of the parties in variance be grieved &c. by reaſon of the perjury; as where a trial is put off, or a judgment or execution ſet aſide upon a falſe affidavit, the offence ſeems to be not only within the meaning of the ſtatute, but alſo within the very letter of it, unleſs the words (witneſſes and depoſitions) are confined to ſo ſtrict a ſignification as to bear no kind of application to any other perſons or oaths, except thoſe which are made uſe of upon the trial of the iſſue in queſtion. 1 Hawk. Pl. C. 180. cap. 69. ſ. 21.

8. If for a *falſe affidavit* an *action* does not lie upon the ſtatute of perjury, yet he may be indicted for this perjury at the common law; for by ſuch falſe affidavits made in the Star-Chamber, Chancery, and B. R. and other courts, ſeveral perſons are greatly vexed. Per Coke Ch. J. Roll. R. 79. pl. 22. Mich. 12 Jac. B. R. Anon.

S. C. Palm. 294. by the name of Ockley and Whitleſoy's Caſe.—Het. 97.

9. J. S. was to prove a matter relating to himſelf; J. S. and one T. S. *procur'd one W. R* a knight of the poſt to ſwear for J. S *who ſwore he knew that the ſaid J. S. did the thing*. It was very true that *J. S. did the thing, but W. R. did not know it, nor did he know J. S.* This was ſaid by the Chief Juſtice to be perjury;

jury; but he and the other Juſtices held, that it is only puniſhable as miſdemeanor, and that by the common law. 2 Roll. R. 244. Mich. 20 Jac. B. R. Whickſley's Caſe.

Paſch. 4 Car. C. B. ſays, it was agreed * by the Court in one STYLES's CASE, that tho' a witneſs ſwears true, yet if it be not true of his own knowledge it is a corrupt oath within the ſtatute.——But in the Caſe of the KING v. HINTON & BROWN, the Court ſaid, that there was a difference when a man ſwears a thing which is true in fact, and yet he does not know it to be ſo, and where he ſwears a thing to be true which is really falſe. The firſt is perjury before God, and the other is an offence of which the Law takes notice. 2 Mod. 102. Hill. 2 & 3 Jac. 1.—But ſuch falſe oath was puniſh'd in the Star-Chamber, as where damages were awarded to the plaintiff in the Star-Chamber, according to the value of his goods riotouſly taken away from the defendant, the plaintiff cauſed two men to ſwear the value of the goods, that never ſaw nor knew them; and though that which they ſwore was true, yet becauſe they knew it not, it was a falſe oath in them, for the which both the procurer and the witneſſes were ſentenced in the Star Chamber. 3 Inſt. 166. Mich. 9 Jac. in the Star-Chamber. Gurnei's Caſe.—— 1 Hawk. Pl. C. 173. cap. 69. ſ. 6.

10. Adjudged by the Court, that a man cannot be puniſhed by the ſtatute of 5 Eliz. cap. 9. for perjury *in his* * *own cauſe*, as † *ſtranger at law* &c. but for that he ſhall be *indicted at common law*, and it was commanded to be ſo obſerv'd from henceforth, and that it has been ſo adjudged. Noy. 128. Sir Robert Miller's Caſe.

——* S. P. Either in an anſwer to queſtions put to him in a court of law or equity having power to oblige him upon oath concerning his knowledge of the matter in diſpute, or in his affidavit concerning ſome collateral matter, wherein the parties own oaths are allowed to be taken. *But* it ſeems, that a *juror* who gives a verdict contrary to manifeſt evidence is not properly guilty of perjury within the above-mentioned deſcription, becauſe he is not ſworn to depoſe the truth, but only to give a true judgment upon the depoſition of others, and in many caſes is not puniſhable at all in foro humano. 1 Hawk. Pl. C. 174, 175. cap. 69. ſ. 5.—† S. P. Vent. 256. Trin. 28 Car. 2. B. R. Anon.

11. A. was convicted of perjury by verdict, for ſwearing *that he was ſervant to J. S.* where in truth *he was only ſervant to the ſervant of J. S.* And for this oath Roll fin'd him 10 l. though Wild mov'd for an abatement, becauſe it was not malicious, and ſaid that one TYLER in like caſe was fin'd but 5 l. All. 79. Trin 24 Car. B. R. Anon.

12. An *equivocal oath*; as where a man having *roll'd up a declaration in ejectment* like a piece of a tobacco-pipe, hid it *in his box*, and after *delivered the box to the tenant in poſſeſſion*, and after *ſwearing the delivery of a declaration* &c. he was pillory'd; per Allibon J. Cumb 62. Mich. 3 Jac. 2. B. R. Anon.

13. Ld C. Parker ſaid, that he did not think it would be perjury at law, if the *depoſitions of a witneſs taken de bene eſſe were quite contradictory to his depoſitions in chief*, there being no iſſue join'd, as there muſt be before the depoſitions are taken in chief. Wms's Rep. 569. Trin. 1719. in Caſe of Cann v. Cann.

14. It ſeems, that any falſe oath is puniſhable as perjury, which *tends to miſlead the Court in any of their proceedings relating to a matter judicially before them*, tho' it no way affect the principal judgment which is to be given in the cauſe; as where a perſon *offers* himſelf *to be bail* for another, and knowingly and wilfully *ſwears* that *his ſubſtance is greater than it is*. Hawk. Pl. C. 173. cap. 69. ſ. 3.

15. Alſo it has been reſolv'd, that not only ſuch oaths as are taken

taken upon judicial proceedings, but alſo all ſuch as any way *tend to abuſe the adminiſtration of juſtice*, are properly perjuries; as where one *takes a falſe oath before a Juſtice of the Peace*, in order to induce him *to compel another to find ſureties for the peace* &c. *Or* where a perſon forſwears himſelf *before commiſſioners* appointed by the King *to inquire of the forfeitures of his tenants* eſtates &c. whereby he makes them liable to be ſeiſed by Exchequer proceſs. Hawk. Pl. C. 173. cap. 69. ſ. 3.

[310] (B) *Puniſhable*, how. *At Common Law, and by Statute.*

Perjuri &c. diſperdant omnia, relegantur de patria, niſi ceſſent & profundius emendent. Brompton's Chronicon, 831. l. 12. leges Alfredi & Godrini.—Deinceps non ſint digni juramento, ſed ordalio. Ibid. 836. l. 24. inter leges Edwardi ——Nunquam juramento poſtea dignus ſit nec in ſanctificato atrio aliquo jaceat, ſi moriatur, ſi non habeat epiſcopi teſtimonium in cujus dioceſi ſit, quod pœnitentiam receperit, & preſbiter hoc referat epiſcopo infra xxx noctes, utrum ad emendationem & ſatisfactionem venerit; ſi non faciat hoc, componat, ſicut epiſcopus ei concedit. Ibid. 841. l. 60. inter leges Adelſtani regis.—Manum perdat vel dimidiam weram, & hoc commune ſit domino ſuo & epiſcopo. Et non habeatur deinceps juratione dignus, ſi erga Deum profundius non emendet, & plegios inveniat quod ſemper in reliquum ceſſet. Ibid. 926. l. 51. inter leges Kanuti regis.— —And there immediately follows another law, viz. Si quis *mendacii teſtimonio manifeſte ſtabit* & probatus inde fuerit, non admittatur deinceps in legitimum teſtimonium, ſed ſolvat regi, vel domino ſuo * HEALSFANG ——* This was a pecuniary mulct in lieu of ſtanding in the pillory. Somn. Gloſſ. verbo Halsfagium.

1. PErjury, *before the Conqueſt, was puniſh'd* ſometimes *by death*, ſometimes by *baniſhment*, and ſometimes by *corporal puniſhment &c.* ſome were puniſh'd by *cutting out their tongues*, as was wont to be of falſe witneſſes: afterwards it came to be more mild, as *forfeiture of all his moveables*; and afterwards it came to *fine and ranſom, and never to bear teſtimony*. 3 Inſt. 163, 164 cap. 74.

F. was indicted on this ſtatute in *giving falſe evidence to the grand inqueſt at a ſeſſions held at W. &c. upon an indictment of a riot.* This indictment was removed into B. R. and F. diſcharged thereof; for *this ſtatute hat two branches*. The firſt is *againſt procurers of perjury*, and this is [in] matter depending in ſuit by bill, writ, action, or information; ſo that procurement of perjury upon indictmen is out of this branch. The ſecond branch, upon which F. was indicted, is provided *againſt thoſe who commit perjury by his or their depoſition in any of the Courts therein mentioned, or being examined in perpetuam rei memoriam*. And tho' this clauſe be general, and not reſtrain'd to any particular ſuits, viz. by bill, writ, action, or information, as the firſt was, yet this ſhall be conſtrued to refer to the firſt, and ſhall be expounded by it. And ſo *one part* of the act *ſhall expound the other*; for otherwiſe, the party that commits the perjury upon [the] indictment ſhall be puniſhed by this laſt branch, and he who ſuborns and procures him to commit it, will paſs unpuniſhed. 5 Rep. 99. a. Mich. 40 & 41 Eliz. B. R. Flower's Caſe.——Ibid. ſays it was ſo adjudged, Mich. 36 & 37 Eliz. B. R. in Monday's Caſe.——And alſo, that ſuch judgment was given, Trin. 39 Eliz. in B. R. in caſe of perjury ſuppoſed to be committed

2. 5 *Eliz. cap. 9. ſ.* 3. enacts, That *all perſons which ſhall corruptly procure any witneſs by letters, rewards, promiſes, or other ſiniſter means, to commit wilful and corrupt perjury, in any matter depending in ſuit by writ, action, bill, complaint, or information, concerning lands or hereditaments, goods, debts or damages in any of the Queen's Courts of Record, or in any Leet, ancient Demeſne Court, Hundred Court, Court Baron, or in the Courts of the Stannary in Devon and Cornwall, or ſhall corruptly procure or ſuborn any witneſs ſworn to teſtify in perpetuam rei memoriam, ſuch offenders ſhall, being convicted*, forfeit 40 l.

mitted upon an indictment of felony.——Perjury and ſubornation of perjury *upon an indictment for the King*, as in the caſe above of a riot, *is out of the words* of the ſtatute, as was reſolved in FLOWER'S CASE; becauſe perjury upon an indictment is not within the ſtatute. But ſince perjury was an offence puniſhable by the common law, tho' the indictment of F. founded upon the ſtatute was overthrown, yet his perjury, tho' upon an indictment, is puniſhable, and was moſt commonly puniſhed in the Star-Chamber. 3 Inſt. 164.—But where P. was indicted upon this ſtatute, becauſe he was produced as a witneſs for the King, upon a trial in an information, and ſworn &c. ſhewing the oath and the falſity therein; an exception was taken, that a witneſs being produced and *depoſed for the King* may not be puniſhed by way of indictment, which is the ſuit of the King merely; for he cannot puniſh his own witneſs who ſwears for him; and it was ſaid to be ſo reſolved in the Star-Chamber, that a bill there lies not againſt him upon that ſtatute; and of that opinion was the whole Court, that ſuch a witneſs is not puniſhable by way of indictment; whereupon he was diſcharged. Cro. J. 120. Trin. 4 Jac. B. R. * Price's Caſe.——It appears, that perjury committed in an information exhibited by the King's attorney, or any other for the King, by any witneſs produced on the behalf of the King, is puniſhable, either by this act, or by the common law; and ſo it was reſolved in the Caſe of ‡ ROWL. AP. ELIZA, which was this. The King's attorney preferred an information in the Exchequer againſt Hugh Nanny, Eſq; the father, and Hugh Nanny the ſon, and others, for intruſion, and cutting down a great number of trees &c. in Penroſe in the county of Merioneth; the defendant pleaded Not guilty, and the trial being at the bar, Rowl. Ap. Eliza was a witneſs produced for the King; who depoſed upon his oath to the jury, that Hugh the father and Hugh the ſon joined in ſale of the ſaid trees, and commanded the vendees to cut them down; upon which teſtimony the jury found for the King, and aſſeſſed great damages, and thereupon judgment and execution was had. Hugh Nanny the father exhibited his bill in the Star-Chamber at the common law, and charged Rowland Ap. Eliza with perjury, and aſſigned the perjury, in that he ſaid Hugh the father never joined in ſale, nor commanded the vendees to cut down the trees &c. And it was reſolved, firſt, that perjury in a witneſs was puniſhable by the common law. Secondly, that perjury in a witneſs for the King was puniſhable by the common law, [311] either upon an indictment, or in an information, or by this act in an information. And the ſaid Rowland Ap. Eliza was by the ſentence of the Court convicted of wilful and corrupt perjury. 3 Inſt. 164. cap. 74.

* S. C. cited 1 Hawk. Pl. C. 179. cap. 69. ſ. 19. where the Serjeant ſays, It ſeems eaſy to account for the judgment, becauſe he ſuppoſes it muſt be intended to have been a *criminal information*; *but* if the information, whereon the ſaid perjury was ſuppoſed to have been committed, had been *of a civil nature*, he did not ſee any reaſon why it ſhould not be as well within the meaning, as it ſeems to be expreſsly within the words of the ſtatute; for ſurely the opinion, that the King cannot by indictment, which is his own proper ſuit, puniſh his own witneſs who ſwears for him, cannot be agreeable to law; becauſe, however the perjury of ſuch a witneſs may ſeem to tend to promote the King's intereſt in relation to the cauſe which happens to be in diſpute; yet certainly it is a heinous crime in its own nature, and as much an abuſe to juſtice, and of the ſame ill conſequence to the publick, and conſequently as worthy of the King's reſentment, as if it had been taken againſt him.

‡ Cro. J. 212. Mich. 6 Jac. B. R. S. C. by the name of Nanuge v. Ap. Ellis & al.

This ſtatute *makes nothing* perjury but what was ſo before; per Holt Ch. J. And per Eyre J. it purſues the common law, and *adds nothing new but the penalty*. Carth. 422. Mich. 9 W. 3. B. R. in Caſe of the King v. Greep.

S. 4. If ſuch offender have not goods or lands to the value of 40*l. he ſhall ſuffer* impriſonment one half year, *and* ſtand upon the pillory one hour *in ſome market town adjoining in open market there.*

S. 5. No perſon ſo convicted ſhall be received as a witneſs in any Court of Record, until the judgment given againſt the ſaid perſon be reverſed; and upon every ſuch reverſal the parties grieved *ſhall recover their damages againſt ſuch as did procure the ſaid judgment to be firſt given againſt them by action upon the caſe.*

S. 6. If any perſon, either by ſubornation, unlawful procurement, or means of any other, or by their own act, wilfully and corruptly commit wilful perjury, in any of the Courts before mentioned, or being examined ad perpetuam rei memoriam, every perſon ſo offending, and being convict, ſhall forfeit 20*l. and have impriſonment ſix months, and the oath of ſuch perſon ſhall not be received in any Court of Record, until the judgment be reverſed by attaint or otherwiſe; and*

So that the *procurer is to forfeit more than the party perjured.* Sav. 46. in pl. 98.—So that in the judgment of

parliament plus peccat author quam actor. 3 Inſt. 167.—

and upon ſuch reverſal the ‡ parties grieved to recover their damages *againſt ſuch as did procure the judgment to be given againſt them by action upon the caſe.*

A man cannot be guilty of ſubornation of perjury, unleſs perjury be actually committed; per Holt Ch. J. But he ſaid, he had known one ſet in the pillory for * *endeavouring to ſuborn*, it being a great offence. Comb. 450. Trin. 9 W. 3. B. R. Anon.

* 2 Show. 1. Paſch. 30 Car. 2. B. R. The King v. Johnſon.——Hawk. Pl. C. 177. cap. 69. ſ. 10. ſays, that in ſuch caſe the party is liable to be puniſhed, not only by fine, but alſo by infamous corporal puniſhment.

‡ He that brings an action upon this ſtatute muſt be the party griev'd; otherwiſe he cannot have it, but ought to have the offender puniſhed in the Star-chamber. 3 Bulſ. 147. in Caſe of Cockeril v. Apthorp.—Bill of debt was brought upon this ſtatute, and held to be maintainable, and adjudged for the plaintiff. Cro. E. 434. Mich. 37 & 38 Eliz. B. R. Johnſon v. Pays.

S. 7. *If the offender have not goods to the value of* 20 *l. he ſhall be* ſet on the pillory *in ſome market-place by the ſheriff if without any city or town corporate, and if within ſuch city &c. by the head officer &c.* and *there have* both his ears nailed, *and be diſabled for ever to be ſworn in any of the Courts of Record aforeſaid, until the judgment be reverſed, and thereupon to recover his damages.*

S. 8. *The one moiety of which money forfeited to be to the Queen, and the other moiety to ſuch perſon grieved by reaſon of the offence, that will ſue for the ſame.*

S. 9. *As well the Judges of the ſaid Courts where ſuch perjury ſhall be committed, as alſo the Juſtices of aſſiſe and gaol delivery, and the Juſtices of peace at their quarter ſeſſions, ſhall have power to inquire of all offences contrary to this act, by inquiſition, preſentment, bill or information, or otherwiſe lawfully to hear and determine the ſame.*

S. 10. *The Juſtices of aſſiſe ſhall in every county two times in the year in their ſittings make proclamation of this ſtatute.*

[312] S. 11. *This act ſhall not extend to any Eccleſiaſtical Court, but that ſuch offenders may be puniſhed by ſuch laws as heretofore in the Eccleſiaſtical Courts.*

A *bill of perjury* was *fil'd in the Chancery for perjury there committed* contra formam of this ſtatute. It was

S. 13. *This act ſhall not reſtrain the power of any Judge having abſolute power to puniſh perjury before, but that they and every of them ſhall and may proceed in the puniſhment of all offences heretofore puniſhable, in ſuch wiſe* * *as they might have done and uſed to do before the making of this act, to all purpoſes, ſo that they ſet not upon the offenders leſs puniſhment than is aſcertained in this act.*

Made perpetual by 29 *Eliz. cap.* 5. *and* 21 *Jac.* 1. *cap.* 28.

doubted, if defendant ſhould plead Not guilty, whether he ſhould be ſworn to his plea, and alſo to anſwer to interrogatories as was uſed in the Star-Chamber. Reſolved, that he ſhould not be ſworn or examined upon interrogatories, unleſs the Court of Chancery has abſolute authority, and had uſed to examine perjuries in this Court before this ſtatute; for then this is reſerved by this proviſo, as for the Star-Chamber; and if the Court of Chancery will examine perjury committed there (as it may by the ſtatute), it muſt be by Latin bill, and the pleadings in Latin, and iſſue joined there, and ſo try it in B. R. as is uſual in the like caſes. D. 288. a. pl. 51. Paſch. 12 Eliz. Anon.——3 Inſt. 167. cites S. C.

* Uſage cannot give a Court authority, where it could not do it of right before, by reaſon of the words, *as they might have done, and uſed to do before &c.* D. 243. a. pl. 54. Mich. 7 & 8 Eliz. Orſlow's Caſe.

3. If a witneſs *depoſes falſely, but the jury* do not credit his oath, but *give their verdict againſt his oath*; tho' the party grieved cannot

not ſue him for the perjury, yet he ſhall be puniſhed at the ſuit of the King. Per Cur. 3 Le. 230. pl. 310. Mich. 31 Eliz. B. R. in Hamper's Caſe.

4. Quære, If *upon aid praier*, he in *reverſion joins, and he is grieved* and prejudiced *by an oath*, and depoſition, whether he may maintain an action upon this ſtatute? For clearly, by the common law he may have attaint. Yelv. 22. ſeems to be a quære of the Reporter at the end of the Caſe of Brode v. Owen. Brownl. 82, 83. S. P. at the end of the S. C. and ſeems a copy of Yelv. 22.

5. 2 *Geo.* 2. *cap.* 25. *ſ.* 2. *The more effectually to deter perſons from committing wilful and corrupt perjury, or ſubornation of perjury; it is enacted, that, beſides the puniſhment already to be inflicted by law for ſo great crimes, it ſhall be lawful for the Court, or Judge, before whom any perſon ſhall be convicted of wilful and corrupt perjury, or ſubornation of perjury, to order ſuch perſon to be ſent to ſome houſe of correction within the ſame county for a term not exceeding ſeven years, there to be kept to hard labour during all that time; or otherwiſe to be tranſported to ſome of his Majeſty's plantations beyond the ſeas for a term not exceeding ſeven years, as the Court ſhall think moſt proper; and thereupon judgment ſhall be given: that the perſon convicted ſhall be committed or tranſported accordingly, over and above ſuch puniſhment as ſhall be adjudged to be inflicted on ſuch perſon, agreeable to the laws now in being; and if tranſportation be directed, the ſame ſhall be executed in ſuch manner as is or ſhall be provided by law for the tranſportation of felons; and if any perſon ſo committed or tranſported, ſhall voluntarily eſcape or break priſon, or return from tranſportation before the expiration of the term for which he ſhall be ordered to be tranſported, ſuch perſon being thereof lawfully convicted, ſhall ſuffer death as a felon, without benefit of clergy, and ſhall be tried for ſuch felony in the county where he eſcaped, or where he ſhall be apprehended.*

S. 4. *This act ſhall not extend to Scotland.*

S. 5. *No attainder for any offence hereby made felony, ſhall make or work any corruption of blood, loſs of dower, or diſheriſon of heirs.*

S. 6. *This act ſhall be of force for five years to be reckoned from the 29th of June* 1729, *and from thence to the end of the then next ſeſſion of parliament.*

Made perpetual by the 9 *Geo.* 2. *cap.* 18.

(C) Puniſhable. *In Reſpect of the Court or Perſons, before whom.* [313]

1. WHERE the *Court hath no authority to hold plea of the cauſe*, but it is coram non judice, there perjury cannot be committed. 3 Inſt. 166. S. P. per Dolben J. 2 Show. 31. in Caſe of Goodwin v. Brown.—Cites 1 Cro. 352.

2. Tho' perjury *in the Spiritual Court* is not puniſhable by the ſtatute, yet the ſtatute leaves it to be puniſhed as it was before, ſo Falſe oath in the Spiritual Court,

(tho' it be no Court of Record) is perjury, for

ſo that it is puniſhable in the Star-Chamber. Cro. E. 185. Trin. 32 Eliz. B. R. Plaice v. How.

which the party may be puniſhed at the common law by indictment; per Cur. and therefore refuſed to quaſh an indictment of perjury for a falſe oath made there. Sid. 454. pl. 23. Paſch. 22 Car. 2. B. R. Anon.—1 Hawk. Pl. C. 173. cap. 69. ſ. 3.

So perjury may be *in the Star-Chamber.*

3. Perjury may be *in the Eccleſiaſtical Court*; for it is a Court Judicial. Cro. E. 609. pl. 12. Paſch. 40 Eliz. B. R. Shaw v. Thompſon.

Cro. E. 609. pl. 13. Paſch. 40 Eliz. Corbet v. Hill.——So *before the Juſtices of aſſiſe.* Ibid. pl. 14. Anon.

* Hawk. Pl. C. 173. cap. 69. ſ. 3. cites S. C. but ſays, it ſeems certain, that no oath whatſoever *in a mere private matter,* however wilful and malitious it may be, is puniſhable as a perjury in a criminal proſecution; for *private injuries are to be redreſſed by private actions.*

4. An indictment of perjury *for ſwearing before a Juſtice of the peace, that J. S. was preſent at a conventicle,* or a meeting for religious worſhip &c. it was moved to quaſh it, becauſe it did *not appear to be a conventicle,* (viz.) *that there was above the number of five,* and ſo the Juſtices of peace had no power to take an oath concerning it, and then it could be no perjury; to which the Ld. Ch. J. ſaid, that conventicles were unlawful by the common law, and the Juſtices may puniſh unlawful aſſemblies. And he ſeemed to be of opinion, that a man *might be indicted* of perjury *for a voluntary and extra-judicial oath*; and cited a late caſe, where one had * *ſtolen away a man's daughter, and* went *before a Juſtice* of the peace, and *ſwore that he had the father's conſent,* and this *in order to get a licence to marry her*; and he was indicted, and convicted thereupon. And all the Court ſaid, that it was not the courſe to quaſh indictments of perjury, nuſance, or the like; but to put the party to plead them. Vent. 369, 370. Mich. 25 Car. 2. B. R. Anon.

* S. P. For which the party may be puniſhed at common law by indictment; per Cur. Sid. 454. in pl. 23. Paſch. 22 Car. 2. B. R. Anon.

5. The *ſtatute* has ſubjected the offender to a certain penalty, and to a corporal puniſhment, and therefore the perjury muſt be by ſwearing falſely in a *Court of Record, and in a thing material to the iſſue.* But this is not required *at common law*; for it is perjury to ſwear falſely in a * *Court Baron,* or in the Eccleſiaſtical Court, which are not Courts of Record; nor that it ſhall be in a thing material to the iſſue; for a man may be perjured in an anſwer in Chancery to a thing not charged in the bill. Per Cur. 5 Mod. 348. The King v. Greep.

——Perjury cannot be committed in the Court of the Lord of Copyholds, or in any Court which is *holden by uſurpation,* otherwiſe in a *Court-Leet,* or *Court-Baron which is held by title.* Godb. 179. pl. 252. Mich. 9 Jac. C. B. Anon.

6. The oath ought to be taken before perſons lawfully authoriſed to adminiſter it; for if it be taken before perſons acting meerly in a private capacity, or before perſons pretending to a legal authority of adminiſtring ſuch oath, but having in truth no ſuch authority, it is not puniſhable as perjury; yet a falſe oath taken *before commiſſioners,* whoſe *commiſſion* at the time is in ſtrictneſs *determined by* the *demiſe of the King,* is perjury, if taken

taken before such time, as the commissioners had notice of such demise; for it would be of the utmost ill consequence in such case to make their proceedings wholly void. Hawk. Pl. C. Abr. 203, 204. cap. 69. s. 4.

(D) Punishable. In respect of being committed *in any Judicial Proceedings.*

1. THO' an oath be given by him that hath lawful authority, and the same is broken, yet if it be not in a judicial proceeding, it is not perjury punishable either by common law, or by 5 Eliz. because they are *general and extra-judicial*, but serve for aggravation of the offence, as general oaths given to officers or ministers of justice, citizens, burgesses, or the like, or for the breach of the oath of fealty or allegiance &c. they shall not be charged in any Court Judicial for the breach of them afterwards. As if an *officer commit extortion*, he is in truth perjured; because it is against his general oath; and when he is charged with extortion, the breach of his oath may serve for aggravation. 3 Inst. 166.

The oath must be either taken in a judicial proceeding, or in some other *publick proceeding* of the like nature, *wherein the King's honour and interest are concerned*; as before commissioners appointed by the King, to inquire of the forfeiture of his tenants, or of defective titles wanting the supply of the King's patents. But it is *not material, whether* the Court, in which a false oath is taken, be *a Court of Record*, or not, or whether it be a Court of *Common Law*, or a Court of *Equity or Civil Law* &c. or whether the oath be taken in the face of the Court, or out of it before persons authorized to examine a matter depending in it, as before the sheriff on a writ of inquiry &c. or whether it be taken in relation to the merits of a cause, or in a collateral matter; as where one, who offers himself to be bail for another, swears that his substance is greater than it is &c. But neither a false oath in a mere private matter, as in making a bargain &c. nor the breach of a promissory oath, whether publick or private, are punishable as perjury. Hawk. Pl. C. Abr. 203. cap. 69. s. 3.

2. If the defendant perjureth himself in his *answer in* * *Chancery, Exchequer-Chamber* &c. he is not punishable by 5 Eliz. for it extendeth but to witnesses; but he may be punished in the Star-Chamber &c. 3 Inst. 166.

* S. P. per Tanfield. 3 Le. 201. pl. 253. in Matthew's Case.

3. A bill of perjury tam quam was sued, because the *defendant being one of the* * *homage &c. did present* with the rest of the homagers, *that the plaintiff had cut down certain trees*, whereas in truth he had not cut down any. All the Justices held, that for this matter the bill lay not upon the statute 5 Eliz. for this branch of the statute is to be *intended* of perjury *in depositions only*. 3 Le. 201. pl. 253. Pasch. 30 Eliz. B. R. Matthews's Case.

* S. P. 1 Hawk. Pl. C. 180. cap. 69. s. 20. — If a man be forsworn *in a Court Baron* before the Steward, this is perjury; per Hobart Ch. J. to which Hutton J. agreed. Win. 3. Pasch. 19 Jac. in Case of the King v. Bowen. — S. P. by Twisden J. Mod. 55 pl. 109. Hill 21 & 22 Car. 2. B. R. Anon. — Perjury at common law may be in a Court which is not of Record, as *Chancery or Court Baron* if *in a material point*, and so upon the statute by express words. Freem. Rep. 506. Pasch. 1693 The King v. .... one of the Ld Mountague's witnesses — And an indictment for perjury in the like case was discharged, because the statute *extends only to perjuries of witnesses in their examinations &c.* per Wray and other Justices. D. 288. a. marg. pl. 51. cites Trin. 19 Eliz. B. R. Knight's Case. — But see Cro. E. 907. contra. Mich. 44 & 45 Eliz. Poultney v. Wilkinson.

4. One was indicted for perjury committed *in his anſwer in the Star-Chamber, and upon his examination to interrogatories there.* But becauſe theſe matters are not within the ſtatute, he *not being* examined as a *witneſs between the parties, nor in perpetuam rei memoriam,* he was diſcharged. Cro. E. 148. Mich. 31 & 32 Eliz. B. R. Rither's Caſe.

[315] *And* it was alſo agreed, that the perjury *at the inqueſt of office* is aſſignable as a miſdemeanor, but * not upon the ſtatute of 5 Eliz. and the Court took the antedating to be a great offence, but becauſe it was not in the bill complained of, they did not proceed. Mo. 627. Agar's Caſe.—* S. P. 1 Hawk. Pl. C. 180. cap. 69. ſ. 20.

5. Information was brought that *where A. was receiver of the rents of the Queen, and had received them, and had given acquittance within forty days after the time of payment, he had depos'd at an inqueſt of office* by commiſſion to inquire whether the condition was broken for nonpayment within the forty days, *that he in facto received it after the forty days expired, and antedated his acquittance within the forty days.* It was rul'd that the attorney may have information upon *perjury* ſuppos'd *in advantage of the Queen,* and that any other perſon may aſſign ſuch perjury, if he be griev'd by it, but the attorney may, tho' the Queen be benefited by it. Mo. 627. pl. 861. Mich. 43 & 44 Eliz. Agar's Caſe.

Brownl. 82. 83. S C. and ſeems only a copy of Yelv. 22. ——Hawk. Pl. C. 181. 182. cap. 69. ſ. 22. cites S. C. But the Serjeant ſays, Perhaps the authority of this opinion may juſtly be queſtioned, not only becauſe the words of the ſtatute whereon it is grounded are miſtaken, but alſo becauſe the offence ſeems in truth to be both within the meaning and letter of the law, ſince thereby a perſon is grieved in reſpect of a cauſe depending in ſuit in a Court mentioned in the ſtatute.

6. A. brought a *bill in Chancery againſt B.* and afterwards *C. was made party to the bill againſt B. by order* of the Court. A *commiſſion iſſued between C. and B. to examine witneſſes.* Upon this commiſſion *J. S. was examined ex parte C. and depoſed directly for C. againſt B.* And thereupon a decree was made againſt B. B. brought debt upon the ſtatute againſt J. S. as a party griev'd by the depoſition: J. S. demurr'd. Gawdy and Yelverton J. held that the action did not lie; for the words of the ſtatute are, where a man *is grieved by a depoſition in a ſuit between party and party;* and in this caſe it appears that *C. was not party to the ſuit, but came in a later by an order,* and no bill depending either againſt him or brought by him, and ſo it is out of the ſtatute; for being a penal law, it ſhall be taken ſtrictly. Yelv. 22 Mich. 44 & 45 Eliz. B. R. Brodee v. Owen.

S. P. But if he had been examined on the part of the King upon interrogatories, it is otherwiſe. Per Weſton. Dal. 84. 85. pl. 39. 14 Eliz. Anon.

7. *M. was defendant in a bill* in the Star-Chamber, and *examined upon interrogatories.* The plaintiff, ſuppoſing that he had committed perjury in his examination, procured him to be indicted upon the ſtatute. But per tot. Cur. he cannot; for *he was no witneſs, but remained ſtill defendant,* notwithſtanding his being examined upon interrogatories; for if he confeſſed any thing againſt himſelf upon the interrogatories, he ſhould be condemned. Quod nota. Yelv. 120. Hill. 5 Jac. B. R. Sir Robert Miller's Caſe.

(E) Puniſh-

(E) Puniſhable. In Reſpect of its being in *a Thing material or not to the Iſſue.*

1. IT is not a perjury within the ſtatute 5 Eliz. unleſs it be depos'd *upon ſome matter depending in ſuit in ſome Court of Record*; and if he be perjur'd *in circumſtance, and* * *not in the point in queſtion*, it is not material or puniſhable by this ſtatute. As if a man ſwears, that he ſaw J. S. ſteal and deliver ſuch a deed, and when he did it, he *was in a* † *blue coat*; where indeed he was not in a blue coat. Per Popham. Goldſb. 191. pl. 140. Hill. 43 Eliz. Anon.

S. P. Or in other Courts mentioned in the ſtatute. And other circumſtance, muſt be purſued, according to the deſcription of it in the ſtatute. Freem. L. 506. Paſch. 1693. The King v. .... one of the Lord Mountague's witneſſes.

If it be not material to the iſſue or cauſe in queſtion, it is not perjury, tho' it be falſe, becauſe it concerns not the point in ſuit; and therefore in effect it is extrajudicial. Beſides *this act gives remedy to the party griev'd*, and if the depoſition be not material, he cannot be grieved thereby. 2 Inſt. 176.

* Where it is *not material to the iſſue*, it is not puniſhable by the ſtatute. Reſolv'd 11 Rep. 13. a. Mich. 10 Jac. in Caſe of Priddle v. Napper.——S. P. by Roll Ch. J. Sty. 337. Trin. 1652. in Caſe of Cuſtodes v. Howel Gwin.——S. P. agreed by the Attorney General. Arg. 2 Show. 20. in Caſe of *The* KING v. EMERTON, that it muſt be to upon the ſtatute; but at the common law it is not neceſſary. [316]

2 Salk. 514. Mich. 9. of W. 3. B. R. Holt Ch. J. in the Caſe of the KING v. GREEPE, denied this Caſe of Goldſb. 191. and held that if a man *gives evidence to the credit of a witneſs*, tho' this be not the iſſue, yet it is perjury.

† If a man be *indicted* for perjury *at common law, it muſt be for a thing* that is *not altogether foreign*, but muſt have ſome relation to the matter; as if a witneſs ſhould *ſwear what cloaths he had on when he ſaw ſuch a fact done*, it is altogether foreign to the matter in queſtion, and if he were miſtaken, it is not perjury at common law. Freem. L. 506. Paſch. 1693. The King v. ..... one of the Lord Mountague's witneſſes.

2. A. was examined upon *interrogatories* in Chancery, *whether J. S. was of ſanæ memoriæ at the time of his death*; to which he anſwer'd, that *he was of non ſanæ memoriæ five days before his death*. Upon which anſwer J. S. was indicted of perjury; but upon exception the indictment was quaſh'd; becauſe it was in a thing immaterial; for it might be that he was not of ſound memory five days before his death, and yet be of ſound memory at the time of his death. Arg. Palm. 383. cites 14 Jac. Manton's Caſe.

S. C. cited Arg 2. Roll R. 309.

3. Indictment for perjury, ſetting forth, *that one* Sotherton *had brought* an action of *treſpaſs againſt T. S. for a treſpaſs done by his ſheep in* Sotherton's *Cloſe* (reciting the whole record) *and that T. S. had pleaded Not guilty, and at the trial* G. D. (the perſon now indicted) *falſo malitioſe & corruptive gave evidence to the jury thus*, (viz.) *I ſaw thirty or forty of T. S.'s ſheep in Mr. Sotherton's Cloſe, and I knew them to be his ſheep, becauſe they were marked with a* (5) *on the ſhoulder, and all his ſheep are mark'd with a* (5); when in truth his ſheep *were not mark'd with a* (5). It was objected to this indictment, that the perjury was aſſigned in a thing *immaterial to the iſſue*; for that was whether the ſheep

Palm. 382. 383. Trin. 12 Jac. B. R. S. C. and Houghton J. ſaid * that if G D. had *ſworn that he ſaw the ſheep there, and that J. S. alſo ſaw them*, perjury may be

assign'd in this; and yet it is not material whether J. S. saw them or no. And so he held in this principal case also. And Lea Ch. J. held the perjury well assign'd, and that the reason was not immaterial, and concluded that this shall not be dispunishable. [But nothing is said of any judgment.] And ibid. 538. Pasch 4 Car. B. R. this was mov'd, and it was insisted that it was not perjury within the statute; because the mark was not material, but that the material point was, whether they were the sheep of T. S. or not. But that Hyde Ch. J. and Whitlock held e contra, and that it is perjury; for tho' it be not the principal point in issue, yet it conduces to it, and is the thing which led the jury. But Doderidge contra, because the swearing was only to the particularity, and here is no perjury; for it is a thing which *dubiously concludes to the issue*, because another man may mark his sheep with a (5) as well as T. S. But this indictment being against two, viz. JARY AND KING, Hyde Ch. J. said that the indictment was vitious; for two cannot be indicted together, and the perjury of the one is not the perjury of the other; to which Whitlock accorded, but Doderidge said nothing. And day was given to the Attorney General to maintain the indictment. ——2 Roll R. 368. 369. Mich. 21 Jac. B. R. S. C. of indictment against one defendant, and there it is that * Haughton J. said that if he had sworn that he saw the sheep there, and that J. S. also saw them, perjury might be assign'd in it; but here the thing is not material, in which the perjury is assign'd, and therefore &c.——Ibid. Ley Ch. J. held the matter of the mark to be the inducement to the jury to find the verdict, and that thence arose the prejudice to the party; and therefore it seemed to him that the perjury could not be better assign'd, and that this being a prejudice to the party, it is not reasonable that he shall be unpunish'd.——[But in neither of the reports is the case mentioned to be adjudg'd.]

of T. S. were in the close or not, and the perjury was, that all his sheep were mark'd with a (5); now, tho' they were not mark'd with a (5), yet they might be in the close: but adjudged that the perjury was well assigned; for when he had swore generally that he had seen the sheep in the close, he gave a reason how he knew them to be the sheep of T. S. and that being false, it was a means to induce the jury to give a verdict against T. S. and he was prejudiced thereby. Nelf. Abr. 975. pl. 21. cites Palm. 382. 535. Jary v. King.

4. One was charg'd with perjury, for having sworn *that J. S. drew his dagger, and beat and wounded W. R.* and it was *found to be with a staff.* This was agreed not to be perjury; for the *beating was the only thing material.* Cited by Richardson. Het. 97. Pasch. 4 Car. C. B. in the Case of Allen v. Westley, as one Styles's Case.

5. An indictment was, that he being interrogated by the Judge in giving evidence to the inquest, viz. whether A. *brought* [317] *such a number of sheep from D. to S. all together?* he answered Yes, *where in truth he brought part at one time and part at another.* The Court discharg'd him; for the bringing them all at one or at several times is not material; but the bringing them or not is the substance; and the *manner of bringing is circumstance only.* 2 Roll. R. 41. Trin. 17. Car. Laiston's Case.

6. A witness was ask'd, whether such a *sum of money was paid for two things then in dispute?* to which he answered Yes, tho' *in truth it was paid but for one by agreement*; yet it not being material whether it was paid for one or for both, it was resolved that he ought not to be punished for perjury. Cited by Haughton J. 2 Roll. R. 42. in Laiston's Case.

Serjeant Hawkins says, Perhaps in all these cases [viz. pl. 2. 3. 4. 5.] it ought to be intended, that the question was put in such a manner, that the witness might reasonably apprehend that the sole design of putting it was to be informed of the substantial part of it, which might induce him through *inadvertency* to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, and he gave a par-

a particular and diſtinct account of the circumſtances, which afterwards appear to be falſe, ſurely he cannot but be guilty of perjury, inaſmuch as nothing can be more apt to incline a jury to give credit to the ſubſtantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumſtances relating to it. And upon theſe grounds the Serjeant cannot but think the opinion of thoſe Judges in the above Caſe of JARY v. KING, who held him guilty of perjury, very reaſonable; for the giving ſuch a ſpecial reaſon for his remembrance could not but make his teſtimony more credible than it would have been without it; and tho' it ſignified nothing to the merits of the cauſe whether the ſheep had any mark at all or not, yet inaſmuch as the aſſigning ſuch a circumſtance in a thing material had ſuch a direct tendency to corroborate the evidence concerning what was moſt material, and conſequently was equally prejudicial to the party, and equally criminal in its own nature, and equally tending to abuſe the adminiſtration of juſtice, as if the matter ſworn had been the very point in iſſue, there doth not ſeem to be any reaſon why it ſhould not be equally puniſhable. But the Serjeant ſays he cannot find this matter any where thoroughly ſettled or debated, and therefore ſhall leave it to every man's own judgment, which, from the conſideration of the circumſtances of each particular caſe, may generally, without any great difficulty, diſcern whether the matter in which perjury is aſſigned, were wholly impertinent, idle and inſignificant, or not, which ſeems to be the beſt rule for determining whether it be puniſhable as perjury or not. Hawk. Pl. C. 175. 176. cap. 69. ſ. 8.

7. A. deviſed his eſtate to M. his wife, and her heirs, and died. J. S. being of the name of A. ſet up a deed, and had two trials at bar, but was nonſuited in both; and upon the evidence it was very ſuſpicious that the deed was forg'd. M. exhibited a bill in Chancery to diſcover what he knew of the deviſe, and *whether he did not ſollicit to prove this will in Chancery;* to which he *anſwer'd*, that *he did not ſollicit in Chancery to prove the will of his kinſman A. the teſtator.* And for this anſwer J. S. was indicted at common law, and it was prov'd at the trial, that *he did ſollicit, but that he did not pay the fees:* the Jury found him guilty, and it was mov'd to ſtay judgment, that it is not perjury, becauſe it is not material. But per Cur. † *Perjury at common law may be in a thing not material.* Sid. 274. pl. 32. Trin. 17 Car. 2. B. R. the King v. Drue.

And therefore if one gives a *falſe anſwer to a thing not charg'd in a bill*, this is perjury puniſhable at common law; *but* if in anſwer *to interrogatories* one be forſworn in a thing * not material charg'd in the interrogatories,

this is not perjury, nor is it a matter puniſhable by the common law, becauſe *he that adminiſters the oath hath no power to adminiſter it, unleſs in a matter charg'd in the interrogatories.* Per Cur. Ibid.—* [The words in the book are as here, but quære if they ſhould not be thus, viz. In a thing material not charg'd in the interrogatories?]

† Serjeant Hawkins, citing S. C. ſays, Surely this ought not to be underſtood in ſo great a latitude as if it were meant that every falſity in ſuch an anſwer muſt needs be perjury, howſoever foreign, circumſtantial and trivial the point wherein it is aſſigned may be, which is directly contrary to what ſeems to be clearly taken for granted in other books. And therefore perhaps no more may be meant by it, but that he may be as well guilty thereof by anſwering to a matter not charged in the bill, as by anſwering to the matters therein contained, which may alone be ſaid to be material, becauſe the defendant is not obliged in his anſwer to take notice of any thing elſe; or elſe perhaps the meaning may be, that in a proſecution for perjury at common law ſetting forth a falſe oath in ſuch an anſwer, relating to the thing ſaid to be in variance, the falſity ſhall be intended prima facie to have been ſome way material in the cauſe, unleſs the contrary be proved by the other ſide. 1 Hawk. Pl. C. 176. cap. 69. ſ. 8.

8. Upon a queſtion about ſealing a deed at D. and whether J. S. was witneſs to it, G. ſwore that J. S. at the time was 100 miles diſtant from D. viz. at N. and ſo could not witneſs it. Juſtice Eyre held, that if a man ſwears falſely in a matter which is *not material to the iſſue*, 'tis not perjury; and to prove the matter, he cited the Caſes in the * margin; and moreover, that the ſtatute 5 *Eliz. againſt perjury purſues the common law*, and *adds nothing new but the penalty:* and that in this caſe the matter in which the perjury was aſſigned, was immaterial to the iſſue,

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* 3 Inſt. 164. 2 Bulſt. 150. Hob. 53. 11 Rep. 113. 1 Cro. 353. Palm.

and therefore no perjury punishable by † indictment. Sed per Holt Ch. J. 'Tis perjury to swear falsely in any *circumstance which conduceth to the issue, or* to the *discovery of the truth; but* where 'tis only in some *impertinent or minute circumstance* (as where the witness dined such a day), which is usual amongst the vulgar in giving evidence, 'tis not perjury, because it doth not conduce to the issue, or to the truth of the matter to be tried. Carth. 422. in Case of the King v. Greep.

135. 2 Roll Rep. 41. 369. Yelv. 111. Sty. 136.—— † Het 97. Cro. 52. ——Parker Ch. J. said his opinion was, that perjury may be committed in a circumstantial matter, tho' he said he did not remember that in fact it was ever carried so far; that he had heard of a case in King William's time, [which seems to be this case of the King v. Greep.] and that upon this oath the defendant was convicted of perjury. And observed, that tho' the matter of this oath was but a circumstance considered in relation to the point in question upon the trial in which the oath was given, yet *it was a false oath, his intire evidence.* But he said that if perjury might be committed in a matter of circumstance, it *must be a material circumstance*, and of that weight, *that without it he could not hope to find credit with the jury.* 10 Mod. 195. Mich. 12 Ann. B. R. in the Case of the Queen v. Muscot.

9. *But* if the *credit of a witness is in question*, and another person *to support it swears falsely*, this is perjury. Carth. 422. in Case of King v. Greep.

S. P. But that a witness coming to town lay at one inn, when he lay at another inn is not perjury, because 'tis immaterial. Per Holt. Comb. 461. S. C.—2 Salk. 514. S. C.—12 Mod. 142. S. C.

(F) Punishable. In respect of its being a *Mistake, or Inadvertency.*

1. L. WAS indicted, and the perjury prov'd was, *that L. swore at a trial* by Nisi Prius, *that J. S. was in London to be arrested* (which was material, as the issue was concerning the taking of J. S. by the sheriff), *where J. S. was not in London.* And upon the evidence of the perjury it was prov'd that *J. S. was in Southwark* out of the liberties at the same time, (which according to the general acceptation is London, but not where the Sheriff of London has any thing to do); and the Jury found him guilty. The Court fin'd him only 20 l. because it seemed to be sworn *by inadvertency.* Sid. 405. Hill. 20 & 21 Car. 2. B. R. The King v. Lewen.

2. Information of perjury; the case appeared to be, that the defendant *S. went with the Justices*, constables and others, *to disturb a conventicle* in a town in Leicestershire, and that he *ask'd a fellow* there *his name*, and *he said James* (who was a known conventicler), whereas in truth the man named *was not there*, and the fellow that answered knew it, but the defendant did not; but however, believing it, he *swears* before the Justice that *James was at the conventicle*; and thereupon a conviction was had. And now upon motion, it being a plain mistake, the verdict was set aside, the oath not being wilful and corrupt perjury. 2 Show. 165. Mich. 33 Car. 2. B. R. The King v. Smith.

3. *So* a person swore, *that he saw and read such a deed*, and *it prov'd* upon the trial *to be only the counterpart* which he saw; yet it

it was held no perjury, becauſe only a miſtake. Cited by Parker Ch. J. and ſaid he remembred this caſe rul'd by his predeceſſor. 10 Mod. 195. Mich. 12 Ann. B. R. in Caſe of the Queen v. Muſcot.

(G) Puniſhable. *By whom.* [319]

1. A Perjury was voluntarily committed *in B. R. by J. S. on proof of a ſuggeſtion for a prohibition granted there againſt an Eccleſiaſtical Judge* according to the 2 & 3 E. 6. cap. 13. by which the party was ſtaid of a conſultation. It was a very great queſtion, whether it was puniſhable in the Star-Chamber or not? and thereupon all the Juſtices aſſembled at Serjeant's-Inn, and they thought that it was not. D. 242. b. 243. pl. 53. Mich. 7 & 8 Eliz. Onſlow's Caſe.

For perjury concerning any temporal act the Eccleſiaſtical Court hath no juriſdiction; and if it be concerning a ſpiritual matter, the party griev'd may ſue for the ſame in the Star-Chamber, and cites the ſtatutes of 3 H. 7. cap. 1. & 11 H. 7. cap. 25. 32 H. 8. cap. 9. and then cites this Caſe in D. 242, 243. and ſays, When you have read this Caſe, you will confeſs how neceſſary the reading of ancient authors and records is; and the continual experience in the Star-Chamber is againſt the opinion conceived there. 3 Inſt. 164.

2. A. brought a *bill in Chancery againſt W. R. and W. S.*—— *W. R.* put in his anſwer, and alſo *made affidavit that W. S. was ſo ſick that he could not travel without danger of death.* At the hearing the cauſe *W. S. came into Court, and affirm'd he was not ſick, but that W. R. had perſuaded him to go to bed and feign himſelf ſick, that on W. R.'s coming to London he might affirm he left W. S. ſick a-bed.* Ld. Egerton ordered them both to be examined upon interrogatories; and though W. R. denied, and W. S. affirm'd it, yet the practice appearing by other witneſſes, which was not only a contempt to the Court, but likewiſe a double perjury in W. R. the Court adjudg'd him to pay 20 l. fine, to be impriſon'd, and pay 10 l. coſts. Mo. 656. pl. 900. 11 November. 44 Eliz. Bullen v. Bullen and Clerke.

And becauſe it was doubted if perjury was *puniſhable in Chancery*, Lord Keeper Egerton ſhew'd a precedent 17 Feb. 37 H. 8. in a cauſe of BASKERVILL v. GULLIAM, where a *witneſs* who had committed perjury in Chancery, was *adjudged there to the pillory* and to pay coſts. Mo. 65[illegible]. in S. C.—— And the like 30 Eliz. in Caſe of POMEROY v. FORD, one Joyce a witneſs in the cauſe was adjudged to the pillory for perjury. And his Lordſhip ſaid, that *every Court may puniſh perjury* appearing before themſelves.* Ibid.

A *juror upon a voire dire affirm'd that he had not* 40 *s. freehold;* and others of his neighbours affirm'd upon their oath, that they knew his land, and that it was of the annual value of 4 l. Whereupon the Juſtices had committed the juror to the Fleet. Ibid. cited by Ld. Egerton, as 10 Eliz. C. B. Sir Geo. Calveley v. Riſhley.

* Vaughan Ch. J. ſaid, that perhaps a witneſs may be puniſhed for perjury *in facie Curiæ*, but that he would not maintain it to be law. Vaugh. 152. in Buthel's Caſe.——Any Court may puniſh ſuch a criminal for perjury committed in facie Curiæ, which was the better opinion in BUSHEL's CASE, tho' the Chief Juſtice Vaughan doubted of it. 8 Mod. 159, 180. Trin. 9 Geo. 1. 1724. The King v. Thorogood.—The ſtatute of 5 Eliz. of perjury directeth how perjury ſhall be puniſhed ſaving the authority of the Star Chamber, yet for perjury committed in Chancery either in an affidavit or an anſwer &c. if ſuch perjury appear to the Chancellor, the party may be puniſhed according to his direction. 1 Chan. Rep. 14. Mich. 13 Jac. in the Earl of Oxford's Caſe.

3. Exception was to an indictment of perjury, that *Juſtices of the Peace* have no power by their commiſſion to take indictments

No indictments lies before *Juſtices*

of peace for perjury at the common Law; for their power

of perjury; but the Court doubted, and ſeemed afterwards of opinion, that they might. 11 Mod. 67. Mich. 4 Ann. B. R. in Caſe of the Queen v. Gunn.

is created by act of parliament within time of memory, and they have thereby no other authority than what is thereby given them; and the general words of their commiſſion, De omnibus aliis tranſgreſſionibus & malefactis quibuſcunque, muſt be underſtood of ſuch crimes as they have power over, by the ſeveral ſtatutes which created or enlarged their power. *But perjury upon the* 5 *Eliz.* is indictable before the Juſtices of Seſſions; becauſe it is ſo appointed by the particular proviſion of that ſtatute; per Curiam. 1 Salk. 406. pl. 2. Mich. 9 Annæ B. R. in Caſe of the Queen v. Yarrington.

Serjeant Hawkins ſays, It has been of late ſettled, that *Juſtices of peace have no juriſdiction over perjury at common law*, and ſo as to forgery; the principal reaſon of which reſolution he ſays he apprehends was, that inaſmuch as the chief end of the inſtitution of the office of theſe Juſtices was for the preſervation of the peace againſt perſonal wrongs and open violence, and the word treſpaſs in its more proper and natural ſenſe is taken for ſuch kind of injuries, it ſhall be underſtood in that ſenſe only, in the ſaid ſtatute [of 34 E. 3 cap. 1.] and commiſſion, or at the moſt to extend to ſuch other offences only as have a direct and immediate tendency to cauſe ſuch breaches of the peace as libels &c. which on this account have been adjudged indictable before Juſtice of the peace. 2 Hawk. Pl. C. 40. cap. 8. ſ. 38.

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4. One made an affidavit in C. B. and being afterwards examined, confeſſed it to be falſe, whereupon the C. B. recorded his confeſſion, and ordered him to be put in the pillory. It was objected, that C. B. had no juriſdiction in criminal caſes, and that therefore if it had appeared on record that the defendant was perjur'd, that Court could not have puniſhed him; but it was anſwered, that the puniſhment by pillory is by the ſtatute of 5 *Eliz.* And C. B. having given a ſentence accordingly ſhews that they proceeded on that ſtatute, which *gives power to any Court where the perjury is committed to puniſh the offender*; ſo that it is plain that that Court has a juriſdiction, eſpecially ſince it is provided by that very ſtatute, that it *ſhall not extend to any Eccleſiaſtical Court*, which being *a negative pregnant*, is a full proof that all other the King's Courts may puniſh ſuch offenders, and even thoſe who ſhall be convicted by their own confeſſion; for the *ſtatute gives power to hear and determine by inquiſition, information, bill, preſentment, or otherwiſe, and to give judgment and award execution* &c. Now by the word (*otherwiſe*) the confeſſion of the party may be intended; beſides, if C. B. cannot puniſh the defendant by the ſtatute of 5 Eliz. he might be puniſh'd at common law; for perjury is an offence at common law. On the laſt day of the term the defendant was pillory'd. 8 Mod. 179, 180. Trin. 9 Geo. 1. 1724. The King v. Thorogood.

(II) *Diſability and Reſtitution.*

See 5 Eliz. cap. 6. ſ. 7. at (B).

2 Hawk. Pl. C. 417. cap. 43. ſ. 25. S. P. nor is ſuch exception ſolv'd by a * *pardon*; but it ſeems that the record of the conviction muſt be produced if it be a record of another Court; or the term &c. be ſhewn, if it be a record of the ſame Court.—* Ibid. 395. cap. 37. ſ. 52. the Serjeant ſays, he does not find it clearly ſettled, whether the pardon of a conviction of perjury makes the party a good *witneſs*.

1. IT is a principal cauſe of *challenge to a juror*, that he has been convicted of perjury as a witneſs. Trials per Pais. 141. cap. 9.

2. *Read*

2. *Read was convict of perjury by Dawſon*; afterwards *R. convicted D. in the point of the firſt perjury*. It was *mov'd* for R. 1ſt. *that* he having abſented himſelf and *judgment not being given, an entry might be made upon the record, that he be acquitted* of the firſt perjury; but the Court held, that they could not do it, but *he might bring error* if he will; but they reſtor'd him to his place of one of the attornies of the Court. 2dly, It was *mov'd, that R.'s bail be diſcharged notwithſtanding his recognizance forfeited*, for the reaſons before; but the Court ſaid, they could not do it now *in another term* without danger of erecting a clock-houſe, beſides the recognizance is eſtreated into the Exchequer. Sid. 217. pl. 23. Trin. 16 Car. 2. B. R. the King v. Read.

Plaintiff recovers againſt the defendant upon the ſole evidence of J. S. and has judgment, and afterwards J. S. was convict of perjury, upon the ſame evidence, notwithſtanding the Court would not ſet aſide the judgment. But if it had been after verdict that an indictment of perjury was depending againſt J. S. the Court would have ſtopped entring the judgment till the perjury tried. Trials per Pais. 226, 227. cap. 11.

3. If a man is *convict on the ſtatute*, diſability is part of the judgment, but *at common law it is only the conſequence*. 2 Salk. 514. Mich. 9 W. 3. B. R. The King v. Greep.

4. A *motion* was made *to ſet aſide a judgment for irregularity* on the defendant's affidavit; and it was *objected* to the reading it, *becauſe he was convict of perjury*; et per Holt Ch. J. Muſt he therefore ſuffer all injuries, and have no way to help himſelf? Powel J. You ought to have the record of conviction in your hand when you make this objection; but per Holt Ch. J. If he had, it would be nothing to the purpoſe. 2 Salk. 461. Mich. 4 Ann. B. R. Anon.

2 Hawk. Pl. C. 433. cap. 46. ſ. 23. ſays, It has been rul'd, [321] that a conviction of perjury does not diſable a man from making an affidavit in relation to the irregularity of a judgment.

(I) *Actions and Pleadings.*

1. AN *action* upon the ſtatute of 5 Eliz. of perjury was brought by three, and they *declared, that* the defendant being *examined* upon his oath *before commiſſioners, if a ſurrender was* made at ſuch a Court of ſuch a manor *of a copyhold*, to the uſe of A. and B.? two of the defendants *ſwore, that no ſuch ſurrender was made* &c. Exception was taken to the declaration, becauſe the *certainty of the copyhold did not appear upon the declaration*; for the ſtatute is, that in that caſe the party griev'd ſhall have remedy; ſo as it ought to appear in what thing he is griev'd; quod fuit conceſſum per totam Curiam. 3 Le. 68. Mich. 20 Eliz. Anon.

S. P. Hawk. Pl. C. 181. cap. 69. ſ. 12.

2. *Another exception* was taken, becauſe the action in ſuch caſe is given to the party grieved; and it appears upon the declaration, *that the ſurrender*, in the negative depoſing whereof the perjury is aſſigned, *was* made *to the uſe of two of the plaintiffs only, and* then *the third* perſon *is not a party grieved*, for he claims nothing by the ſurrender; and therefore, and becauſe the two parties grieved have joined with the third perſon not grieved, it was the opinion

opinion of Wray and Southcote Juſtices, that the writ ſhould abate. Ibid.

S. P. Tho' in the * *concluſion* of the declaration, it *was, & ſic falſe, corrupte & voluntarie dejuravit*: but becauſe it was not alleged at the firſt when the fact was alleged, the declaration was adjudged inſufficient, and that the plaintiff nihil cap. per billam. Cro. E. 201. pl. 30. Mich. 32 & 33 Eliz. B. R. Somerland's Caſe.——S. P. 1 Hawk. Pl. C. 178. cap. 69. ſ. 17.——The word *voluntarie* ought to be in the premiſſes, and *corruptive does not include it*, and ſo was the opinion of the whole Court; and awarded that nil capiat per breve. Het. 12. Paſch. 3 Car. C. B. Kitton v. Walters.

* The indictment *wanted* the concluſion, viz. *et ſic falſo & voluntarie perjurium commiſit* &c. and defendant was diſcharg'd. Cro. E. 137. Trin. 31 Eliz. 9. Thomas's Caſe.

3. An information upon the ſtatute 5 Eliz. was, that the defendant *commiſit voluntarium perjurium contra formam ſtatuti*, but did *not ſay*, *corrupte & voluntarie commiſit perjurium*; it is not good. Per Shute J. Sav. 43. Mich. 24 & 25 Eliz. in the Exchequer, in the Caſe of Bradſhaw v. Lowe & al.

4 Le. 105. Mich. 29 Eliz. B. R. S. C.

4. A man was indicted upon the ſtatute of 5 Eliz. of perjury, *in a Court Leet*, and the indictment was, that he at the Court Leet of the Earl of Bath, *ſuper ſacramentum ſuum coram ſeneſcallo* &c. And *exception* was taken, *becauſe it ſaid, at the Leet of the Earl of Bath*, whereas *every Leet is the King's Court*, although another has the profit and commodity of it; and it was ſaid, that the Steward of a Leet was an officer of record; and alſo his oath was, if he had made any reſcous or not, with which he was charged. Drew, It is not within the ſtatute of 5 Eliz. for then it *ought to be before a jury in giving evidence, or upon ſome articles*; but the Court was clear of opinion againſt him. Godb. 71. Mich. 28 & 29 Eliz. B. R. Anon.

5. In an action the plaintiff *declared of a perjury in an action of debt brought, Hill. 27 Eliz.* whereas the action in which the perjury was, *was Hill. 28 Eliz.* and ſo the recital did miſs the record. It was objected, that by this means the party might be doubly charged; to which it was anſwered of the other ſide, that he cannot be doubly charged, becauſe it is betwixt the *ſame parties* and in the *ſame cauſe*, and only a circumſtance is miſtaken. Per Clench J. It is needleſs to ſhew in what action the firſt perjury was committed; for if he ſays in treſpaſs, whereas in truth it was in debt, all is naught; but per Gawdy J. if no action be alleged he cannot ſue upon the ſtatute of 5 Eliz. But the caſe was upon a *ſpecial verdict*, which *found that the action was brought at another time than either of the parties had alleged, and no mention was of it before the verdict found it*; and therefore Coke ſaid it was void; for he ſaid, that by 22 Aſſ. 17. the Jury cannot find any other thing than the parties have alleged; for there the jury found a dying ſeiſed after a recovery, whereas a dying ſeiſed was alleged, and did not ſay after a recovery. Godb. 88. pl. 98. Mich. 28 & 29 Eliz. B. R. Dennie v. Turner.

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S. P. 1 Hawk. Pl. C. 178. cap. 69. ſ. 17.

6. *When ſuch heinous crime is objected* againſt a perſon *it ought to be fully alleged*, or otherwiſe it is not good; as where the indictment was, that *Tacto per ſe ſacro evangelio falſo depoſuit*, but it was *not directly alleged that he was ſworn*; the indictment was

diſ-

diſcharged. Cro. E. 105. pl. 17. Trin. 30 Eliz. B. R. Dinſlow's Caſe.

7. Indictment was, that the defendant was examined upon certain articles in the Star-Chamber, and that *falſo & voluntarie depoſuit*, but *ſhews not in what matter* he ſwore falſly, *nor in what action*; and the *oath was in* the Star-Chamber in *Middleſex*, and the *indictment in Stafford*; and he was diſcharg'd. Cro. E. 137. Trin. 31 Eliz. B. R. Stedman's Caſe.

8. Indictment was, that *defendant upon an iſſue* in ſuch a matter *falſo depoſuit* ſuch a thing, but *ſhewed not how the iſſue was, nor how the d poſition trench'd to the point of the iſſue*; and he was diſcharged. Cro. E. 148. Mich. 31 & 32 Eliz. Lane's Caſe.

9. Indictment *recited the ſtatute, that if any be ſworn &c. in any Court of Record*, whereas the *ſtatute mentions them ſpecially* &c. The defendant was diſcharged. Cro. E. 137. Trin. 31 Eliz. Thomas's Caſe.

10. The indictment was, that *Apud caſtrum Lincoln falſo depoſuit*, and did *not ſhew in what county* the caſtle was. The defendant was diſcharg'd. Cro. E. 137. Thomas's Caſe.

One was indicted *by the name of N. L. of the pariſh of Algate*, but the indictment did *not ſhew in what county Algate was*, and thereupon was outlaw'd. The outlawry was reverſed, tho' it was objected to be well enough, becauſe *Middleſex was in the margin*, and ſo the pariſh ſhould be intended to refer thereto. But becauſe an indictment ſhall not be taken by intendment, and becauſe the county in the margin *ſhall be referr'd to the place where the offence was committed*, and not to the habitation of the party, therefore it was held to be ill and reverſed. Cro. J. 16. Trin. 5 Jac. B. R. Leeche's Caſe.

Arreſt of judgment in an indictment of perjury before the Juſtices of peace in Norfolk, for that it ſet forth, that a fine was levied in C. B. in Weſtminſter in the county of Middleſex; and that the defendant perjured himſelf at Theed in the county aforeſaid, which Mr. Serjeant Weld held, muſt relate to the laſt county named; and then the Juſtices of peace for Norfolk could not have juriſdiction; and this he ſaid was the expreſs caſe of the QUEEN v. RHODES, adjudged about 2 years ago in this Court. Sir James Mountague contra, and ſaid, If it had been in caſe of an action, it would have been good; he took a difference between the county's being in the margin, and in the body of the indictment, and where it is only by way of recital and in the ſubſtantial part of the indictment; Weld ſaid, and if it can ever be conſtrued bad, it ſhall never be taken otherwiſe in an indictment: the opinion of the Court was, that the indictment was naught; ſed adjournatur. 11 Mod. 66, 67, Mich. 4 Ann. The Queen v. Gun.

11. Exception was taken to an *indictment* of perjury upon the ſtatute 5 Eliz. *againſt three*, becauſe it was *falſo & corruptive depoſuerunt*, but not ſaying *voluntarie*; and that though at the end of the indictment it is *et ſic voluntarium commiſerunt perjurium*, yet this does not help it; and for this cauſe they were diſcharged. Cro. E. 147. Mich. 31 & 32 Eliz. B. R. Lembro v. Hamper.

Such count was held inſufficient for two cauſes. 1. For that in the act of 5 Eliz. as here it appeareth, there are two diſtinct clauſes, one if he be perjured of his own proper act, the other if he be perjured by ſubornation &c. and the plaintiff ought to declare in certainty, within which of them the defendant is perjured. The 2d cauſe was, where the act ſays (wilfully and corruptly commit any wilful perjury &c.); and the words of the count are, falſo dixit & depoſuit, and ſays not voluntarie & corrupte; and the ſaid clauſe (& ſic commiſit voluntarium & corruptum perjurium,) ſalveth not the former inſufficiency, becauſe it is but a concluſion upon the former matter. And the like judgment was given in this Court as to this latter point, anno 27 Eliz. in the Caſe of one MELLERS of Lincolnſhire. 3 Inſt. 167.

3 Le. 230 S. C & 2 Le. 211. S. C. but in both places the word *(deceptive)* is inſtead of (corruptive) as here; and contra formam ſtatuti does not help it.—Indictment for perjury before a commiſſioner for taking affidavits concluded *contra formam ſtatuti*, but does *not ſay voluntarie*, and therefore ill. Show. 190. Hill. 2 W. & M. The King v. Taylor.

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12. One

S. C. cited by Holt Ch. J. who ſays, it is the Caſe of KING and BOWLES, and that he had examined the roll, and found it to be according to the report. 12 Mo. 141. Mich. 9 W. 3. in Caſe of the King v. Griebe.—

* S. P. Hawk. Pl. C. 173. cap. 69. ſ. 22.

12. One was indicted upon the ſtatute of 5 Eliz. of perjury, for that there was a *ſuit in Chancery* betwixt one MARSHALL AND HARVEY *for the manor of Staverton* in the county of Devon, and a *commiſſion was* thereupon *awarded to examine witneſſes*; that the *defendant ſwore that the deed of the feoffment of the manor* (manerium prædictum innuendo) *was delivered as an eſcrow* to be delivered &c. *ubi revera it was delivered abſolutely* &c. The firſt exception was, that this oath, that the deed of the manor was delivered as an eſcrow &c. is not material, unleſs it be ſhewn that it concerned the manor in queſtion; for otherwiſe, although it were falſe, it is not puniſhable neither by action nor by indictment upon the ſtatute; for the ſtatute is, if a witneſs depoſe falſly concerning any cauſe &c. for which falſe oath he is not puniſhable by the ſtatute, unleſs it be ſhewn or averred how this concerns the cauſe; and of that opinion was the whole Court; and although it is alleged, * *manerium prædict. innuendo*, yet it ſhall not help it; for a man ſhall not be puniſh'd as a perjurer by an innuendo, wherefore for this cauſe only the indictment was diſcharged. Cro. E. 428. Mich. 37 & 38 Eliz. B. R. Anon.

13. The indictment *recited the ſtatute* of 5 Eliz. *and miſ-recited it* in hoc, that *the ſtatute is, quod quilibet attinctus de tali offenſa ſhall loſe and forfeit* 20 *l.* The *recital is*, quod quilibet attinctus &c. *admitteret & forisfaceret* 20 *l.* ſo it is *admitteret* pro *amitteret*, which is not ſenſible, nor agreeable with the ſtatute; and altho' it was ſaid, that theſe words are quaſi ſynonima & de eodem ſenſu, and the one being well recited is ſufficient; yet becauſe they be both in the ſtatute, and the one is miſ-recited, it is ill, and there is not any ſuch ſtatute recited; wherefore for this cauſe, without hearing any of the other exceptions which were offered, becauſe this fault was manifeſt, the indictment was diſcharged, and the outlawry reverſed. Cro. J. 133. Mich. 4 Jac. B. R. Parker's Caſe.

For in as much as there is no medium between the 2 branches of this diſtinction, ſo that all perjury whatſoever muſt needs come within one of them, and it is no way material under which of them it doth come, it is a reaſonable expoſition to look on the ſaid words, as put into the ſtatute ex abundanti, ſeeing they expreſs no more than the law muſt needs have implied without them; from whence it follows, that they operate no more than if they had not been expreſſed, and conſequently ſhall not oblige the proſecutor neceſſarily to purſue them, which would put him under the difficulty not only of proving the perjury, which alone is material, but alſo of ſhewing it to be within one of the branches of the ſaid diſtinction, which is nothing to the purpoſe. Hawk. Pl. C. 179. cap. 69. ſ. 18.

14. In action of *delt* upon the ſtatute, and verdict given for the plaintiff, it was moved in arreſt of judgment, that plaintiff *omitted in the declaration the words of the ſtatute*, viz. *that if any one, either by the ſubornation of &c. or by their own act, conſent, or agreement, wilfully and corruptly commit any manner of perjury* &c. And that the perjury was *alleged* to be, *that defendant* being brought as a witneſs *did ſwear that the plaintiff ſuccidit & effodit a pear-tree, ubi revera there was no pear-tree growing there* the preciſe day of the treſpaſs, whereas he ſhould have ſaid, *ubi revera non ſuccidit*; but Coke Ch. J. held the declaration good, and the verdict well given; and to this the whole Court agreed, and judgment was given for the plaintiff. 3 Buſſt. 147. Mich. 13 Jac. Cockeril v. Apthorp.

15. It

15. It was ſaid at the bar, and not gainſayed, If a man *perjure himſelf againſt two*, the *one* by himſelf *cannot have an action* upon the ſtatute, but they ought to join; for he is not the only party grieved. Het. 73. Hill. 3 Car. C. B. Deakins's Caſe.

16. An indictment on the ſtatute was, *that in a ſuit in Chancery between A. and B. a commiſſion iſſued in which the defendant was examined upon interrogatories, whether he knew the land in queſtion &c.? To which he before the ſaid commiſſioners, falſly, voluntarily, and corruptly depoſed upon his oath, that the ſoil and freehold* [then in diſpute] *was A.'s, and belonging to his manor of D. where revera it was not A.'s, nor parcel of his manor of D. but parcel of B.'s manor in D. and ſo committed wilful and corrupt perjury againſt the ſtatute of* 5 *Eliz.* Exception was taken for *not ſhewing what was the iſſue in Chancery, nor that this land was there in queſtion, nor does it appear that it tended to the proof or diſproof of the iſſue, ſo as it might be a damage to the plaintiff*; and of this opinion was Richardſon Ch. J. and Croke J. and tho' the interrogatory mentions it to be the land in queſtion, yet it is *not ſhewn how it is in queſtion*; and there *can be no indictment upon this ſtatute, but where it is ſhewn, that the depoſition is upon the matter in queſtion, and conducing to the iſſue, and the party thereby prejudiced.* Jones J. doubted as to the exception; but Berkley J. held it well enough; for it would be too prolix to ſhew the bill, anſwer, and iſſue; and it being alledged that there was a ſuit in Chancery between them, and the interrogatory being whether he knew the land in queſtion? which ſhews the land was in queſtion, and a convenient certainty is mention'd, it ſuffices; otherwiſe he agreed it was not good; ſo it was adviſed (there being two indictments) that he ſhould plead to the one, and thereby try the truth, and the exception ſhould be ſav'd. Cro. C. 352, 353. Hill. 9 Car. B. R. Sharp's Caſe.

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S. P. Hawk. Pl. C. 181. cap. 69. ſ. 22.

17. *Information* of perjury *at common law was exhibited*, and the *defendant was found guilty*; it was *moved in arreſt* of judgment, *that the perjury was ſuppoſed to be* committed *in anſwering to ſeveral interrogatories* adminiſtred to him *in Chancery*, which is very uncertain, becauſe it is *not ſhewn in what interrogatory the defendant was perjured*; but the Court were clear of opinion, that the information was good notwithſtanding this; for every perjury is puniſhable by the common law, tho' they agreed that the * ſtatute 5 Eliz. cap. 9. requires greater certainty. Sid. 106. pl. 16. Hill. 14 & 15 Car. 2, B. R. The King v. Wallengen.

An *information* of perjury *at common law* does not require ſo much *certainty* as an indictment on the ſtatute; for if perjury be aſſigned in ſwearing to ſeveral interrogatories in Chancery, without ſhewing in which, this is good at common law, but not *upon the ſtatute*; per Cur. 5 Mod. 348. King v. Greep.—Sid. 107.—In an *indictment* for perjury at common law the ſame certainty is required as is upon the ſtatute; becauſe the ſtatute does not make any thing perjury which was not ſo before, per Holt Ch. J. Carth. 422. The King v. Greep.

* S. P. 1 Hawk. Pl. C. 181. cap. 69. ſ. 22.

18. Exceptions were taken to an indictment of perjury taken at a ſeſſions of the peace, becauſe it was ſaid to be *taken in plena ſeſſione*

ſeſſione pacis, and it does *not appear to be the quarter ſeſſions*, as by the ſtatute it ought. Roll ſaid, It is not enough to ſay that it was taken in plena ſeſſione, but it muſt appear in what ſeſſions it was; and it was afterwards quaſhed, becauſe it did *not ſhew that any of the Juſtices before whom it was taken were of the quorum.* Sty. 123, 124. Trin. 24 Car. B. R. Burton's Caſe.

19. In an information of perjury, and verdict for the King; the perjury was committed in giving evidence upon a trial in this Court between DUN AND DAWSON. It was mov'd in arreſt of judgment, becauſe the *information* was, *Memorand' quod Thomas Fanſhaw miles dat Curiæ hic intelligi & informari quod termino St. Hillarii* 1659, *in rotulis continetur ſic* (viz.) that Dun brought his action, *and recites the whole record* of it, and the trial, *and that the ſaid Read falſum præſtitit ſacramentum* at this trial; and he moved, that it is not poſitive that the defendant took a falſe oath; but that *continetur ſic*, that he took a falſe oath; where he ought to have ſaid after the recital ſo, Et ulterius dat' Cur' hic intelligi, that the defendant took a falſe oath at that trial; and after conſideration the Court gave judgment againſt the defendant, becauſe the *late precedents are ſo*; and now after verdict it ſhall be taken a diſtinct ſentence betwixt the recital and the et quod; and by Windham the record recited being in this Court, the Judges ſhall take notice how far the record recited extends, and
[325] what that is that is poſitively rehearſed; and judgment was given accordingly. Raym. 34, 35. Mich. 13 Car. 2. B. R. The King v. Read.

Sid. 148. S. C. And as to the objection that it appeared by the record recited, that there are ſeveral errors in it, the Court thought it as well as it could be; for had it been otherwiſe there would have been variance between the record and the indictment, which would be ill; becauſe thoſe errors are not errors of the judgment, but of the firſt record.

20. Information of perjury ſet forth, *that Sir John Lee brought treſpaſs in C. B. for cutting of trees, againſt Garward*, and that the *defendant there pleaded Not guilty*; and upon the trial there the *defendant ſwore that the ſaid William Garward* ultimo Junii 12 Car. 2. did *cut* 60 *trees of the value of* 80*l.* where in truth he did not cut 60 trees of the value of 80 l. and verdict againſt the defendant. And it was moved in arreſt of judgment, 1ſt. *In recital of the action brought in C. B.* and the iſſue joined, *it is ſaid* that it was awarded, *quod venire faceret hic duodecim*, which is in B. R. and ſo the trial was coram non judice, and then no perjury can be committed, and cited Yelv. 111. PAIN'S Caſe. 3 Inſt. 166. 2dly, *It is ſaid, that in that action Jurata ponitur in reſpectum coram Domino Rege*, ſo an action is begun in C. B. and tried in B. R. and it is not after a verdict; for there is *no mention of a verdict* to be in that action of treſpaſs, and ſo not helped by any ſtatute; and for this cauſe it was ſtaid till &c. But afterward the exceptions were over-ruled, and judgment againſt defendant to ſtand on the pillory, and be fined 20 l. Raym. 74. Paſch. 15 Car. 2. B. R. The King v. Wright.

An indictment was removed

21. On a motion to *amend an information of perjury* it was ruled, that they give notice to the defendant of the things to be amended,

amended, and he to ſhew cauſe why they ſhould not be amended; for the Court ſaid it may be amended. Lev. 189. Trin. 18 Car. 2. B. R. The King v. Goſſe.

into B. R. laſt term out of Middleſex *againſt Edwards* of perjury, and he was named Edward all along in the indictment unto the concluſion, and then it was, & ſic prædictus Johannes commiſit perjurium. The Court was moved, that this might be amended, and it was ſaid, indictments removed out of London have been amended by the original, for they do not certify that but only a tranſcript; and a jury have been ſummoned to amend an indictment found in this Court; and in this caſe, if by examination of the clerk of the peace it appeared that the indictment certified varied from the original, it might be amended; ſed Curia adviſare vult. Vent. 13. Paſch. 21 Car. 2. B. R. The King v. Bromley.

22. Information for perjury; upon Not guilty pleaded upon the trial, the *record of the trial*, wherein the defendant is alleged to be perjured, was produced, and it *varied from what it was laid in the information*, and at the aſſizes it was allowed to be found ſpecially; and upon opening the verdict for the defendant, it was reſolved by Twiſden J. and the whole Court (abſente Keling Ch. J.) that the *jury cannot have conuſance of any variance between the record and the information*; but the Judge at the trial ought to have determined it; and ſo a venire facias de novo ought to iſſue. Raym. 202. Mich. 22 Car. 2. B. R. The King v. Sykes. S. P. 1 Hawk. Pl. C. 181. cap. 69. ſ. 22.

23. An indictment ſet forth, that a conventicle was held at D. and that they *movebant, perſuadebant & ſubornaverunt* a certain perſon *to ſwear that ſeveral* men *were then preſent, who really were at that time at another place*; they were found guilty, and a writ of error was brought to reverſe the judgment; the error aſſigned was, that the indictment does *not ſet forth that any oath was made*, ſo it could not be ſubornation; there is a difference between the perſuading of a man to ſwear falſly and ſubornation itſelf; for an indictment for ſubornation always concludes, Contra formam ſtatuti. Curia, It is not enough to ſay a man ſuborned another to commit a perjury, but he *muſt ſhew what perjury it is, which cannot be without an oath*; for an indictment cannot be framed for ſuch an offence unleſs it appears that the thing was falſe which he was perſuaded to ſwear: the queſtion therefore is, if the perſon had ſworn what the defendants had perſuaded him to do, whether that had been perjury? But the indictment was quaſhed, becauſe the words (*per ſacramentum duodecim proborum & legalium hominum*) *were left out*. They held, that if the return had been right upon the file, the record [326] ſhould be amended by it. 3 Mod. 122. Hill. 2 & 3 Jac. 2. B. R. The King v. Hinton and Brown.

24. Indictment *recited the record* of a trial, *in which* the perjury *was ſuppoſed to be committed, being a feigned iſſue out of Chancery*, ſetting forth a diſcourſe between Ld. W. and four others, concerning the boundaries of lands, and that Ld. W. affirmed A. to be a boundary, and that three of the four affirmed that it was not; whereupon a wager was laid, and mutual promiſes made between the Ld. W. and the other four &c. And now at the trial of the indictment, this *variance was aſſigned between the record recited, and the indictment* itſelf; the affirmation laid *in the*

the record being, that *A. was not the boundary, was made by four*, whereas the *indictment laid it to be made by three*, omitting the fourth; another variance was, that one of the denominations of the *lands in the record were Barnap*, and *in the indictment Barnep*; and another word in the *record was orientati*, but in the *indictment* it *was orientali*; but a groſſer fault was, that the *record of the trial, in which the perjury was alleged, was not entered up*, and *ſo it did not appear that ever there was any trial*; and Holt Ch. J. denied the *minutes* of it for evidence; but he ſaid, that by reaſon of the other exceptions, the indictment being inſufficient, they might indict him de novo; for an acquittal upon a bad indictment, would be no plea to a good one; whereas had the indictment been good, an acquittal upon the laſt fault had been peremptory. 6 Mod. 167. Paſch. 3 Annæ B. R. The Queen v. Carter.

See Trial (B. f. 6.) Perjury.

(K) *Proof.*

1. WHEN any one takes an oath in a Court, the Court always preſumes it to be true until his oath be diſproved, and he be convicted of perjury by indictment, or cenſure in the Star Chamber, or otherwiſe, and not in an *action ſur caſe*. Cro. J. 601. Mich. 18 Jac. B. R. Ayre, als. Eyre v. Sedgewick.

2. In an information of perjury, *the party, to whoſe damage the information has concluded, ſhall not be a witneſs*; becauſe if the defendant be convicted, this intitles the party to an action upon the ſtatute. Sid. 237. pl. 5. Hill. 16 and 17 Car. 2. B. R. in Caſe of the King v. Povey, Lambert & al.

Afterwards, Paſch. 21 Car. 2. Upon a trial at bar by a Jury of Lincolnſhire a verdict was found for the plaintiff, viz. that it was a ſuppoſitious child. Ibid.

3. An information was againſt B. and others for perjury, and againſt T. and G. for ſubornation. The caſe was thus: *D. being tenant for life*, of lands in Lincolnſhire of good value, *remainder to his firſt ſon in tail*, and ſo to his firſt daughter &c. *married M.* They came to London and lodged in Chancery Lane, where D. ſoon afterwards died. *About the time of D.'s death, M. pretended ſhe was lately delivered of a daughter.* Upon a trial at bar in ejectment, between this infant and the remainder-man, *the birth was proved by circumſtances uſual* in ſuch caſes, *and alſo by marks*; and the child being in Court was ſtript and *ſhewn*. But B. the *midwife gave evidence, that it was* not *the child* of M. but *of a poor woman in St Giles's*, which B. and others *bought of the woman* for 2 s. 6 d. and, by appointment, was *brought privately to M. and ſhe was to make an out-cry*; and that it was put into her boſom, and taken from thence by its thighs when women came to the ſuppoſed labour; and that there was a bladder of blood and lambs purtenances provided, and ſhewed for the after-birth to thoſe who came to the labour, and afterwards burnt; and for giving this evidence *B. was indicted of perjury*, and the circumſtances to prove her guilty were the cutting the navel-ſtrings, the colour of the infant's ſkin, &c. and that ſhe had received 50 l. of T. and ſeveral treats at taverns, by direction of G. who was the next

next in remainder with others, and ſo they were guilty of ſubornation; and ſeveral circumſtances were proved to this purpoſe; but on the other ſide, *the poor woman and others ſaid, that B. had her child at this time, and* that *no account was given of it afterwards*, unleſs this was the child; and there was great proof, that after the child was chriſtened at St. Giles's the mother gave it to B. and *preſumptive proof that the ſame child was chriſtened again at St. Dunſtan's*; and it *appeared that money had been given to the witneſſes on both ſides*. Upon the whole, the Jury acquitted the defendants of the perjury and ſubornation. Sid. 377. Mich. 20 Car. 2. B. R. The King v. Buckworth & al.

4. An *anſwer in Chancery* was ſworn before J. S. one of the Maſters, and upon being *excepted to for inſufficiency, another* anſwer *was ſwore* before another Maſter, *which ſecond anſwer explained the generality of the firſt*. As where the *firſt was* thus, viz. *She received no money* &c. The *ſecond was* thus, viz. *She received no money before ſuch a day* &c. It was ruled by the Court at a trial at bar upon an information, 1. That nothing ſhall be aſſigned for perjury which is explained by the ſecond anſwer, becauſe it clears up what was a perjury before, ſo as now to be no perjury. 2. That where one is ſworn to anſwer directly and to his knowledge, *no perjury can be* aſſigned in any thing there which is not of his knowledge, as *of his belief* &c. 3. That tho' *recital of a deed* in other caſes is evidence, yet it *is not evidence to prove perjury*, nor ſhall it be received by the Court, *nor a letter of the party indicted, tho' ſworn* by one that he believes it to be his hand. And ſo the defendant was acquitted. Sid. 418. Trin. 21 Car. 2. B. R. The King v. Carr.

5. An information for perjury was aſſign'd in certain *depoſitions in Chancery before Commiſſioners* in the country, an examin'd copy whereof was produced and ſwore a true copy; it was urged that it ought to be prov'd that the party ſwore ſuch things, becauſe this was but a copy of what was returned into Chancery by the commiſſioners, who are neither officers nor on oath, and not like an anſwer ſworn before a Maſter in Chancery who is a ſworn officer. The Court was divided, and ſo the copies were not admitted as evidence, the commiſſioners who took the depoſitions being all living, and might have been ſubpœna'd. Whereupon the defendant was found not guilty, without entring on the merits. 2 Show. 486, 487. Mich. 2 Jac. 2. B. R. The King v. Baſpoole.

Information for perjury *in an affidavit* made *before commiſſioners in the country*, in a certain cauſe depending there. The *proof of a cauſe depending* was a capias and warrant thereon, and affidavith'd and allowed.

There needs no proof that the party, before whom the affidavit was ſworn, was a commiſſioner, unleſs diſprov'd on the other ſide; and per Cur. the affidavit being of the defendant in the cauſe, and *uſed by defendant on motion in Court* it is enough, otherwiſe if not ſo; but a copy of an affidavit only produced againſt a man, without proof that he made it, uſed it, or was concerned in the cauſe, would be inſufficient. Show. 397. Trin. 4 W. & M. The King v. James.

S. P. and ſeems to be S. C. 3 Mod. 116. Mich. 2 Jac. 2. B. R. Anon. And Serj. Pemberton for the defendant, admitted that an information will lie in this caſe againſt him, but the commiſſioners muſt be here, or ſome other perſon, to prove that he was the perſon who made oath before them. The commiſſioners ign the depoſitions, and they ought to produce them ſo ſigned to the Court and prove it; for depoſitions are often ſuppreſſed by order of the Court. If a true copy of an affidavit made before the Ch. J. of this Court be produced at a trial, it is not ſufficient to convict a man of perjury. This is not like the caſe of perjury aſſigned in an anſwer in Chancery taken in the country,

for that is under the party's hand; but here is nothing under the defendant's hand, and therefore the commiſſioners ought to be in the Court to prove him to be the man. The Court were equally divided: the Ch. J. and Wythens J. were of opinion that it was not evidence to convict the defendant of perjury; it might have been otherwiſe upon the return of a Maſter of Chancery; for he is upon his oath, and is therefore preſumed to make a good return; but commiſſioners are not upon oath, they pen the depoſitions according to the beſt of their ſkill, and a man may call himſelf by another name before them without any offence. The commiſſioners cannot be miſtaken in the oath, tho' they may not know the perſon; for this Court may be ſo miſtaken in thoſe who make affidavits here, but not in the oath, if the commiſſioners, or the clerk to the commiſſion had been here, they would have been good evidence.

6. Preſumption is ever to be made in favour of innocence; and the oath of the party will have a regard paid to it till diſprov'd; therefore to convict a man of perjury, a probable or
[328] credible evidence is not enough; but it *muſt be a ſtrong and clear evidence*, and more numerous than the evidence given for the defendant; for elſe it is only oath againſt oath. *A miſtake is not enough* to convict a man of perjury; *the oath muſt be* not only falſe, but *wilful and malicious*. 10 Mod. 194, 195. Mich. 12 Ann. B. R. in Caſe of the Queen v. Muſcot.

7. J. S. made an *affidavit in C. B.* and being ſummoned into Court afterwards *confeſſed his making it, and that it was falſe;* whereupon the Court *recorded his confeſſion, and ordered him into cuſtody to be put into the pillory* for perjury. It was objected, that this could not be done upon his own confeſſion, becauſe it is not a conviction, but only a matter of evidence: for that he ought judicially to be brought before the Court by indictment, and therefore his confeſſion ought not to have been recorded; to which it was ſaid, that it is not only a new, but a very ſtrange doctrine, that a criminal ſhall not be convicted upon his own confeſſion, which is the ſtrongeſt proof of guilt; and the laſt day of the Term he was put in the pillory. 8 Mod. 179, 180. Trin. 9 Geo. 1. 1724. The King v. Thorogood.

8. It ſeems that no one ought to be found guilty thereof without clear proof, *that the* falſe *oath* alleged againſt him *was taken with ſome degree of deliberation; for if* upon the whole circumſtances of the caſe it ſhall appear probable, that it was *owing rather to the weakneſs than perverſeneſs of the party*, as where it was occaſioned by ſurpriſe or inadvertency, or a miſtake of the true ſtate of the queſtion, it cannot but be hard to make it amount to voluntary and corrupt perjury, which of all crimes whatſoever is the moſt infamous and deteſtable. Hawk. Pl. C. 172. cap. 69. ſ. 2.

9. It is ſaid, that no oath ſhall amount to perjury, unleſs it be *ſworn abſolutely and directly*; and therefore that he who ſwears a thing according as he thinks, remembers or believes, cannot in reſpect of ſuch an oath be found guilty of perjury. Hawk. Pl. C. 175. cap. 69. ſ. 7.

[For more of Perjury ſee Actions for Words, Bankrupt, Subornation, and other proper Titles.]

Per Nomen.

(A) *Pleadings.*

1. GRANT made *to the baron and feme by name of feme without other name of baptiſm is good*, and *in pleading her name ſhall be ſhewn*, and the variance ſhall not prejudice. And it ſeems that he ſhall plead, *that it was granted to W. N. and E. his feme by name of W. N. and his wife.* Br. Pleadings, pl. 138. cites 30 E. 3. 18. and Fitzh. Feoffments 54.

2. Where a man *recovers againſt a parſon* who after is *made a biſhop*, the execution ſhall go againſt him by name of biſhop, and *ſhall count that he recovered againſt him by name of parſon*; per Danby and Moyle Juſtices. Br. Variance, pl. 52. cites * 9 E. 4. 42, 43.

So where A. B. *eſquire*, entered into a recognizance, and afterwards was *made a Knight and Bart.* the capias muſt be thus, viz. Capias corp. A. B. mil. & baronet, qui per nomen A. B. armigeri recognovit &c. Hob. 129. Sir Geo. Greiſly's Caſe.—* Br. Noſmes, pl. 27. cites 9 E. 4. 44. S. C.

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3. In aſſiſe againſt J. S. he *pleaded a feoffment made to him by deed*, and *the deed is J. N.* and yet good, for he *may be known by two ſirnames*, but the pleading is the better if he pleads *per nomen*, &c. [but] where he pleads a deed to *J. S.* and ſhews a deed made to *W. S.* [it is not good] for he cannot be known by *two proper names.* Br. Pleadings, pl. 66. cites 1 H. 7. 28.

4. *So* where he pleads of the *manor of B.* and ſhews a *deed of the manor of S.* Br. Ibid.

5. In aſſiſe of a portion of tithes in N. in the county of G. 'twas alleged, that *H. 8. dedit & conceſſit prædictam portionem decimarum inter alia per nomen totius portionis decimarum provenientium &c. de terris dominicalibus archiepiſcopi Eborum jacent. & exiſtent. in N. in dict. com. G. nuper monaſterio dudum ſpectant. &c. ac adtunc vel nuper in tenura E. T.* Exception was taken (among other exceptions) to this. But it ſeems that there *needed not any averment*, that the lands put in view were the demeſne lands of the archbiſhop in the tenure of E. T. See D. 83. a. b. pl. 77. and 86. b. pl. 99. a. 100, 101, and 102. Paſch. 7 E. 6. The Caſe of the New Serjeants als. Dean and Chapter of Briſtol v. Clerke.

6. If a man will ſay that *ſuch a one was ſeiſed of the manor of Dale, and* of the manor of *Sale, and infeoffed him of the manor of Dale by deed, by name of the manor of Sale*, this plea is not good; becauſe *the per nomen does not agree with the premiſſes*, and becauſe it will not

not warrant it. Arg. Pl. C. 150. b. Mich. 3 Mar. in Caſe of Throgmorton v. Tracy.

But if he had ſaid that he had infeoffed him of this land by the name of all his land of the part of his father, it had been good; for this is a good allegation that it is of the part of his father; ſo it is if the grant be of *all his land in ſuch a vill.* Roll. R. 422. pl. 11. cites 1 H. 7. 28. b.

7. *So* if a man pleads that *J. S. was ſeiſed of* 20 *acres* of land by deſcent, *of the part of the father*, and thereof *infeoffed him by deed by the name of all his lands which he had by deſcent of the part of the mother;* this plea is not good; for the per nomen does agree with the premiſſes, and therefore will not warrant the premiſſes. Arg. Pl. C. 150. b. in Caſe of Throgmorton v. Tracy.

And *therefore* it was ſaid, if one makes his *title to a rent of* 20 *s. and ſays, that J. S. was ſeiſed of ſo much land* &c. *and granted to him by the deed ſhewed forth the rent by the name of* 20 *s. rent iſſuing out of all his lands* and tenements; this plea with the per nomen is good, as it is held in 8 H. 4. and the per nomen and the plea ſtand together. Arg. Pl. C. 150. b. in Caſe of Throgmorton v. Tracy.—*And* ſo a *leaſe of* 100 *acres of land, and ſo many of meadow, by the name of yard-land*, ſtand together, and may well ſo be impleaded. Arg. Pl. C. 151. a. in Caſe of Throgmorton v. Tracy.—Per Nomen cannot be pleaded unleſs it be by deed. 3 Le. 9. Tindal v. Cobb.

8. When one pleads by a per nomen a plea of any thing *given by deed*, or other writing whatſoever, if the thing contained in the per nomen *agree in effect* and ſubſtance with the premiſſes before the per nomen, then the plea is good, and the premiſſes and the per nomen ſhall ſtand as one full and entire matter varying in words, and not in effect. Arg. Pl. C. 150. b. in Caſe of Throgmorton v. Tracy.

9. If the *matter in law* contained in the per nomen will *warrant the premiſſes of the plea*, the plea is good enough, otherwiſe not, and ſo cannot be made an exception by itſelf diſtinct from the matter in law, but are both one. Arg. Pl. C. 151. Ibid.

10. *One brought waſt*, and counted that an abbot *was ſeiſed &c. of one houſe*, and 30 acres of land &c. and demiſed to the defendant, and that after by ſurrender and the act of 31 H. 8. the King was ſeiſed, and granted to the plaintiff and his heirs the aforeſaid tenement by name of the manor of C. with the appurtenances. Exception was taken, that there are not words ſufficient in the count to carry to him the lands let, ſo as that he may maintain a writ of waſt; for the per nomen cannot maintain the grant of the land in leaſe *without averment that thoſe in the leaſe are parcel of the* manor; yet judgement was given to the contrary, and error brought upon the ſame. D. 207. pl. 14. Mich. 3 & 4 Eliz. Wyburn v. Darrel.

[330] 11. Plaintiff in ejectment declared of a leaſe for years of 300 *acres of land*, 60 acres of meadow, 60 acres of paſture, and 20 acres of wood &c. by the name *of all that the manor of W.* habend' the ſaid manor and other the premiſſes &c. for three years &c. virtute cujus &c. he entered &c. And the doubt was, if this was ſufficient, or that he ſhould have ſaid habend. tenement. prædict. &c. and in tenement. præd' &c. intravit. And adjudged the ſaid count ſufficient, and the word manerium ſurplus. D. 304. pl. 57. Mich. 13 & 14 Eliz. Anon.

12. A. by fine conveyed to J. S. *two manors (inter alia) per nomen of two manors, five meſuages, and* 300 *acres of land*, and by the ſame fine *J. S. rendered a rent of* 50 *l. to A. and his heirs.* On aſſiſe brought afterwards of the rent, judgment was for the plaintiff. Error was brought, and among other errors it was aſſigned, that by pleading this fine of theſe manors (inter alia) it *may be intended that other lands paſſed by this fine;* ſo that an aſſiſe brought againſt him that was tenant only of the manors is not good; for that all the tenants of the land charg'd are to be nam'd. Gawdy and Clench J. held it to be error; for being (inter alia) the per nomen ſhall be intended of more than the two manors, and that the ter-tenants of the reſidue ought to be named; but Fenner J. contra. Adjornatur. Nota, It was diſcontinued by the death of the defendant. Cro. E. 226. Paſch. 33 Eliz. B. R. Garnons v. Weſton.

S. C. Le. 254. 255. pl. 363. accordingly, and there Fenner J. ſaid, that if one in pleading ſays, that *J. S. was ſeiſed of* 20 *acres, and thereof did enfeoff him, per nomen of Greenmead*, this ſhall not have reference to the inter alia, but to the 20 acres only.

13. *Warrantia chartæ* of two meſuages and 20 acres of land, and counts that defendant *infeoffed him of the ſaid meſuages and land* per nomen *unius toſti & 2 virgat. terræ.* It was excepted to, becauſe that which comes under the per nomen does not warrant the count; for that the two meſuages cannot paſs by any word contain'd under the per nomen. Sed non allocatur; for it may be there was only one toft there at the time of the purchaſe, and the two meſuages might have been built there ſince. Judgment for the plaintiff. Cro. E. 611. Paſch. 40 Eliz. B. R. Anon.

14. A copyhold tenement was granted by A. to B. and two others *habend' poſt mortem J. S.* In treſpaſs againſt B. he pleaded this grant, but *pleaded it as a grant in poſſeſſion, and not as in reverſion.* And upon demurrer, the record being viewed, it was that A. granted *tenementa prædict' per nomen of a meſuage which A. held for life.* And it was reſolved to be an incurable fault; for it is not alleged that he granted the tenement in reverſion, and the per nomen will not help it; and judgment for the defendant. Cro. E. 661. 662. Paſch. 41 Eliz. B. R. Gay v. Kay.

Cro. E. 822. Paſch. 43 Eliz. B. R. S. C. Grey v. Chapman. —— In *treſpaſs* for taking the plaintiff's beaſts at K. Defendants *juſtified* the caption as bailiffs of M. and that the place contains, and did contain, when the caption

15. A. had verdict in *ejectment*, and it was moved in arreſt of judgment, that the count was of a *leaſe of ten acres of land by the name of all his lands and tenements in Shoram in Kent*, and judgment was ſtayed; becauſe there is no place where the ten acres of land are, and that naming the vill in the *per nomen* is not ſufficient. Noy. 32. Gray v. Champein.

is ſuppoſed, 20 acres of land in K. aforeſaid; that long before the caption one *A.* was *ſeiſed of* 100 *acres of land, and* 100 *acres of paſture in K.* aforeſaid, whereof the *locus in quo* is, and at the time of the caption, and time out of mind, *was parcel* in his demeſne, as of fee, containing 20 *acres.* That *A.* long before the caption, viz. 18 December, 16 Car. 1. at K. aforeſaid, by indenture, in conſideration of former ſervice done to him by *B. granted to B. and M.* his wife a *rent* of 20 *l.* a year, *iſſuing out of the ſaid* 20 *acres*, with the appurtenances, by the name of all his lands and hereditaments ſituate in K. aforeſaid, *habendum* the ſaid rent *to the ſaid B. and M. and their aſſigns after the deceaſe of C. and D. or either of them, which firſt ſhould happen during the lives of B. and M. and the longer liver of them*, at Lady Day and Michaelmas by equal portions, the firſt payment to begin at ſuch of the ſaid feaſts as ſhould firſt happen next after the deceaſe of the ſaid C. and D. or either

either of them. An *exception* was taken to the conuſance; *becauſe it is ſaid, the rent was granted out of the* 20 *acres*, being the *locus in quo, by the name of* all the grantor's lands and hereditaments in K. and that a per nomen in that caſe is not good. The Court held, notwithſtanding the Caſe of GREY AND CHAPMAN, and the Caſe of GAY AND CAY; that * in the preſent caſe the per nomen is well enough; becauſe it is alleged that the grantor was ſeiſed of 200 acres of land in K. whereof the locus in quo being 20 acres is parcel. By reaſon whereof, the *rent being granted out of every parcel of the* 200 *acres, it is well enough* to ſay, it was granted out of the 20 acres per nomen of all his lands in K. becauſe the 20 acres are * *alleged to be parcel* of all his lands there, being 200 acres. But in CHAPMAN's CASE, it is not alleged that the 20 acres of land demiſed were parcel of all the tenements in S. per nomen of which the 20 acres were to paſs. As for the other Caſe of Gay, it was not poſſible that lands granted as in poſſeſſion, ſhould paſs per nomen of land that was in reverſion. Vaugh. 173, 174, 175. Hill. 23 & 24 Car. 2. C. B. Crowley v. Swindles & al.

*S. P. and if it was granted out of the whole, it was granted out of every part. Freem. Rep. 77. pl. 94. Trin. 1673. and ſeems to be S. C. by name of Graves v. Allenhurſt.

This ſeems to be the Caſe of DAY v. FIN. 7 Jac. B. R. cited by Bridgman J. in Roll. R. 422. in the Caſe of Fawkner v. Fawkner.

16. The plaintiff declared in *ejectment* upon a leaſe *of a houſe, ten acres of land*, 20 *acres of meadow, and* 20 *acres of paſture*, by the *name of one meſuage, and* 10 *acres of meadow* be it more or leſs; and upon a Not guilty pleaded, the plaintiff had a verdict; but moved in arreſt of judgment, and judgment was ſtay'd; for by the plaintiff's own ſhewing in his declaration, he could not have execution of the number of acres found by the verdict; for in the leaſe there are but ten acres demiſed; and theſe words (more or leſs) could not in judgment of law be extended to 30 or 40 acres; for it is impoſſible by common intendment, and the rather becauſe *the land demanded* by the declaration *is of another nature than that* which is *mentioned in the per nomen* &c. for that is only of meadow; and the declaration is of arable and paſture. Brownl. 145. Anon.

17. In replevin, the defendant avowed for rent, and made title by a *grant of the rent out of the tenements aforeſaid, whereof the caption aforeſaid is ſuppoſed per nomen of all his land which was not then in leaſe*, and did *not aver that the place where* the caption was, *was out of leaſe* at the time of the grant. The plaintiff was nonſuited, and this was moved in arreſt of the return, that the avowry was not good; and ſo held Bridgman, notwithſtanding that it was alleged that the grant was out of this land per nomen; but per Haughton contra, the grant being alleged de tenementis prædictis is a ſufficient averment that it was not in leaſe at the time. And Doderidge and Croke ſeemed to the ſame intent, and judgment was given accordingly for the avowant. Roll. R. 422. Trin. 24 Jac. B. R. Fawkner v. Fawkner.

Br. Faits, pl. 33. cites 22 H. 6. 12. per Newton.

18. There is a difference between a *feoffment* and a *releaſe*; a feoffment may be pleaded per nomen *without an averment*, but a releaſe cannot be ſo pleaded; for in a feoffment the livery operates to paſs the land. Arg. Sti. 270. Paſch. 1651. in Caſe of Cremer v. Burnett.

S. C. And ſame exception taken. Cart. 240. but there 242, it was anſwered, Arg. That

19. In formedon the tenant *pleaded a fine of a fourth part* per nomen *of a third part*, and did *not aver that it is the ſame*. Exception was taken thereto; but it was anſwered, that if a per nomen be *repugnant or incongruous*, it is naught; as is Pl. C. 150. and 3 Cro. 602. but here a *third part comprehends a fourth part*, and ſo it is well enough, and cites 1 Cro. 110. [but this book

ſeems

ſeems miſ-cited, whether it means Cro. C. or Cro. E.] Freem. Rep. 126. Mich. 1673. C. B. in Caſe of Fowle v. Dogle.

the precedents are always of a third part, and not in tres partes dividendas; and that it is *good in a fine*, tho' *not in a writ*. Fowle v. Double. —— And accordingly a fine of the fourth part pleaded per nomen of a third part, was held well enough by the whole Court; becauſe a third part muſt neceſſarily include a fourth, and that it is well enough without ſaying into how many parts to be divided. And they agreed the Caſe, F. N. B. 244. 1 Le. 114. that a writ of two parts, not ſaying into how many parts to be divided, is not good; becauſe * two parts refer to no certain number of parts, but a fourth part implies a diviſion into four. And beſides, there is a great difference between a fine which is a common aſſurance, and a writ. Freem. Rep. 157. pl. 175. S. C.

* Le. 115. Trin. 30 Eliz. B. R. in Caſe of Charnock v. Worſley.

20. It never was known that an ill *plea* at firſt was made good by a per nomen, and this appears by the Caſe of Fawkner. Roll. R. 422. But by the addition of a per nomen, a *count* has been made ill (as appears in Day and Finn's Case. Yelv. 166. Brownl. 145 Owen 133) Arg. Lutw. 1006. Paſch. 10 W. 3. The King v. Hungerford. [332]

[For more of Per Nomen in general, ſee Grant (O) &c. (R) &c. Manor, and other proper Titles.]

Perpetuity.

(A) *What* is. *And how conſidered* in Law.

1. THERE are *two ſorts* of perpetuities, an *abſolute* one, and a *qualified* one; and eſtates tail from the time of the ſtatute *de donis* till common recoveries were found out were look'd upon as perpetuities. 12 Mod. 282. Paſch. 11 W. 3. C. B. in Caſe of Scattergood v. Edge.

2. A perpetuity *is*, where if all that have intereſt join, yet they cannot bar or paſs the eſtate. But if by concurrence of all having intereſt the eſtate tail may be barr'd, it is no perpetuity. Ch. Caſes 213. Mich. 23 Car. 2. Waſhborne v. Downes.

3. A perpetuity is a thing *odious* in law, and *deſtructive* to the commonwealth; it would put a ſtop to the commerce, and prevent the circulation of the kingdom; per Ld. North. Vern. 164. Paſch. 1683. Duke of Norfolk v. Howard.

4. Every *executory deviſe is* a perpetuity as far as it goes, *i. e.*

an eſtate unalienable, tho' all mankind join in the conveyance. 1 Salk. 229. Trin. 9 W. 3. C. B. Scattergood v. Edge.

Jo. 56. Mich. 22 Jac. C. B. S. C.—— S. P. 10 Rep. 38. b. in Portington's Caſe.

5. A. ſeiſed in fee *gives* his *lands* after his death without iſſue male to B. *in tail*, male, *until he or they effectually go about to do any acts to alter* or diſcontinue *this eſtate* tail and then to C. and the heirs male of his body with ſeveral remainders over. The deviſor dies without iſſue; B. enters; C. dies leaving iſſue D. —B. levies a fine. D. enters. And the queſtion was, if the entry was good? Reſolved per tot. Cur. that this was a perpetuity, and not allowable, being repugnant to law; for by ſuch a limitation an eſtate tail cannot be determined and given to another; for by the fine the remainder is diſcontinued and deveſted ſo as D. cannot enter; for it is no limitation to enter but after the effectual going about; and it is not effectual till the act done; and when it is done the remainder is diſcontinued, and then he cannot enter. Cro. J. 696. Mich. 22 Jac. B. R. Foy v. Hynde.

S. P. becauſe 'tis a fighting againſt God. Per Ld. Chancellor.

6. It is abſolutely againſt the conſtant courſe of Chancery to *decree* a perpetuity, or give any *relief* in that caſe; per Ld. Chancellor. 1 Chan. Rep. 144. 15 Car. 1. Biſhop v. Biſhop. Trin. 41 Eliz. Cary's Rep. 11. Anon.

7. Truſtees of a *term* limited over *in tail*, *remainder in tail*, were *decreed* in Chancery *to convey the eſtate over*; for otherwiſe there would be a perpetuity; per Bridgm. Ch. J. Sid. 37. Paſch. 13 Car. 2. C. B. in Caſe of Grig v. Hopkins.

[333] Pl. C. 414. Newys & Scholastica v. Larke

8. A deviſe to B and the heirs of his body, and * *if he go about to alien*, his eſtate ſhall ceaſe, and the lands *go over to a charity*; it is a void limitation, as tending to create a perpetuity. Vern. 161. Paſch. 1683. Pewterer's Company v. Chriſt's Hoſpital.

is contra where the limitation over was on the alienation of the tenant in tail.——* So, *if he attempt to alien* &c. He made a feoffment, and held good, and judgment affirmed. Vent. 321. Mich. 29 Car. 2. B. R. Pierce v. Winn.

9. The father ſettles land on his ſon in tail male, and takes *bond* from him, that *he will not dock the entail*; decreed the bond good. Had not the ſon agreed to give the bond, the father might have made him only tenant for life; and tho' the *alienation* is not made by the ſon, but *by his iſſue*, the bill was diſmiſſed with coſts; per Commiſſioners. 2 Vern. 233. Trin. 1691. Freeman v. Freeman.

In this caſe Ld. Cowper held, that there ought to be a *ſtrict ſettlement made*, and the intent of the teſtator followed as far as the rules of the law will permit, and directed it to be made ſo, that ſuch as were in being ſhould be only tenants for life; but where the limitation was to be to a perſon not in being, he muſt be made tenant in tail male. Ibid.—Ch. Prec. 455. S. C.

10. An attempt to make a perpetual *ſucceſſion of eſtates for life* is vain and not practicable; per Cur. 2 Vern. 738. Hill. 1716. Humberſton v. Humberſton.

11. *Chattel leaſes* cannot be entailed. MS. Tab. cites Feb. 28th, 1725. Ruſhout v. Ruſhout.

12. A

12. A perpetuity, as it is a legal word or term of art, *is the limiting an eſtate either of inheritance or for years ſo as would render it unalienable longer than for a life or lives in being at the ſame time, and ſome ſhort or reaſonable time after.* 2 Wms's Rep. 620. by the Maſter of the Rolls. Mich. 1732. in Caſe of Stanley v. Leigh.

[For more of Perpetuity in general, ſee Condition, Executory-Devile, Remainder, and other proper Titles.]

Per quae Servitia.

(A) *What* it is. And *in what Caſes* it lies. *And for whom.*

1. THIS is a *writ of execution.* Br. Per quæ Servitia, pl. 7. cites 39 E. 3. 19. Per Thorp.

2. Where there are *two lords*, and the *one grants the ſeigniory by fine*, the tenant is not compellable to attorn. Br. Per quæ Servitia, pl. 13. cites Old. N. B. Per quæ Servitia.

If a man make a gift in tail, the remainder in fee, and the ſeigniory or rent charge iſſuing out of the land be granted by fine, the conuſee ſhall maintain a per quæ ſervitia, or a quem redditum, and compel him to attorn; for herein his eſtate of inheritance is no privilege to him; becauſe a tenant in fee ſimple (as his eſtate was at the common law) is alſo compellable in theſe caſes to attorn. Co. Litt. 316. b.

3. It does not only lie where a man grants the ſervices of his tenant for term of life, but alſo where the *lord grants the ſervices of his tenant in fee ſimple.* Br. Per quæ Servitia, pl. 13. cites 9 E. 2. And therefore Brook ſays Natura Brevium is miſtaken. F. N. B. 147. (A). [334]

4. This action *does not lie but upon grant by fine*, and not by deed. Br. Per quæ Servitia, pl. 1. cites 43 E. 3. 8.

5. If a man *grants ſervices to J. S. for life*, the *remainder to W. N. in fee*, and after *J. S. dies before any attornment*, W. N. ſhall have per quæ ſervitia. Br. Per quæ Servitia, pl. 10. cites 20 H. 6, 7.

6. *Lord, meſne, and tenant;* the *meſne granted the meſnalty to A. by fine for term of life*, the *remainder to J. S. in fee*; the grantee for life brought per quæ ſervitia, and the *tenant came ready to attorn ſaving his acquittal*, and the plaintiff confeſſed it, and the tenant attorned; the grantee for life died: he in * *remainder cannot*

* S. P. which muſt be in a per quæ ſervitia brought by him againſt the tenant.

cannot diſtrain till he has confeſſed the acquittal. Br. Per quæ Servitia, pl. 12. cites 18 E. 4. 7. per Cur.

Co. Litt. 320. b.—S. P. for he has right to the remainder, and is privy in eſtate. Co. Litt. 252. a.

(B) *Againſt whom* it lies.

1. THIS writ lies as well *againſt tenant of the fee ſimple* of the land, as againſt other tenant. Br. Per quæ Servitia, pl. 13.

2. If *baron and feme bring* per quæ ſervitia, and the *tenant ſays that he is ready to attorn, ſaving to him his acquittal*, and the *baron alone confeſſes the acquittal* for him and his heirs, and not the feme, and the *baron dies*; his heirs ſhall be bound to the acquittal in the life of the feme, and yet the heir is not lord. Br. Per quæ Servitia, pl. 13. cites H. 5. E. 3.——For *feme cannot confeſs acquittal without examination*, and examination does not lie in this action. Ibid.

3. If per quæ ſervitia be brought againſt him who is not tenant the day of the writ, yet he ſhall attorn if he was *tenant the day of the note levy'd*; for he who was tenant the day of the note levy'd ſhall attorn in per quæ ſervitia, quem redditum reddit, & quid juris clamat. Br. Per quæ Servitia, pl. 5. cites 8 H. 6. 17.

4. If a fine is levied of a *ſeigniory*, and *before the attornment the tenant makes feoffment over in fee*, there the attornment of the feoffee is good, if he will attorn; but by all the Juſtices of C. B. per quæ ſervitia does not lie *againſt the feoffee*, nor againſt any other, but againſt him who was tenant at the time of the fine levied; for the per quæ ſervitia ſhall not vary from the fine. But per Littleton, Per quæ ſervitia lies well againſt the feoffee for avoidance of miſchief; for it may be, that the feoffor may die without heir, and therefore it ſhall lie againſt the feoffee; for ſcire facias * upon a fine lies againſt the feoffee, and ſo here; but Curia e contra. Br. Per quæ Servitia, pl. 9. cites † 18 H. 4. 10.

* Orig. (verſe). † This is miſtaken for 18 E. 4. 10.

(C) *Pleadings.*

1. IN a *per quæ ſervitia* iſſue was taken *upon the quantity of the ſervices*. Br. Iſſues joined, pl. 79. cites 20 E. 3. & Fitzh. Per quæ Servitia, 11.

2. In per quæ ſervitia, the *tenant ſaid, that the conuſor had nothing in the ſervices but in tail* and *ſhewed part of the fine levy'd of the ſervices in tail to the anceſtor of the conuſor, to whom he attorned*, judgment *if now he ſhall be compelled to attorn to the diſcontinuee*; for
[335] then the iſſue in tail may, after the death of the conuſor, diſtrain him, and the ſecond conuſee alſo, and ſo he ſhall be *attendant to*

two

two lords; and therefore a good plea; quod nota; and this by reaſon that he ſhewed part of the fine of the tail; and nonſuit in this action is not peremptory. Br. Per quæ Servitia, pl. 6. cites 24 E. 3. 25.

3. In per quæ ſervitia, Candiſh ſaid, The mother of the conuſor was ſeiſed in fee after the ſtatute of quia emptores terrarum, and infeoff'd us by this deed in fee, judgment &c. But per Thorp, the beſt iſſue is, *that the anceſtor was ſeiſed and infeoff'd him, and ſo you did not hold of the grantor*, and the iſſue was taken accordingly; and the *defendant cannot have common day*; for this is a *writ of execution*; and the defendant made attorney. Br. Per quæ Servitia, pl. 7. cites 39 E. 3. 19.

4. Per quæ ſervitia *againſt three*, whereof *two came*, and the *third made default*, and demanded *judgment, if the two alone ſhall be put to anſwer*; becauſe it ſhall be *intended by the bringing of the writ, that they are tenants in common*; & non-allocatur; by which *they demanded what land, and by what ſervices they held* of the conuſor. But the plaintiff was not compell'd to ſhew it; but the defendants themſelves ſhall ſhew it, becauſe it is in their advantage. Br. Per quæ Servitia, pl. 11. cites 21 E. 4. 48.

[For more of Per quae Servitia in general, ſee Attornment, and other proper Titles.]

Perſonal.

(A) Perſonal Things. *What Things* are *ſo perſonal that* they *cannot be transferr'd.*

1. *POWERS* are not transferable over. Arg. Mo. 520. Mich. 37 & 38 Eliz. in the Ld. Buckhurſt's Caſe.

2. *Redemption of a pawn* is redeemable only during the life of pawnor, and not by his executor. Yelv. 178. Trin. 8 Jac. B. R. Ratcliff v. Davis.

3. Things annexed to the perſon cannot be transferred nor executed by another; as *Arbitrement—Suit at Court—Homage—Fealty*. Arg. And alſo agreed that *tenant for life with power to make leaſes* cannot make *livery by attorney*, nor *executors that have power to ſell*, but where they have intereſt it is otherwiſe. Arg.

Arg. 2 Roll. R. 393. Mich. 21 Jac. cites 9 Rep. . . . . Combes's Caſe.

S. P. Ibid. 368. in Caſe of Sydown v. Holme— 4. A *privilege* does not extend beyond the perſon. Jo. 190. Hill. 4 Car. B. R. in Caſe of Whitton v. Wheſton.

S. P. Ibid. 370. in S. C.———S. P. Ibid. 387. Paſch. 12 Car. B. R. in Caſe of Hartford v. Leech.

5. Whether a prebendary can grant a *power* to his leſſee *to make a commiſſary* within his prebendary? Court divided. Raym. 88. Hill. 15 & 16 Car. 2. B. R. Sharrock v. Boucher.

6. *Dignities of peerage* are ſo perſonal, and annexed to the blood, that it cannot be transferr'd to any other perſon, or ſurrendered to the Crown. Arg. Parl. Caſes 1. The King v. Lord Purbeck.

[336] 7. If the *King grant* a tract of *land* in the plantations abroad to a man *with a legiſlative power*, which grantee paſſes over to another; the legiſlative power ſhall not paſs as a privilege annexed to the land, but remains with the perſon of grantor. Per Holt Ch. J. 12 Mod. 399. Paſch. 12 W. 3. in a Caſe between Baſſe and Bellamount.

[For more of Perſonal, ſee Aſſignment, Guardian, and other proper Titles.]

(A) Perſonating.

Br. Noſme, pl. 65. cites S. C. 1. DEBT upon a *bond by J. F.* the *defendant ſaid, that he made and delivered the bond to another J. F. and not to the plaintiff*; and a good plea; and the plaintiff was compell'd to anſwer to it; quod nota: and ſo it ſeems that there were two J. F.'s, and the wrong J. F. got the bond, and brought the action. Br. Obligation, pl. 82. cites 12 H. 6. 7.

2. A. had a warrant to arreſt J. S. and A. demanded of a ſtranger what his name was, who *ſaid his name was J. S.* whereupon A. *arreſted him*. The *ſtranger brought falſe impriſonment*; and adjudg'd it lay; for the bailiff ought at his peril to take notice of the party. Mo. 447. Trin. 38 Eliz. Coot v. Lightworth.

Cro. E. 531. S. C. —Mo. 630. 3. A. levies a *fine* in the name of B.—B. being beyond ſea; and ſentence was given that the fine ſhould be void. Noy. 99. Mich.

Mich. 38 & 39 Eliz. in the Star-Chamber. Gillibrand v. Hubbard. S. C.—— 12 Rep. 123. cites S. C. but ſays that part of the ſentence was, that if the defendant did not *re-aſſure the land to the plaintiff*, he ſhould forfeit a *greater fine to the Queen*; but that there was no ſentence to draw the fine off the file, nor damages awarded to the plaintiff.—A reconveyance was decreed. Roll R. 115. cites S. C.———The perſon was fined and impriſoned, and a *vacat entered* on the roll. Cro. E. 531. S. C. by name of Hubert's Caſe.

Lord Keeper ſaid, He had always noted this *difference*. If *one of my name levies a fine of my land in my name*, I may well confeſs and avoid this fine, by ſhewing the ſpecial matter. But if a ſtranger, who is *not of my name*, levies a fine of my land in my name, I ſhall not be received to *aver* that I did not levy the fine, but another in my name; for that is meerly contrary to the record; and ſo it is of a recognizance, and other matters of record. But he conceived, that when the *fraud appears to the Court*, as in the principal caſe, they may well *enter a vacat on the roll*, and ſo make it no fine, altho' the party cannot avoid it by *averment*, during the time that it remains a record. Cro. E. 531. Mich. 38 & 39 Eliz. Hubert's Caſe.

4. A. *acknowledges an action* in the name of B. and ſentence was given that (vacat) ſhall be made upon the roll. Noy. 99. in the Caſe of Gillibrand v. Hubbard. Per Popham, who cited Holcomb's Caſe. Cro. E. 531.

5. A. being *bail* for J. S. gives his name in to be B. Plaintiff recovers, and after judgment and execution awarded againſt B. upon proof that B. was not at London at the time of the bail taken, and it being confeſs'd by J. S. and thoſe that procured the bail, that A. put in the bail, a vacat was ordered *quoad* B. of that bail, and of the judgment in the ſcire facias. Cro. J. 256. Mich. 8 Jac. B. R. Cotton's Caſe. B. was taken in execution upon a recognizance of *bail*, and he made it appear to the Court, that he never acknowledged the recognizance, but was perſonated by another; and thereupon it was moved, that the bail might be vacated and he diſcharged, as was done in *Cotton's Caſe*. 2 Cro. 256. But the Court ſaid, Since 21 Jac. c. 26. by which this offence was made felony without clergy, it is *not convenient to vacate it until the offender is convicted*; and ſo it was done 22 Car. 2. in *Spicer's* Caſe; wherefore it was ordered, that B. ſhould bring the money into Court, and be let at large to proſecute the offender. Twiſden ſaid, It muſt be tried in *Middleſex*, tho' the bail was taken at a Judge's chamber in *London*, becauſe filed here, and the entry is *Venit coram Domino Rege &c.* So it differs from a recognizance acknowledged before my Lord Hobart, upon 23 H. 8. at his chamber, and recorded in *Middleſex*, there the *ſcire facias* may be either in *London* or *Middleſex*. Hob. Rep. 195. 196. Vent. 301. Beaſley's Caſe—— Mod. 46. S. P. Rawlin's Caſe.———

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Cockeril, who perſonated Beeſley, was hanged at Tyburn, but the rope was immediately cut; and afterwards Beeſly *on motion had reſtitution of his goods in the hands of the ſheriff*. Hill. 28 Car. 2. B. R. 2 Jo. 64. Beeſley's Caſe.

6. A *commiſſion of rebellion* was awarded againſt A. Whereupon B. came before the commiſſioners, and *affirm'd himſelf to be the perſon*. The commiſſioners apprehended him by virtue of their commiſſion; but per Hale Ch. B. the commiſſioners having no warrant to take him by their commiſſion, his affirming himſelf to be the perſon will not excuſe them in *falſe impriſonment*, as has been held on the executing a *capias*. Hard. 323. Paſch. 15 Car. 2. Thurbane's Caſe.

[For more of Perſonating in general, ſee Cheats, Fines, and other proper Titles.]

Petitions in Chancery.

(A) *What* it is, *to whom* they muſt be, and *in what Caſes, and how* it may be *granted.*

S. P. Curſ. Canc. 420.

1. IT is a perſon's *requeſt in writing* directed to the Lord Chancellor or Maſter of the Rolls, ſhewing ſome matter or cauſe whereupon he prays ſomewhat to be granted or done for him. P. R. C. 269.

S. P. Curſ. Canc. 421. —Or *for favour*; as to have *time enlarg'd for anſwering*, for *publication*: to *haſten joining in commiſſion* &c. for *paying money*. P. R. C. 269.——S. P. Curſ. Canc. 421.——To have a *hardſhip removed*; as that *proceſs of contempt* may be *ſtay'd*, and that the defendant may *have a copy of the bill*, where there being many defendants, who employ ſeveral clerks, the clerk of one of the defendants cannot get him a copy of it, whereby proceſs of contempt is iſſued out againſt him for not anſwering. P. R. C. 269.——S. P. Curſ. Canc. 421.—And in many other the like caſes petitions in Chancery are uſually preferred, *ſubſequent* to the bill filed. But in ſome caſes a petition may be *precedent* to the ſuit &c.; as for a perſon to be admitted in forma pauperis, or to be aſſign'd a *guardian* &c. Ibid.

2. Moſt *things which may be mov'd for of courſe*, may be petition'd for; as a commiſſion to anſwer, or plead, and demur; for the Lord Chancellor's *letter to a Nobleman to appear* and anſwer a bill &c. that the *cauſe may be heard*; for a *rehearing*; for an *appeal* &c. or to have a *miſtake amended* in a caption &c. P. R. C. 269.

S. P. Curſ. Canc. 421.

3. Sometimes it is *upon a collateral matter* only, as it has relation to ſome precedent ſuit, or to an officer of the Court, *as to have* a clerk or ſolicitor's *bill taxed*, or to oblige him *to deliver up papers*. P. R. C. 270.

S. P. Curſ. Canc. 422.

4. The Maſter of the Rolls is not to be petitioned for *rehearings*, but the Chancellor; alſo the *Chancellor* only is to be petitioned touching *pleas, demurrers or exceptions*, or touching *decrees or ſpecial orders* made before the Chancellor. In moſt other caſes of petition, the Maſter of the Rolls may be applied to. P. R. C. 270.

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(B) *What may be done upon* a Petition *without* a *Bill.*

1. WHERE the *King has a right as pater patriæ to take care of his ſubjects*, as in caſes of *charities, ideots, lunaticks* and *infants*; this is delegated to, and falls under the direction of the Court of Chancery, which in conſequence thereof hath uſed,

uſed, upon petition only, without any bill or decree, to make orders touching the determination of ſuch right. Vide 2 Wms's Rep. 118. 119.

2. *Right of guardianſhip* was determined on petition againſt the mother, ſhe being a papiſt; and upon an appeal from Chancery to the * Houſe of Lords, they determined the right againſt the mother, and no objection was made as to the determining it on petition only. Per Lords Commiſſioners. 2 Wms's Rep. 120. cites 18 March 1718. Lord Teynham and Barret's Caſe.

* April 1724. *So* in the caſe of a *teſtamentary guardian*, ſuch guardian having a plain legal right upon the words of the will, and the whole caſe ariſing thereon, there can be no need of a bill in equity, *no proofs of either ſide are requiſite*, or can avail; and therefore the matter is properly determinable upon a petition without a bill. 2 Wms's Rep. 120. Per Lords Commiſſioners. Hill. 1722. in Caſe of Eyre v. Lady Shaftsbury.

3. *No* former *order* made in Court is to be *altered, croſſed, or explained* upon any petition, *but* ſuch orders *may be* only *ſtay'd* upon it for a ſmall time, till the matter may be moved in Court. P. R. C. 270. S. P. Curſ. Canc. 421. and 422.

4. No *commiſſioners for examination* of witneſſes ſhall be *diſcharged*, *nor* ſhall any examinations or *depoſitions* of witneſſes be *ſuppreſſed* upon petitions, unleſs the matter be firſt referred, and certificate had thereupon. P. R. C. 270. S. P. Curſ. Canc. 421.

5. No *ſequeſtration*, *diſmiſſion*, *retainer* upon diſmiſſion, *or final order* is granted on petition. P. R. C. 273. S. P. Curſ. Canc. 422. —Nor the *commitment* of any perſon taken *upon proceſs of contempt* to be *diſcharged*, but upon hearing the adverſe party, his attorney or clerk, towards the cauſe. P. R. C. 273.——S. P. Curſ. Canc. 422.

(C) *What is to be done in caſe an Order is made* upon the Petition.

1. PEtitions are *delivered out of Court*, *and* if it be *for a matter of courſe*, as to be admitted in * forma pauperis, or ſuch like, it is *forthwith granted*, and ſigned. *If* it be for any *thing* which *requires examination*, or that the adverſe party be heard, then it is commonly ordered, that *all parties attend the next day of petitions*, or general ſeal; at which day the matter is debated, and ordered as the Court ſees cauſe. Affidavits are in ſuch caſe often neceſſary to inform the Court how matters ſtand on each ſide. P. R. C. 271. S. P. Curſ. Canc. 422. —* A petition (even to be admitted in *forma pauperis*) muſt now be *on double ſixpenny ſtamps*. 271. P. R. C. ——S. P. Curſ. Canc. 423.

2. If there be occaſion to petition *out of term and general ſeals* too, and the *matter* is *of conſequence*, and requires diſpatch, a petition may be delivered, and the parties will be ordered to attend the Ld. Chancellor or Maſter of the Rolls, at a time therein appointed, and have juſtice done them; for this Court is always open. P. R. C. 271. S. P. Curſ. Canc. 422.

3. An *order* upon a petition *for attending* and hearing the matter, *muſt be* drawn up, paſt, and *ſerved*, as other orders; and S. P. Curſ. Canc. 422.

and a copy of the petition is alſo to be delivered to the party ſerved. P. R. C. 271.

[339] S. P. Curſ. Canc. 423. 4. In 1647, there was an order made, that *no officer ſhould iſſue* a ſubpæna, attachment, or other *proceſs*, *nor proceed* or admit of any proceedings in any cauſe depending in this Court upon a petition ſigned by the Lords Commiſſioners, or the Maſter of the Rolls, *until the petition were firſt filed with the regiſter*, and an order drawn, and entered thereupon. *All proceſs* and proceedings *otherwiſe* iſſued, and had thereupon, ſhould be null and *void*, and not bind the adverſe party. P. R. C. 272.

S. P. Curſ. Canc. 423. 5. In 1687, it was ordered, that *no order* made *upon any petition* (unleſs the ſame be *by way of ſummons*) *ſhould be of* any *effect to ground ſubpænas* or other proceſs *upon*, *unleſs* within three days in Term time, or a week in the Vacation, after the ſame ſhould be granted, an order were drawn, and *entered up with the regiſter*, on ſuch petition, to the end no perſon might be ſurpriſed with any private order. P. R. C. 272.

S. P. Curſ. Canc. 421. 6. *No injunction* for ſtay *of ſuits* at law ſhall be granted, revived, diſſolved or ſtayed, upon petition; *nor* ſhall an injunction *of any other nature* paſs by order upon petition, *without* notice, and a *copy* of the petition *firſt given the other ſide*. The petition to be filed with the regiſter, and the order entered. P. R. C. 272.

S. P. Curſ. Canc. 421. 7. Said in Court, where a *matter comes in by petition*, and the *other ſide* would diſcharge the order, or have any thing relating to the matter, he *ought regularly to* do it by *petition*; tho' the Court ſometimes will grant it upon motion. P. R. C. 273.

[For more of Petitions in Chancery in general, ſee Petition, and Monſtrans de Droit at Title Prerogative, and other proper Titles.]

Phyſicians and Surgeons.

(A) Phyſicians and Surgeons *of London incorporated: How. And their Power.*

1. 3 *H.* 8. *cap.* 11. *ſ.* 1. ENacts, That *no perſon within the city of London, or ſeven miles thereof, ſhall practiſe as a phyſician*

ſician or ſurgeon, unleſs he be firſt examined, approved and admitted by the Biſhop of London, or the Dean of St. Paul's, aſſiſted by four Doctors of phyſick, and for ſurgery by four expert perſons in that faculty, on pain of 5l. one moiety to the Crown, and the other to him that will ſue for the ſame.

S. 2. And no perſon beyond the ſaid city and precinct of ſeven miles, unleſs approv'd as aforeſaid, ſhall practiſe phyſick or ſurgery in any dioceſe within this realm, except he be firſt approved by the biſhop of the dioceſe, and in the biſhop's abſence, by his vicar-general, aſſiſted by ſuch expert perſons in the ſaid faculties as they ſhall call for that purpoſe, and give their letters teſtimonial to, upon the like pain, to be levied and employed as aforeſaid.

S. 3. Provided that this act be not prejudicial to the Univerſities of Oxford or Cambridge, or to any privilege granted them.

2. By 5 *H.* 8. *cap.* 6. *Surgeons of London are diſcharged of ſerving as conſtables, watch, and all manner of offices bearing any armour, and alſo of all inqueſts and juries within the city. And this act is declared to extend to all barber-ſurgeons admitted and approved according to the aboveſaid act of* 3 *H.* 8.

3. By 14 & 15 *H.* 8. *cap.* 5. *ſ.* 2. *The King's Charter for the Incorporation of the College of Phyſicians in London (bearing date the* 13*th of September in the* 10*th year of his reign) is confirmed*; *the ſubſtance whereof is as follows*: [340]

A perpetual College of Phyſicians is granted and erected in London, and within ſeven miles compaſs of the ſame, and ſhall alſo have perpetual ſucceſſion, a common ſeal, and ability to purchaſe lands not exceeding 12*l.* per annum. *They may ſue and be ſued, make ordinances for the good government of the College, and of all others that practiſe phyſick within the ſaid limits; neither ſhall any practiſe phyſick within that circuit, unleſs approved under the ſeal of that College, in pain of* 5*l. to be divided between the King and the ſame College; likewiſe four phyſicians ſhall be yearly choſen to ſupervi ſe the reſt, as alſo their medicines and receipts, ſo that ſuch as offend may be puniſhed with fines, amerciaments, impriſonment, or other due means. Laſtly, Phyſicians ſhall not be put upon inqueſts in London or elſewhere; howbeit, theſe letters patents ſhall not be prejudicial to the city of London, nor the liberties thereof.*

In an action of falſe impriſonment the defendants juſtified under this ſtatute, ſetting forth, That the plaintiff practiſed phyſick not being admitted &c. That being examined, he was found inſufficient and forbid to practiſe, but notwithſtanding ſuch prohibition, he afterwards practis'd for a month or more, whereupon they amerc'd him 5l. to be paid to them at their next aſſembly &c. and likewiſe injoin'd him to forbear practiſing any more until he be found ſufficient &c. under pain of impriſonment. That he continuing ſtill to practiſe was further fin'd and order'd to be committed. That being queſtion'd, if he would ſubmit to the ſaid College? he replied, that he had practis'd and would practiſe without leave of the College, and denied that by the ſtatute they had any authority over him, as having taken his degree of Doctor of Phyſick within the univerſity regularly, and ſo thought himſelf protected by that clauſe in the act; whereupon the Cenſors (defendants) order'd him to priſon, which was executed accordingly, and for this impriſonment this action was brought. In this caſe Daniel J. thought a doctor of phyſick of either univerſity was not within the body of the act; but ſuppoſe him to be within the body, yet he was excepted by the laſt clauſe. But Warburton J. e contra upon both points. Coke Ch. J. ſaid nothing as to either of theſe points, becauſe all three (and who were all the Judges preſent) agreed, that this action was clearly maintainable for two other points; and they reſolved, 1. That the *Cenſors had no power to commit the plaintiff for any of the cauſes mentioned* in the bar. Becauſe the ſaid *clauſe, which gives power* to the ſaid Cenſors *to fine and impriſon, does not extend to the ſaid clauſe,* viz. *That none in the ſaid city &c. exerciſe the ſaid faculty &c.* which prohibits every one from practiſing phyſick in London &c. without licence of the Preſident and College; but *extends only to puniſh thoſe who practiſe in London, pro delictis ſuis in non bene exequendo, faciendo & utendo facultate medicinæ,* ſo that their power

power is limited to the ill and not to the good uſe and practice.—2. Admitting that the cenſors had power, yet they have not purſu'd it. 1. Becauſe *the cenſors alone have power to fine and impriſon, whereas* here the *preſident and cenſors impos'd this fine of* 5*l.* 3. The plaintiff was *ſummoned to appear before the preſident and cenſors*, and for not appearing was fined 5*l.* whereas the preſident had no authority. 4. The *fines impos'd by them by virtue of this act belong to the King*, and not to them, and yet the fine is *limited to be paid to themſelves &c.* and for nonpayment have impriſoned him. 5. They *ought to have committed the plaintiff immediately*, tho' no time be limited in this act. 6. Their *proceedings ought not to be by parol*, inaſmuch as their authority is by patent and act of parliament, and eſpecially it being to fine and impriſon. 7. The act giving a *power to impriſon until he be delivered by the preſident and cenſors or their ſucceſſors ſhall be taken ſtrictly*, or otherwiſe the liberty of the ſubject is at their pleaſure. And this is well proved by a judgment in parliament in the ſame caſe; for when this act of 14 H. 8. had given the cenſors power to impriſon, yet it was taken ſo literally, that the *gaoler was not bound to receive ſuch* as they ſhould commit to him, *becauſe they had authority to impriſon without any Court; and thereupon the ſtatute* 1 *Mar. cap.* 9. *was made to compel the gaoler to receive them under a penalty*, and yet none can commit to priſon unleſs the gaoler receives him; but the 14 H. 8. was taken ſo literally that no neceſſary incident was implied. And it being objected that 1 Mar. cap. 9. had enlarged the power of the cenſors, as appeared by the words of the act, it was clearly reſolv'd, that *it does not enlarge their power to fine and impriſon for any matter not within the* 14 *H.* 8. *the words of the act of Queen Mary being, (according to the tenor and meaning of the ſaid act)*; and further *(ſhall commit any offender &c. for his &c. offence or diſobedience contrary to any article or clauſe contained in the ſaid grant or act, to any ward, gaol &c.)* And in this caſe it does not appear by the record, that the plaintiff has done any thing contrary to any article or clauſe within the grant or act of 14 H. 8. And for the two laſt points judgment was given for the plaintiff, nullo contradicente as to them. 8 Rep. 107. to 121. Mich. 6 Jac. Dr. Bonham's Caſe.

Ld. Ch. J. Coke, in the concluſion of his argument, obſerves theſe *ſeven rules for the better direction of the preſident and commonalty of the ſaid College* for the future. 1. That none can be puniſh'd for practiſing phyſick within London, but by forfeiture of 5*l.* a month, which is to be recovered by law. 2dly, If any practiſe phyſick there for leſs time than a month, that he ſhall forfeit nothing. 3dly, If any perſon prohibited by the ſtatute offend in non bene exequendo &c. they may puniſh him according to the ſtatute within the month. 4thly, Thoſe whom they commit to priſon by the ſtatute ought to be committed immediately. 5thly, The fines which they aſſeſs according to the ſtatute belong to the King. 6thly, They cannot impoſe fine or impriſonment without making a record thereof. 7thly. The cauſe for which they impoſe a fine and impriſonment ought to be certain; for this is * *traverſable*; for tho' they have letters patents and an
[341] act of parliament, yet inaſmuch as the party grieved has no other remedy, neither by writ of error or otherwiſe, and they are not made Judges, nor a Court given to them, but have authority only to do it, the cauſe of their commitment is traverſable in action of falſe impriſonment brought againſt them. 8 Rep. 120. b. 121. a. in Dr. Bonham's Caſe.

* Holt Ch. J. in delivering the opinion of the Court, ſaid, that notwithſtanding the opinion in Doctor Bonham's Caſe, the charge of male adminiſtration of phyſick is not traverſable, and that my Ld. Coke's opinion in that caſe was but obiter, and no judicial opinion: beſides that he ſeemed to have been under ſome tranſport, becauſe Doctor Bonham was a graduate at Cambridge, his own mother univerſity. And he himſelf after in the ſame caſe ſays, that if the cenſors do convict a man for ſuch offence, they ought to make a record of it; and that they cannot do unleſs they are Judges of Record; and then we ſay, their proceedings are untraverſable, and they unpuniſhable for what they do as Judges. 12 Mod. 388, 389. Paſch. 12 W. 3. in Caſe of Dr. Grenville v. the College of Phyſicians.

In an action for practiſing phyſick within 7 miles of London without licence, the caſe upon a ſpecial verdict was, that the defendant, being an *apothecary* by trade, was ſent to by J. S. then ſick of a certain diſtemper; and he having ſeen, and being informed of the ſaid diſtemper, did, *without preſcription* or advice *of a Doctor, and without any fee* for advice, compound and *ſend the ſaid* J. S. *ſeveral parcels of phyſick as proper for his* ſaid *diſtemper, only taking the price of his drugs*, and if this were a practiſing of phyſick, ſuch as is prohibited by the ſtatute, was the queſtion: and after ſeveral arguments, the Court at laſt unanimouſly agreed, that *practiſing* of phyſick *within this ſtatute conſiſts*, 1ſt, *In judging of the diſeaſe* and its nature, conſtitution of the patient, and many other circumſtances. 2dly, In judging *of the fitteſt and propereſt remedy* for the diſeaſe. And 3dly, *In directing* and ordering *the application* of the remedy to the diſeaſed. And that the proper buſineſs of an Apothecary is to make and compound, or prepare the preſcriptions of the Doctor purſuant to his directions. It was alſo agreed, that the defendant's taking upon himſelf to ſend phyſick to a patient as proper for his diſtemper without taking aught for his pains, is plainly a taking upon himſelf to judge of the diſeaſe, and fitneſs of remedy, as alſo the executive or directing part. Et tot. Cur. Plaintiff had judgment. Note, This judgment was reverſed in Domo Procerum. 6 Mod. 44. Mich. 2 Ann. B. R. College of Phyſicians v. Roſe.

There ſhall be eight of the College called Elects, who from amongſt themſelves ſhall yearly chuſe a preſident; and as any of the elects fail

fail (by death or otherwiſe) others ſhall be choſen in their places by the ſurvivors of the ſame elects.

S. 3. None ſhall practiſe phyſick in the country without a teſtimonial of his ſufficiency from the preſident, and three of the elects of the ſame college, unleſs he be a graduate in one of the univerſities.

One that has taken his degree of Doctor of Phyſick in either of the univerſities may not practiſe in London, and within 7 miles of the ſame, without a licence from the College of Phyſicians; per Cur. clearly, and that by reaſon of the charter of incorporation, confirmed by 14 & 15 H. 8. cap. 5. penn'd in very ſtrong and negative words. As to the *teſtimonials* granted *by the univerſities upon a* perſon's *taking the Doctor's degree*, the Court was of opinion, that theſe might *have the nature of a recommendation*, and give a man a fair reputation, *but conferred no right*; and conſequently all thoſe ſtatutes which have confirmed the privileges of the univerſities could revive or confirm nothing but the reputation that this teſtimonial might give ſuch graduates. And as to the laſt *clauſe* of this ſtatute, *That none ſhall practiſe in the country without a licence* from the preſident and 3 elects, *unleſs he be a graduate* of one of the univerſities; it was ſaid, that all the inference from that would be, that poſſibly *two licences may be neceſſary where a perſon is not a graduate.* In the Caſe of DOCTOR LEVETT, Lord Ch. J. Holt did not think this a queſtion worth being found ſpecially. The *College* of Phyſicians without doubt are *more competent judges* of the qualifications of a phyſician *than the univerſities*; and there may be many good reaſons for taking a particular care of thoſe that practiſe phyſick in London. Adjornatur. 10 Mod. 353, 354. Hill. 3. Geo. 1. B. R. College of Phyſicians v. Doctor Weſt.

4. 32 *H.* 8. *cap.* 40. *ſ.* 1. enacts, That *all members of the College of Phyſicians in London, ſhall be diſcharged of keeping watch or ward in the ſaid city and ſuburbs thereof; nor ſhall any of them be choſen conſtable or other officer within the ſaid city or ſuburbs, and every ſuch election ſhall be void.*

S. 2. And it ſhall be lawful for the Preſident and Fellows of the ſaid College, yearly to chuſe four of their number, who ſhall have power, after they are ſworn, to enter the houſe of any apothecary in the ſaid city, to ſearch and view his wares and drugs, and ſuch as they ſhall find defective and corrupted, having called to their aſſiſtance the wardens of the myſtery of apothecaries, or one of them, ſhall cauſe to be burnt or otherwiſe deſtroyed. And every apothecary that ſhall deny the ſaid four Phyſicians entrance into his houſe &c. to ſearch and try his drugs, ſhall forfeit 5l. one half to the King, and the other to him that will ſue for the ſame; and every of the ſaid perſons ſo choſen, refuſing to be ſworn, or to make the ſaid ſearch once in a year, having no lawful impediment, ſhall forfeit * *40s.*

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* Cay's Abridgment is only 10s. each.

S. 3. And every member of the College of Phyſicians is hereby authoriſed to practiſe ſurgery in London, or elſewhere within the realm.

5. 32 *H.* 8. *cap.* 42. *ſ.* 1. enacts, That *the barbers and ſurgeons of London are by this act united and made one body corporate, called by the name of* Maſters and Governours of the Myſtery and Commonalty of Barbers and Surgeons of London; *and all members of the ſaid company, who ſhall be admitted to practiſe ſurgery, ſhall be exempted from bearing of armour, and from being put upon watches or inqueſts: and the ſaid company, and their ſucceſſors, ſhall have the overſight and correction, as well of freemen as foreigners, for ſuch offences as they ſhall commit againſt the good order of barbery and ſurgery, as heretofore among the ſaid myſtery and company of barbers of London hath been accuſtomed.*

S. 2. *And the ſaid company of barber-ſurgeons ſhall have free liberty yearly, to take four perſons condemned for felony, for anatomies yearly.*

S. 3. *And no barber in London, or within one mile thereof, ſhall practiſe ſurgery, letting of blood, or any other thing relating thereto, except drawing of teeth; nor ſhall any perſon who practiſes ſurgery within thoſe limits, exerciſe the craft of a barber; and all perſons practiſing ſurgery in London, or within one mile thereof, ſhall have an open ſign in the ſtreet where they dwell, that all people may know where to reſort to them.*

S. 4. *And no perſon ſhall have or keep a barber's ſhop in London, unleſs he be a freeman.*

S. 5. *And there ſhall be choſen yearly four Maſters for the ſaid company, of which two ſhall be expert in ſurgery, and the other two in barbery, who ſhall have power to puniſh and correct all defaults in the ſaid company; and every perſon who ſhall offend in any of the articles aforeſaid, ſhall forfeit 5l. for every month he ſhall ſo offend, one moiety to the King, and the other to him that will ſue for the ſame.*

S. 6. *Provided that the ſaid barbers and ſurgeons ſhall pay ſcot and lot, and other charges as formerly.*

S. 7. *Provided it ſhall be lawful for any perſon, not being a barber or ſurgeon, to retain in his houſe as a ſervant, a barber or ſurgeon, who may exerciſe his art in his maſter's houſe, or elſewhere, by his licence.*

6. 34 & 35 *H.* 8. *cap.* 8. *ſ.* 3. enacts, That *it ſhall be lawful for any of the King's ſubjects, having knowledge and experience in the nature of herbs, roots, and waters, or applying the ſame to practice, to miniſter to any outward ſore, wound, impoſthumation, outward ſwelling or diſeaſe, any herbs, ointments, baths, and plaiſters, according to their ſkill; and alſo drinks for the ſtone and ſtrangury, or agues, without incurring any pain by the ſaid ſtatute.* 3 *H.* 8. *cap.* 11.

Debt upon the ſtatute 14 *H.* 8. *cap.* 5. by the plaintiff, as Preſident of the Colledge of Phyſicians in London, and of the Corporation of Phyſicians there, for that the defendant uſed the art of phyſick in London without licence from the College there, againſt the ſtatute and their charter; for which he demanded 5l. for every month, being the penalty given by the ſtatute; the *defendant pleaded the* ſtatute 34 *H.* 8. which enables every one to practiſe phyſick or ſurgery, being ſkilful therein, notwithſtanding any act to the contrary. The *plaintiff replies and ſhews the ſtatute* 1 *Mar. cap.* 9. which confirms their charter, and every article thereof to ſtand in force; any act, ſtatute, law, or cuſtom to the contrary notwithſtanding. Hereupon the *defendant demurred*;

7. By 1 *Mar. cap.* 9. *ſ.* 2. 4. *The aboveſaid act of* 14 *H.* 8. *cap.* 5. *for incorporating the Phyſicians of London is confirmed; and it is enacted, that whoever ſhall be committed to priſon by the Preſident of the ſaid corporation, or ſuch as ſhall be elected yearly, for the correction of offenders, to any priſon within the ſaid city or precinct, except the Tower of London, the keeper of ſuch priſons ſhall receive in cuſtody ſuch offenders, as ſhall be ſo committed, without bail or mainpriſe, until ſuch offender ſhall be diſcharged by the Preſident and ſuch perſons as ſhall by the ſaid College be thereunto authoriſed, upon pain that ſuch keeper ſhall forfeit double the fine that ſuch offender ſhall be aſſeſſed to pay, ſo that the ſaid fine do not at any one time exceed the ſum of 20l. one moiety whereof ſhall go to the Crown, and the other to the ſaid Preſident and College.*

demurred; *1ſt, Becauſe this general clauſe in this law doth not reſtrain the ſtatute of* 34 H. 8. 2dly, That this pleading is a departure: for it ought to have been ſhewn before. It was argued for the plaintiff, 1ſt, *That the act of* 34 H. 8. *is repealed by the* 1 Mar. *quoad the College* of Phyſicians in London, as fully as if it had been by expreſs words recited and repealed. For when it confirms the charter of 14 H. 8. and appoints, that it, and every part thereof ſhall ſtand and be available, the ſtatute of 34 H. 8. cannot ſtand with it, quia *leges poſteriores leges priores contrariat abrogant*. 4 Ed. 4. PORTER'S CASE, Co. 1. fol. 25. b. 2dly, That it is not any departure; becauſe there is not any new matter, but matter pleaded in reviving of the former or fortification thereof, and a record was ſhewn. Mich. 10 & 11 Eliz. betwixt BOMBELINS v. . . . . where the record was in the ſame manner as this record is; and there the plaintiff had judgment: Wherefore &c. and there being none on the defendants part to argue; the Court, upon hearing the record, gave rule that judgment ſhould be entred for the plaintiff, unleſs &c. Cro. J. 121. Trin. 4 Jac. B. R. Doctor Laughton v. Gardener.

S. 5, 6. And if the warden of the grocers (that is of the apothecaries' company) ſhall neglect to go with the preſident, or four phyſicians elected, according to the ſaid ſtatute of 32 H. 8. *to ſearch for faulty drugs when required ſo to do, that then the ſaid phyſicians may ſearch and puniſh the ſaid apothecaries for any faulty drugs without the ſaid aſſiſtance of the ſaid wardens; and every perſon, who ſhall reſiſt ſuch ſearch, ſhall forfeit* 10*l. And all juſtices of peace, mayors, ſheriffs, bailiffs, and conſtables, and other officers within the ſaid city and precincts, are required to aſſiſt the ſaid preſident and college, and all perſons authoriſed by them, to put the aboveſaid ſtatutes in execution, upon pain of incurring a contempt.*

8. A judgment in debt was obtained upon the ſtatute 14 H. 8. by Doctor Laughton, *Preſident* of the College of Phyſicians in London, who *died before execution* had, and thereupon the *ſucceſſor brought a ſcire facias* to have execution; it was thereupon demurred, becauſe the ſcire facias ought to be brought by the executor or adminiſtrator of him who recovered, and not by the ſucceſſor; but upon hearing of the record, without argument, the Court held, that the ſucceſſor might well maintain the action, for the ſuit is given to the College by a private ſtatute; and the ſuit is to be brought by the Preſident for the time being; and *he having recovered in right of the corporation*, the law ſhall transfer that duty to the ſucceſſor of him who recovered, and not to his executors, the action being brought, for that he practiſed phyſick in London without licence of the College of Phyſicians, againſt the ſtatute of 14 H. 8. Wherefore it was adjudged for the plaintiff. Cro. J. 159, 160. Paſch. 5 Jac. B. R. Doctor Atkins v. Gardener. Brownl. 93. S. C. — Nov. 121. S. C.

9. An *action* brought *in the name of the Preſident alone* is not good; per Coke Ch. J. and Doderidge J. againſt Haughton J. 2 Bulſ. 185, 186. Hill. 11 Jac. the College of Phyſicians v. Doctor Tenant. Pemberton Ch. J. 11 anſwer to an objection that the Preſident only ſhould bring the action, ſaid, that that had been frequently over-rul'd. 2 Show. 166 pl. 158. Mich. 33 Car. 2. B. R. Preſident and College of Phyſicians v. . . . .—Debt was brought in the name of the Preſident and College of Phyſicians, on the ſtatute of 14 H. 8. cap. 5. for the penalty of 5*l.* per month for practiſing phyſick in London without licence; and upon demurrer to the declaration, this exception among others was taken, that the action ought to be brought in the name of the College only, or the Preſident only, the words of the patent being, Quod ipſi per nomina præſidentis collegii, ſeu communitatis facultatis medicinæ, London, could ſue and be ſued. To this it was anſwer'd, that they are incorporated by the name of Preſident and College, and have in conſequence of that a power to ſue and be ſued by that name and this power is not taken away by the additional affirmative power which is farther given to them. And judgment was given for the plaintiff. 2 Salk. 451. Trin. 13 W. 3. B. R. The Preſident and College

of Phyſicians of London v. Salmon.———The action was brought by the name of *Preſident and College or Community of the Faculty of Phyſick in London*, for practiſing phyſick without licence, *Per quod actio accrevit Domino Regi & Dom. Reginæ & eidem Præſidenti qui tam pro Collegio & Communitate &c.* Holt Ch. J. ſaid, This is the beſt way of declaring, eſpecially ſince the penalty is given to the corporation; ſed adjornatur. 5 Mod. 327. Hill. 8 W. 3. College of Phyſicians v. Salmon.

[344] Jo. 261. S. C. by the name of the College of Phyſicians v. Butler.

10. Debt was brought upon the ſtatute of 14 H. 8. 5. for practiſing phyſick within ſeven miles of London without licence &c. The defendant *pleaded the ſtatute of* 34 *H.* 8. *cap.* 8. and *that he having ſkill in the nature of herbs, roots, &c. by ſpeculation and practice, applied to perſons requiring his ſkill, herbs, ointments &c. to their ſores &c. and to all other diſeaſes in the ſaid ſtatute mentioned, prout ei bene licuit*, and as to any other practice Not guilty: et de hoc ponit &c. et hoc paratus eſt verificare. The plaintiff *replies, and ſhews the ſtatute* 1 *Mar.* 9. *which confirms the charter of* 10 *H.* 8. *and the ſtatute* 14 *H.* 8. *and appoints that it ſhall be in force notwithſtanding any ſtatute or ordinance to the contrary.* Hereupon the queſtion was, whether the 34 H. 8. be repealed by the 1 Mar. 9. by reaſon of the general words, any act &c. to the contrary &c? Richardſon Ch. J. conceived it was; but Croke J. conceived, that the 34 H. 8. related to ſurgeons, and their applying outward medicines to outward ſores and diſeaſes, and drinks only for the ſtone, ſtrangullion, and ague, and that that ſtatute was never intended to be taken away by 1 Mar. 9. But to this point Jones and Whitlock J. would not deliver their opinions; but admitting the ſtatute of 34 H. 8. to be in force, yet they all reſolv'd that the defendant's plea was ill; for in his pleading, that he apply'd herbs, ointments &c. to their ſores &c. he *leaves out the principal word* in the ſtatute, viz. (*externis*) and does *not ſhew that he miniſtred potions for the ſtone, ſtrangullion, or ague*, as the ſtatute appoints to theſe three diſeaſes only and no other, ſo that by this plea his potions might be miniſtred to any other ſickneſs, and for this cauſe affirmed the judgment. Cro. C. 256. Trin. 8 Car. B. R. Butler v. the College of Phyſicians.

11. An action was brought in C. B. upon the ſtatute 3 H. 8. for practiſing phyſick without licence, and judgment given; and error was brought in B. R. becauſe the judgment was wholly given for the Preſident, whereas it ſhould have been given part for the Preſident and part for the King; in maintenance of the judgment it was anſwered, that the judgment is to be given for the party who brings the action, and if the action had been brought by the King only, judgment ſhould have been given for him only, yet the money recovered ſhall be diſtributed as the ſtatute directs. Roll Ch. J. ſaid, the caſe is not alike where the King brings the action, and where the informer brings it; for the King may receive all the money, and the informer may have his part by petition to the King, and the King may if he will *ſue alone* and have judgment for all, if *the King begins his ſuit before the informer*, but if he begins it afterwards the informer ſhall have his part; and if

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the King do inform tam pro ſeipſo as for the College, there the College ſhall have its part; per Roll Ch. J. Sti. 329. Trin. 1652. Dr. Trigg v. the College of Phyſicians.

12. A copy of the ſtatute for not adminiſtring phyſick within London not being of the College &c. was produced by defendant, and ſworn to be a true copy taken out of the Rolls Chapel, and no *Le Roy veult* in it; and it was alledged, that Cardinal *Wolſey* had a great ſum of money to foiſt it in among others; but per Pemberton Ch. J. there were ſeveral forms of ſtatutes in ages paſt, and this has been allowed an act of parliament ſo often, and in ſo many caſes, that he would not diſpute it now. 2 Show. 166. Mich. 33. Car. 2. B. R. Preſident and College of Phyſicians v. . . . . .

13. *Debt* was brought upon 14 H. 8. 5. *for practiſing phyſick in Weſtminſter* for ſo many months; the defendant *pleaded the letters patents of K. Ch.* 2. *giving free liberty to French proteſtants to exerciſe the faculty of phyſick in London and Weſtminſter* &c. and that he was a French proteſtant &c. Upon a demurrer the plea was held ill: but then an exception was taken to the *declaration*, which ſets forth, that the defendant practiſed phyſick in Weſtminſter, but does *not ſay that Weſtminiſter is within ſeven miles of London*; and for that reaſon the defendant had judgment. 4 Mod. 47. Mich. 3 W. & M. B. R. College of Phyſicians v. Buſh.

S C. cited 5 Mod. 328 in the Caſe of the COLLEGE OF [345] PHYSICIANS v. SALMON, and ſaid, that it was brought by the name of Preſident, College, or Community &c. and held naught; but Holt Ch. J. ſaid there was no judgment in that Caſe.

14. Holt Ch. J. ſaid, It ſeemed to him that the *Cenſors may tender an oath* as a neceſſary conſequence of their judicial power; but ſaid he would give no poſitive opinion; and tho' a perſon be *not one of the College*, yet if he *practiſe phyſick within their juriſdiction*, he ought to ſubject himſelf to the law as well as any other. 12 Mod. 393. Paſch. 12 W. 3. in delivering the judgment of the Court in the Caſe of Dr. Grenville v. College of Phyſicians.

15. The *Cenſors of the College* of Phyſicians in London are impowered to inſpect, govern, and cenſure all practiſers of phyſick in civitate London and ſeven miles round, ſo as to puniſh by fine, amerciament, and impriſonment. Per Holt Ch. J. The Cenſors *have a judicial power*; for a power to examine, convict, and puniſh is judicial, and they are Judges of Record becauſe they can fine and impriſon; and being Judges of the matter, what they have adjudged is not traverſable. 1 Salk. 396. Trin. 12 W. 3. B. R. Groenvelt v. Burwell.

12 Mod. 386. S. C. — Carth. 492. S. C. — But tho' the pills and medicines were really ſalubres pillulæ & bona medicamenta, yet no action lies againſt the Cenſors; becauſe it is a wrong judgment in a matter within the limits of their juriſdiction, and a Judge is not anſwerable, either to the King or the party, for the miſtakes or errors of his judgment, in a matter of which he has juriſdiction: it would expoſe the juſtice of the nation, and no man would execute the office, upon peril of being arraigned by action or indictment for every judgment he pronounces. 1 Salk. 397. Trin. 12 Will. 3. B. R. Groenvelt v. Burwell & al.

16. Since the ſtatute of H. 8. of Confirmation of the Charter of the College of Phyſicians, none can practiſe phyſick in London, or within 7 miles round it, without a licence from the College,

College, and the *exception* therein *does not qualify the prohibitory clauſe* in it, but only orders, that *in all parts of England* a *practiſer* of phyſick *muſt either have a licence* from the College, *or be a graduate* in either of the univerſities; and this was the ſcope of the ſtatute in few words; per Holt Ch. J. 12 Mod. 602. at Niſi Prius. Mich. 13 W. 3. Anon.

17. 10 *Geo.* 1 *cap.* 20. *Recites former acts. And*

S. 1, 2. *Impowers the Cenſors &c. to ſearch the houſes of any perſons keeping medicines, drugs &c. and to deſtroy all ſuch as are defective, corrupted or decay'd; except drugs in the houſes or warehouſes of merchants &c. not making or keeping medicines for ſale.*

S. 3. *Gives liberty to the apothecaries to appeal to the College.*

S. 4. *Inflicts a penalty of* 10*l. on perſons hindering a ſearch.*

S. 6. *Patentees for ſole making &c. any medicine are not to be prejudiced hereby.*

This act was to be in force for three years, and to the end of the next ſeſſion of parliament.

S. 7. *Where any perſon is condemned by the Cenſors for not well executing, practiſing, or uſing the faculty of phyſick, he may within* 14 *days after notice appeal to the College, and the judgment given on ſuch appeal ſhall be final.*

S. 8. *enacts, That this act, and the acts of* 14 *and* 15 *H.* 8. *cap.* 5. *and* 32 *H.* 8. *cap.* 40. *and* 1 *Mar. Seſſ.* 2. *cap.* 9. *be deemed publick acts.*

[For more of Phyſicians and Surgeons in general, ſee Recusant, and other proper Titles.]

(A) Pirate or Piracy. *What. Who.* And how conſidered.

1. A *Pirate is* now taken for one who maintains himſelf by pillage and robbing at ſea; but *in former times the word was uſed in a better ſenſe,* being attributed to ſuch perſon to whoſe care the mole or peer of a haven was intruſted; and ſometimes for a ſea ſoldier. Aſſer Menevens Epiſt. in vit. Ælfredi—Rex Ælfredus juſſit cymbas & galeas, i. e. longas naves fabricari per regnum, ut navali prælio hoſtibus adventantibus obviaret; impoſitiſque piratis in illis vias maris cuſtodiendas commiſit. Cowel's Interp. verbo Pirata.

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2. A *Norman* was captain of an Engliſh ſhip who *had Engliſh people with him, and robbed* people *upon the ſea*, and was taken and found guilty; and becauſe he did it in the Norman language, *it was* accounted *only felony againſt him*, and he was hang'd: and *againſt the Engliſh it was adjudg'd treaſon*, becauſe they did it in the Engliſh language; and they were drawn and hang'd. Br. Treaſon, pl. 16. cites 40 Aſſ. 25. that it was ſaid by Fitzjohn to have been before Shard; quod non negatur.

Br. Corone, pl. 118. cites S. C. —Staunf. Pl. C. cap. 1. fo. 10. b. 11. cites S. C.—— 11 Rep. 53, 54. Trin. 7 Jac. in the Caſe of the Admiralty, cites S. C. ——Hawk. Pl. C. 87. cap. 32. ſ. 1. and 98. cap. 37. ſ. 2. cites S. C.—— Before the ſtatute of 25 E. 3. if a ſubject had committed piracy upon another (for ſo is the book to be intended upon a fact done before 25 E. 3.) this was holden to be petit treaſon, for which he was to be drawn and hang'd; becauſe pirata eſt * *hoſtis humani generis*, and it was *contra ligeanciæ ſuæ debitum*: but if an alien, as one of the Normans who had revolted in the reign of King John, had committed piracy upon a ſubject, this offence could be no treaſon; for tho' he were *hoſtis humani generis*, yet the crime was not *contra ligeanciæ ſuæ debitum*, becauſe the offender was no ſubject; but ſince the ſtatute of 25 E. 3. this is no treaſon in the caſe of a ſubject. 3 Inſt. 113.

* If piracy be committed on the ocean, and the *pirates* in the attempt there *happen to overcome*, the *captors* are not obliged to bring them to any port, but *may* expoſe them *immediately* to puniſhment, and *hang them up* at the main-yard end before a departure; for the old natural liberty remains in places where are no judgment. Molloy 61. cap. 4. ſ. 12.————And *therefore* at this day, if a *ſhip* ſhall be on a voyage to the Weſt-Indies, or on diſcovery of thoſe parts of the unknown world, and in her way be aſſaulted by a pirate, but in the attempt *overcomes the pirate*; by the Laws Marine, *the veſſel is become the captors*; *and* they may *execute ſuch beaſts of prey* immediately, *without any* ſolemnity of *condemnation*. *So* likewiſe, if a ſhip be aſſaulted by pirates, and in the attempt the pirates ſhall be overcome, *if the captors bring them to the next port*, and the *Judge* openly *rejects the trial, or the captors cannot wait* for the Judge *without certain peril* and loſs, juſtice may be done upon them by the Law of Nature, and the ſame may be there executed by the captors. Molloy 61. cap. 4. ſ. 13.

3. 28 *H.* 8. *cap.* 15. *ſ.* 4. *This act ſhall not extend to any perſon for taking any victual, cables, ropes, anchors or ſails, which ſuch perſon (compelled by neceſſity) taketh of any ſhip which may ſpare the ſame, ſo the perſon pay for the ſame money or monies worth, or deliver a bill obligatory to be paid, if the taking be on this ſide the Straits of * Morroke, to be paid within four months; and if it be beyond the ſaid Straits, to be paid within twelve months; and that the makers of ſuch bills pay the ſame at the day limited.*

* Morocco. Molloy 65. cap. 4. ſ. 20.

4. A man cannot be hanged for piracy for a *robbery done on the Thames*, for this is infra corpus comitatus; per Coke and Doderidge. Roll. R. 175. Paſch. 13 Jac. B. R. Palachie's Caſe.

S. C. cited. 3 Bulſ. 28. —If a *pirate enters* into *a port* or haven of this kingdom, and a merchant being at anchor there, the pirate *aſſaults* him *and robs* him, this is not piracy, becauſe the ſame is not done ſuper altum mare, for that the act is infra corpus comitatus, and was inquirable and puniſhable by the common law, before the ſtatute of 28 H. 6. cap. 15. Molloy 69. cap. 4. ſ. 27.

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5. If a pirate *attacks a ſhip, and* only *takes* away *ſome of the men* in order to the ſelling them for ſlaves, this is piracy by the law marine; but if a man takes away a villain or ward, or any other ſubject, and ſells them for ſlaves, yet this is no robbery by the common law. Molloy 63. cap. 4. ſ. 16.

6. If a pirate ſhall *attack a ſhip*, and the *maſter* for the redemption ſhall *give his oath to pay a ſum certain*; though there be no taking, yet is the ſame piracy by the law marine; but by the common law there muſt be an actual taking, though it be but

but to the value of a penny, as to a robbery on the highway. Molloy 64. cap. 4. ſ. 18.

7. If a *ſhip* ſhall *ride at anchor*, and the *mariners* ſhall be *part in their ſhip-boat and the reſt on the ſhore*, and none ſhall be in the ſhip; yet if a *pirate* ſhall *attack* her *and rob her*, the ſame is piracy. Ibid.

8. It was reſolved by all the Judges, and the reſt of the commiſſioners then preſent, that his Majeſty having granted *letters of repriſal to* Sir Edmond Turner and George Carew againſt the ſubjects of the States General of the United Provinces, and that *afterwards that grant was called in by proclamation, and* afterwards *ſuperſeded under the Great Seal*; that *Carew* [without Turner] having *deputed ſeveral to put in execution the ſaid commiſſion*, who accordingly did; and being indicted for piracy, *the ſame was* not a felonious and a piratical ſpoilation in them, but *a caption in order to an adjudication*; and tho' the authority was deficient, yet *not being done* by the captain and his mariners, *animo deprædandi*, they were acquitted. Molloy 71. cap. 4. ſ. 33.

This act is *made perpetual by* 6 *Geo.* 1. *cap.* 19.

9. 11 & 12 *W.* 3. *cap.* 7. *ſ.* 7. *If any of his Majeſty's ſubjects ſhall commit piracy or robbery, or any act of hoſtility, againſt others his Majeſty's ſubjects upon the ſea under colour of any commiſſion from any foreign ſtate, or authority from any perſon whatſoever, ſuch offenders, and every of them, ſhall be adjudged pirates, felons, and robbers; and being convicted according to this act, or* 28 *H.* 8. *cap.* 15. *ſhall ſuffer pains of death, and loſs of lands and goods.*

S. 8. *If any commander of any ſhip, or any mariner, ſhall, in any place where the admiral hath juriſdiction, betray his truſt, and turn pirate, enemy, or rebel, and piratically and feloniouſly run away with the ſhip, or any boat, ordnance, ammunition, or goods, or yield them up voluntarily to any pirate, or ſhall bring any ſeducing meſſages from any pirate, enemy or rebel, or conſult or confederate with, or attempt to corrupt any commander, officer, or mariner, to yield up or run away with any ſhip or goods, or turn pirate, or go over to pirates, or if any perſon ſhould lay violent hands on his commander to hinder him from fighting in defence of his ſhip and goods, or confine his maſter, or endeavour to make a revolt in the ſhip, he ſhall be adjudged a pirate, felon, and robber, and being convicted according to this act ſhall ſuffer death, and loſs of lands and goods.*

This act is *made perpetual by* 2 *Geo.* 2. *cap.* 28.

10. 8 *Geo.* 1. *cap.* 24. *ſ.* 1. *If any commander of any ſhip, or other perſon, ſhall trade with any pirate, or ſhall furniſh any pirate, felon, or robber, on the ſeas, with ammunition, proviſions, or ſtores, or ſhall fit out any ſhip knowingly and with deſign to trade or correſpond with any pirate &c. or if any perſon ſhall conſult, combine, or correſpond with any pirate &c. knowing him to be guilty of any piracy, felony, or robbery, ſuch offender ſhall be adjudged guilty of piracy, felony, and robbery, and ſhall be tried according to the ſtatutes* 28 *H.* 8. *cap.* 15. & 11 & 12 *Will.* 3. *cap.* 7. *and being convicted ſhall ſuffer death, and loſs of lands and goods; and if any perſon be-*

longing to any ſhip, upon meeting any merchant-ſhip on the high-ſeas, or in any port, haven, or creek, ſhall forcibly board and enter ſuch ſhip, and though they do not ſeiſe and carry her off, ſhall throw over-board or deſtroy any of the goods, they ſhall be puniſhed as pirates.

S. 10. *This act ſhall extend to all his Majeſty's dominions in Aſia, Africa, and America, and ſhall be a publick act, and ſhall continue* 7 *years &c.*

11. An indictment was againſt a *maſter of a ſhip* for piratically *burning his ſhip*. The caſe was, viz. A ſhip was *laden* with linnen *at Rotterdam*, and *bound for Malaga in Spain*, and when the defendant received the bill of lading, he was *ordered* by the merchants and owners *to put in at Lynn Regis* in Norfolk, in order *to get a Mediterranean paſs* for his ſafety; and when he came near Dartmouth-bay, it was *proved by one witneſs* (who was the carpenter of the ſhip), *that the defendant tamper'd with him, to know what he would take to knock the ſhip in the head; and* it was proved *by another* witneſs, *that* the *defendant gave the ſhip's crew ſome bowls of punch on that day the ſhip was burnt, and made them all drunk*; *and* afterwards *order'd* this witneſs *to make a fire in the cabin, where* there was *none for a month before* that time; which he did when the defendant and moſt of the crew were going aſhore, except two that were very drunk; *and that there was but one bucket belonging to the ſhip, which* the *defendant* had *ordered* a ſailor *to fling overboard the day before* the ſhip was burnt. The two ſailors who remained drunk in the ſhip, made oath, that they were ſleeping there till the ſhip was ſo much on fire, that they could not relieve her nor themſelves, but that they were carried off by another ſhip's boat then in the harbour. Upon this evidence the preſumption was very ſtrong, and the ſhip was burnt by that fire which was firſt made in the cabin; but this being only preſumption, and no direct proof, the defendant was acquitted. 8 Mod. 74. Paſch. 8 Geo. 1. The King v. Maſon. [348]

12. He was afterwards tried upon another indictment for piracy, *in ſtealing the goods* which he had at Rotterdam on ſhip-board, and conſigned to ſuch a place, viz. to Malaga; and the *evidence* againſt him was, *that the goods were delivered* to him, and that *afterwards he got both the ſhip and cargo inſured* at London and Rotterdam; and when he came to the coaſts of England, he *privately run all the goods, and when* the ſhip happened to be burnt, *he came to Dartmouth* and *proteſted both ſhip and cargo as burnt* and loſt (according to the method of proteſting inſured ſhips), tho' the cargo was privately run by him as before-mentioned, which was proved by ſeveral witneſſes. To prove the delivery of the goods to him, an exemplification of the entry thereof was offer'd in evidence, which entry was made in the cuſtom-houſe books at Rotterdam, and atteſted by a public notary, and ſealed with the public ſeal there; but the Court would not admit this exemplification to be given in evidence,

dence, thereupon the owner of the goods proved the property and the delivery &c. 8 Mod. 75. The King v. Maſon.

It is not piracy unleſs the ſame fact done upon land had been felony. Roll. R. 175. Paſch. 13 Jac. B. R. Palachie's Caſe.

13. The counſel for the King againſt the defendant laid down this for a rule, viz. that *all acts which amount to felony at land*, the ſame would amount to piracy at ſea; that upon this evidence it plainly appear'd, that the defendant had *run the goods animo furandi*, which if done at land would be felony; as for inſtance, if goods are delivered to a carrier, and he ſteals them animo furandi, it is felony, and ſo is this piracy; for it appears, by his proteſting that the ſhip and cargo was burnt and loſt, that he deſigned to cheat both the owners and inſurers. 8 Mod. 75. King v. Maſon.

14. It is true, if a *maſter* of a ſhip *runs goods* with an intention *to cheat the King of the duties*, this is no piracy, tho' the *goods* ſhould happen to be *ſeiſed as forfeited* to the crown *for not paying the duties*. But here, by the defendant's *proteſting the goods to be loſt when they were not*, but privately run by him, this *muſt be with an intention to cheat* and defraud the owners, for it was done *animo furandi*, and his intention makes it piracy, as a felonious intent makes the action felony. The defendant produced an inſtrument in writing under the merchant's hand, who freighted the ſhip (as he pretended), by which he had authority to run the goods as he ſhould find opportunity: but upon inquiry and proof this ſeemed to be a forgery, for the merchant on oath denied his ſigning the inſtrument; and the witneſs to it being now produced to prove the ſigning, made
[349] oath, that he did not know the merchant therein mentioned, but that the defendant and another were at a publick houſe in Rotterdam, and ſent for this witneſs, who came, and then the defendant told him, that the other perſon there preſent was his merchant, and that he ſent for him to be a witneſs to the power his merchant gave him; and thereupon the inſtrument being ready drawn, that other perſon ſigned it, and this witneſs atteſted it; all which gave room for a preſumption that he intended the running the goods, before he left Holland, animo furandi; *but* notwithſtanding, the Judge of the common law, who aſſiſted the Judge of the admiralty, directed the jury to acquit the defendant, *for that the goods were delivered* to him *upon a ſpecial truſt to deliver them at Malaga*, and that it *could be no piracy* to convert thoſe goods in a fraudulent manner *until that ſpecial truſt was determined*, no more than it could be felony in a carrier by converting of goods delivered to him to carry to ſuch a place before that ſpecial truſt was determined; and this appears to be the law of England by concurrent reſolutions in ſeveral law-books. 8 Mod. 75, 76. The King v. Maſon.

If a *bale* or pack *of merchandiſe* be *delivered* to a maſter *to carry* over

15. Thereupon the counſel for the King inſiſted, that tho' this was not piracy before the ſpecial truſt was determined, *yet* the *breaking open ſome bales of linnen on board* this ſhip made it piracy, for this was a converſion *with force & animo furandi*; and that it would be felony in a carrier to break open any

boxes delivered to him, and to convert them animo furandi, for ſuch a converſion by force is felony, though the ſpecial truſt was not determined; but the Court held there was a *difference* between *opening of bales of linnen, and breaking open locks or nails of boxes* by a carrier, and that this was no piracy; whereupon the jury acquitted the defendant of this indictment. 8 Mod. 76, 77. The King v. Maſon.

ſea *to ſuch a port*, and he *goes away* with the whole pack or bale *to another port, and there ſells* and diſpoſes of *the ſame*, the ſame is no felony. *But* if he *opens the bale* or pack, *and takes any thing out animo furandi*, the ſame may amount to ſuch a larceny as he may be indicted in the Admiralty, tho' it amounts not to a piracy. *Yet if* ſuch a maſter of ſhip ſhall *carry the lading to the port appointed, and after he retakes the whole pack or bale back again*, this may amount to a piracy; for he being in nature of a common carrier, the *delivery had taken its effect, and the privity of the bailment is determined.* Molloy 63, 64. cap. 4. ſ. 17.

16. (And he was afterwards tried upon a third indictment for a cheat in committing the acts aforeſaid, and was found guilty and fined, and impriſoned till he paid the fine. 8 Mod, 77. The King v. Maſon.)

(B) *What is forfeited*, &c.

1. PAtentee of pirate's goods ſhall *pay no cuſtom*; for as they are goods given by law to the King, there is no reaſon he ſhould have cuſtom for his own goods. Lane 15. Hill. 4 Jac. Anon.

2. By the *grant of bona piratarum*, he ſhall not have goods which the pirates had ſtolen from others, but only their own proper goods, and the owners of the reſt ſhall have their goods reſtored to them again if they come for them; but if they come not, then they are to be forfeited to the King; per Coke Ch. J. who ſays this was the opinion of all the Judges. 3 Bulſ. 148. Mich. 13 Jac. Prinſton's Caſe.

Roll. R. 285. Hildebrand, Brimſton and Baker's Caſe S. C. ——Molloy 66. cap. 4. ſ. 23. cites S. C.—The King ſhall have the piratical goods

3. Pirate ought to be *attainted* of piracy *before the forfeiture* of his own proper goods; per Coke Ch. J. ut ſup. 3 Bulſ. 148.

where the *owner is not known.* Jenk. 325. pl. 40.———The goods taken from others the King cannot grant; for it appears by the ſtatute 27 *E.* 3. *St.* 2. *cap.* 8. *that the merchant ſo robbed ſhall be received to prove that the goods or chattels belong to him by his chart or cocket, or by other lawful proof of merchants &c. and then the ſaid goods ſhall be delivered without any ſuit at the common law*, which act is general, be the robber privy or a ſtranger. But it was reſolved, that *until ſuch proof be made the King may ſeiſe the ſaid goods*; for goods of which the property is unknown, the King may ſeiſe. And if they are *bona peritura, the King may ſell them*, and upon proof *reſtore the value.* And note, The ſtatute does *not limit the owner to any certain time to prove the property* of the goods in ſuch caſe of depredation. 12 Rep. 73. Trin. 8 Jac.

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4. A ſhip belonging to merchants is not *forfeited* for the piracy of the crew that were in it. Per Doderidge and Coke. Roll R. 285. Hill. 13 Jac. B. R. Hildebrand's Caſe.

5. 8 *Geo.* 1. *cap.* 24. *ſ.* 2. enacts, That *every ſhip fitted out with a deſign to trade or correſpond with any pirate, and all the merchandizes put on board the ſame, with an intent to trade with any pirate, ſhall be forfeited, one moiety to the King, the other to the*

firſt

firſt diſcoverer of ſuch deſign, who may ſue for the ſaid ſhip &c. in the High Court of Admiralty.

(C) *Property alter'd.* In what Caſes.

1. ENgland, *Denmark and Spain* are in amity with one another; a *Dane robs a Spaniard* upon the ſeas; the *goods are ſold in England.* They ſhall be reſtored to the Spaniard, becauſe of theſe amities. Per omnes Juſticiarios Angliæ. Jenk. 165. pl. 17. cites 2 R. 3. 2.

S. P. And the owners are for ever concluded, and if they ſhould go about in the *Admiralty* to queſtion the property, in order to reſtitution, they *will be prohibited.* Molloy 66. cap. 4. ſ. 23.

2. *Buying in market overt without fraud* goods taken by pirates piratically will defend the buyer. Reſolved. Hob. 79. pl. 103. Don Diego d'Acuna v. Joliff & al.

If an Engliſh merchant buys goods of a pirate, the owner may have remedy againſt the buyer. Per Doderidge J. 3 Bulſt. 29. Paſch. 13 Jac. B. R. in Caſe of the King v. Marſh.—[But nothing is mentioned by Doderidge of market overt.]—And Trin. 41 Eliz. C. B. it was reſolved by all the Court, that goods ſo taken being ſold upon the land, unleſs it be in a market overt, doth not alter the property. Cro. E. 685. pl. 20. Anon.

Vent. 308. Anon. S. P. obiter contrary to Hob. 78. Spaniſh Ambaſſador's Caſe.——2 Lev. 25. S. C.——* S. P. Reſolv'd. Godb. 193. Trin. 10 Jac. C. B. Greenway v. Baker.——Cro. E. 685. pl. 20. Trin. 41 Eliz. S. P. adjudged in an Anonymous Caſe.

3. Goods are * taken by pirates, yet this does * not change the *property*; tho' if goods are taken by an enemy, and retaken by an Engliſhman, it is otherwiſe. Vent. 174. Mich. 23 Car. 2. B. R. in the Caſe of Radley v. Eglesfield.

By the Stat. of 27 E. 3. cap. 13. If a merchant loſe his goods at ſea by piracy or tempeſt (not being wreckt), and they afterwards came to land; if he can make proof they are his goods, they ſhall be reſtored to him in places guildable by the King's officers and ſix men of the country; and in other places by the Lords there and their officers, and ſix men of the country. Molloy 65. cap. 4. ſ. 22.——This law hath a very near relation to that of the Romans, called De uſu-captione, or the Atinian law; for Atinius enacted, that the plea of preſcription or long poſſeſſion ſhould not avail in things that had been ſtolen, but the intereſt which the right owners had ſhould remain perpetual: the words of the law are theſe, Quod furreptum eſt, ejus rei æterna auctoritas eſſet, where by (auctoritas) is meant jus dominii. Ibid.

See 10 Mod. 79. S. P.

4. In all caſes where a ſhip is taken by letters of marque or piracy, if the ſame is not *carried infra præſidia of that prince or ſtate by whoſe ſubject the ſame was taken*, the owners are not diveſted of their property, but may reſeiſe whereſoever they meet with their veſſels. Molloy 62. 63. cap. 4. ſ. 15.

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(D) Puniſhment *of Piracy.*

1. 28 *H.* 8. *cap.* 15. *ſ.* 3. ENacts, That *for treaſons, robberies, felonies, murders and confederacies done upon the ſea, or in any place rehearſed in this ſtatute, the offenders ſhall not have benefit of clergy.*

2. Clergy

2. *Clergy is not allowable* upon arraignment for piracy upon the ſtatute 28 *H.* 8. unleſs the piracy was done in a * creek or other river in which the common law before the ſtatute had juriſdiction, nor if 'twas done *in alto mari*, and out of the body of the county; becauſe ſuch felony is not felony by our law, but by the civil law, in which no clergy was accuſtomed to be allowed. And the ſtatute 28 H. 8. does not make it felony, but only ordains how it ſhall be tried; and ſays, ſee the Statute of 1 *E.* 6. which takes away and gives clergy, and yet it *does not extend to this act of* 28 *H.* 8. *nor to this felony* of piracy done ſuper altum mare. 2. By the † *King's pardon of all felonies by common law, or by any ſtatute*, it is not pardoned; becauſe it is neither felony by the common law nor ſtatute, if it be ſuper altum mare: but otherwiſe, if it be *committed in a creek or port.* Reſolved by all the Juſtices. 2 Jac. Feb. 14. Mo. 756. pl. 1044. in a Caſe of Pirates.

* Moll. 69. cap. 4. ſ. 28. ——The caſe was, Divers did in the reign of the late Queen Eliz. commit piracy and robbery upon the high ſea of divers merchants of Venice in amity with the ſaid Queen, and after the pirates, being not known, obtained a pardon, granted at the coronation of King James, whereby the King pardoned them all felonies (inter alia). Reſolv'd, 1ſt. That before this ſtatute piracy or robbery on the high ſea was no felony whereof the common law took any knowledge, for that it could not be tried, being out of all towns and counties, but was only puniſhable by the civil law, as by the preamble it appeareth; the attainder by which law wrought no forfeiture of lands, or corruption of blood. 2dly. That this ſtatute did † *not alter the offence*, or make the offence felony, but leaveth the offence as it was before this act, viz. felony only by the civil law, but giveth a means of trial by the common law, and inflicteth ſuch pains of death as if they had been attainted of any felony &c. done upon the land. But yet (as hath been ſaid) the offence is not altered; for in the indictment upon this ſtatute, the offence muſt be alledged upon the ſea; ſo as this act inflicteth puniſhment for that which is a felony by the civil law, and no felony whereof the common law taketh knowledge. 3dly. Although the King may pardon this offence, yet being no felony in the eye of the law of the realm, but only by the civil law, the ‡ pardon of all felonies generally extendeth not to it, for this is a ſpecial offence, and ought to be eſpecially mentioned. 3 Inſt. 112.—Upon this reſolution theſe conſequents do follow: 1ſt. That by the attainder upon this act, though there be forfeiture of lands and goods, yet there is ‖ *no corruption of blood.* 2. Seeing the offence is not made felony by the laws of this realm, there can be ¶ no acceſſory of any felony by the laws of this realm in this caſe, either before or after the offence, becauſe the principal is no felon by our law, neither doth this act ſpeak of any acceſſory. 3. If there be an †† acceſſory upon the ſea to a piracy, that acceſſory may be puniſhed by the civil law before the Lord Admiral, but cannot be puniſhed by this act, becauſe it extendeth not to acceſſories, nor makes the offence felony. Laſtly, The ſtatute of 35 H. 8. cap. 2. taketh not away this ſtatute for treaſons done upon the ſea for the cauſe aforeſaid. 3 Inſt. 112.——† Molloy 68. cap. 4. ſ. 25.—Hawk. Pl. C. 90. cap. 37. ſ. 6.——‡ Molloy 70. cap. 4. ſ. 28.——‖ Molloy 69. cap. 4. ſ. 26. & 70. ſ. 29.——Hawk. Pl. C. 99. cap. 37. ſ. 8. cites S. C.——† *But* ſee Statute 11 & 12 *W.* 3. *cap.* 7. *ſ.* 9. *at* (E).—Molloy 69. cap. 4. ſ. 26.—Hawk. Pl. C. 99. cap. 37. ſ. 8. cites S. C.—†† S. P. Molloy 70. cap. 4. ſ. 29.—** Hawk. Pl. C. 99. cap. 37. ſ. 6. cites S. C.

3. The words of the ſtatute of 28 H. 8. are, *That a commiſſion ſhall be directed &c. to hear and determine ſuch offences after the courſe of the laws of the land &c.* So that if the offender, upon his arraignment before commiſſioners by force of this ſtatute, ſtand *mute*, he ſhall have judgment de peyne fort & dure, by force of this general branch; but it is out of the latter words of the act, viz. *And ſuch as ſhall be convict of any ſuch offence by verdict, confeſſion or proceſs*; for he that ſtandeth mute, is not convict of the offence, but ſuffereth for his contumacy. Alſo it is neither by verdict, confeſſion or proceſs. 3 Inſt. 114.

Hawk. Pl. C. 99. cap. 37. ſ. 9. S. P. and cites S. C. and ſuch puniſhment was inflicted on a pirate that ſtood mute. D. 241. b. pl. 49. Mich. 7 & 8 Eliz. Anon.

4. Anciently, when any merchants are robbed at ſea, or ſpoiled of their goods, the King uſually iſſued out *commiſſions under*

under the Great Seal of England, *to inquire* of ſuch depredations and robberies, and to puniſh * the parties; and for frauds in contracts, to give damages to the parties, and proceed therein ſecundum legem & conſuetudinem Angliæ, ſecundum legem mercatoriam, & legem maritimam; all three laws included in the commiſſions. Molloy 71. cap. 4. ſ. 32.

5. *By* 8 *Geo.* 1. *cap.* 24. *ſ.* 1. *Perſons declared pirates thereby, and being convicted, ſhall ſuffer death, and* loſs of lands and goods.

S. 4. *Every offender convicted of any piracy, felony or robbery, by virtue of this act is excluded the benefit of clergy.*

(E) *Acceſſories* puniſhed. How.

1. IF a pirate at ſea *aſſault a ſhip, but* by force *is prevented entring* her, and in the attempt the *pirate ſlays a perſon in the other ſhip*, they are all principals in ſuch a murder, if the Common Law hath juriſdiction of the cauſe: but by the Law Marine, if the parties are known, they who gave the wound only ſhall be principals, and the reſt acceſſaries; and where they have cognizance of the principal, the Courts at common law will ſend them their acceſſory, if he comes before them. Molloy 62. cap. 4. ſ. 14.

2. 11 & 12 *W.* 3. *cap.* 7. *ſ.* 9. enacts, That *all perſons who ſhall either on land or upon the ſeas knowingly ſet forth any pirate, or aſſiſt or maintain, procure, command, counſel or adviſe any perſon to commit any piracies or robberies upon the ſeas; and ſuch perſon ſhall thereupon commit any ſuch piracy or robbery, all ſuch perſons ſhall be adjudged acceſſary to ſuch piracy and robbery; and after any piracy or robbery committed, every perſon who knowing that ſuch pirate or robber has committed ſuch robbery, ſhall on the land or upon the ſea receive, entertain or conceal any ſuch pirate or robber, or receive any ſhip or goods by ſuch pirate or robber piratically and feloniouſly taken, ſhall be adjudged acceſſary to ſuch piracy and robbery; and all ſuch acceſſaries may be inquired of, heard and determined after the common courſe of the law, according to the ſtatute* 28 *H.* 8. *cap.* 15. *as the principals of ſuch piracies and robberies ought to be; and being attainted, ſhall* ſuffer death, and loſs of lands and goods.

3. 8 *Geo.* 1. *cap.* 24. *ſ.* 3. enacts, That *all perſons who by the act* 11 & 12 *W.* 3. *cap.* 7. *are declared acceſſaries to any piracy, are hereby declared principal pirates.*

(F) *Rewards for oppoſing* or diſcovering Pirates.

1. 11 & 12 *W.* 3. *cap.* 7. *ſ.* 10. ENacts, That *when any Engliſh ſhip ſhall have been defended againſt pirates, enemies or ſea-rovers by fight, and brought to her port, in which fight any of the officers or ſeamen ſhall have been killed or wounded, it ſhall be lawful for the Judge of his Majeſty's High Court of Admiralty, or his ſur-*

rogate

vegate in the port of London, or the mayor, bailiff or chief officer in the ſeveral outports of this kingdom, upon petition of the maſter or ſeamen of ſuch ſhip, to call unto him four or more ſubſtantial merchants, and ſuch as are no adventurers or owners of the ſhip or goods, and have no intereſt therein, and by advice with them, to raiſe upon the adventurers and owners of the ſhip and goods, by proceſs out of the ſaid Court, ſuch ſums of money as himſelf and the ſaid merchants by plurality of voices ſhall judge reaſonable, not exceeding 2 per cent. of the freight, and of the ſhip and goods according to the firſt coſts of the goods, which money ſhall be diſtributed among the captain, maſter, officers and ſeamen of the ſhip, or widows and children of the ſlain, [353] *according to the direction of the Judge of the ſaid Court &c. with the approbation of the merchants aforeſaid, who ſhall proportion the ſame to the ſhip's company, having ſpecial regard to the widows and children of ſuch as ſhall have been ſlain, and ſuch as have been wounded.*

S. 11. *A reward of* 10*l. for every veſſel of* 100 *tons or under, and* 15 *l. for every ſhip of a greater burden, ſhall be paid by the commander of every ſhip wherein any combination ſhall be ſet on foot for the running away with or deſtroying ſuch ſhip, or the goods therein, to ſuch perſon as ſhall firſt make a diſcovery thereof; the ſame to be paid at the port where the wages of the ſeamen are to be paid.*

S. 12. *This act ſhall be in force for* 7 *years &c.*——*But is made perpetual by* 6 *Geo.* 1. *cap.* 19.

2. 8 *Geo.* 1. *cap.* 24. *ſ.* 5. enacts, That *if any ſeaman or mariner on board any merchant-ſhip or veſſel ſhall be maimed in fight againſt any pirate, every ſuch ſeaman &c. upon due proof of his being maimed in ſuch fight, ſhall not only have and receive the rewards already appointed by* 22 *and* 23 *Car.* 2. *cap.* 11. *but ſhall be admitted into and provided for in Greenwich hoſpital, preferable to any other ſeaman who is diſabled from ſervice by age.*

(G) *Puniſhment* of Sailors &c. *for not oppoſing Pirates.*

1. 8 *Geo.* 1. *cap.* 24. *ſ.* 6. ENacts, That *if any commander, maſter, or other officer, or any ſeaman or mariner of any merchant ſhip or veſſel which carries guns and arms, ſhall not, when they are attacked by any pirate, or by any ſhip &c. on which any ſuch pirate is on board, fight, and endeavour to defend themſelves and their ſaid ſhip, &c. from being taken by the ſaid pirate, or ſhall utter any words to diſcourage the other mariners from defending the ſhip, and by reaſon thereof the ſhip &c. ſhall fall into the hands of ſuch pirate, then every ſuch commander &c. and every ſuch ſeaman &c. who ſhall not fight and endeavour to defend and ſave the ſaid ſhip &c. or who ſhall utter any ſuch words as aforeſaid, ſhall loſe and forfeit all and every part of the wages due to him and them reſpectively, to the owner of the ſaid ſhip &c. and ſhall not be permitted to ſue for or recover the ſame*

or any part thereof in any Court, either of law or equity, and alſo ſhall ſuffer ſix months impriſonment.

S. 10. *This act ſhall continue 7 years &c.—But is made perpetual by 2 Geo. 2. cap. 28.*

(H) Pleadings &c. in Indictments.

1. IN caſe of piracy, the indictment, laying the offence to be *done upon the ſea felonice*, is not ſufficient, but it *muſt be piratice* alſo. Staunf. Pl. C. 114. a.

Hawk. Pl. C. 100 cap. 37. ſ. 10. ſays, It has been held, That ſuch indictment muſt allege the fact to be done upon the ſea, and muſt have both the words felonice and piratice.——The *indictment muſt mention* the ſame to be *done upon the high ſea.* Molloy 68, 69. cap. 4. ſ. 25.

[For more of Piracy in general, ſee Admiralty, Trial, and other proper Titles.]

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Piſcary.

* (A) [*Excluſive of the Owner of the Soil.*]

* There is no letter at this Title in Roll. *Libera* piſcaria *is all one with ſeparalis* piſcaria, and *not with communis* piſcaria; for *libera* piſcaria *implies an intereſt*,

[1 A Man may *claim ſeparalem piſcariam* in ſuch water, *and the owner of the ſoil ſhall not fiſh there* upon ſuch piſcary. Co. Litt. 122. and there cites Mich. 29, 30 El. between *Shirland and White*, B. and in the ſame Term between *Friſton and Crachrode* reſolved.]

[2. *But* if a man claims *communiam piſchariæ*, *vel liberam* piſcariam, the owner of the ſoil ſhall fiſh there. Co. Litt. 122. and there cites M. 29, 30 El. B. between *Shirland and White*; and in the ſame Term between *Friſton and Crachrode* reſolved.]

and he might plead to an action of treſpaſs for fiſhing in libera piſcaria ſua, that it *is his franktenement*, the which he could not plead if it was only in the nature of a common; and for this Holt Ch. J. cited 46 E. 3. 11. and in the Regiſter 95. And F. N. B. 88. G. H. there is a writ of *treſpaſs quare vi & armis liberam piſcariam ſuam piſcatus eſt*, and ſuch a writ is brought 17 E. 4. 6. and therefore the Regiſter and F. N. B. being ſo, and the old book of E. 3. agreeing with it, they did not regard the Caſes cited, or 1 Inſt. 122. but gave judgment for the plaintiff, Niſi. Skin. 342. Paſch. 3 W. & M. B. R. Smith v. Kemp.

3. If one who *has a ſeveral fiſhing grants liberam piſchariam*, the grantee has free fiſhing with the grantor. But if he *grants piſchariam*

piſchariam ſuam, without ſaying any thing more, the intire piſchary will paſs. 2 Sid. 8. Mich. 1657. B. R. Alderman of London v. Haſtings.

* (B) *In what Place.*

* This in Roll is (A) —See Prerogative. (B. a) pl. 14, 15.

[1. M. 1. H. 5. B. R. Rot. 90. ACTION brought for fiſhing in his ſeveral piſcary, and defendant pleads that the place where &c. *is the ſea where ſhips go, and within the juriſdiction of the admiral*, and demanded judgment; and adjourned.]

Every ſubject of common right may fiſh with lawful nets, &c. in a *navigable river* as well as in the ſea, and the King's grant cannot bar them thereof. But the Crown only has a right to *royal fiſh*, and the King may only grant that. 6 Mod. 73. Mich. 2 Annæ. B. R. Warren v. Matthews.—1 Salk. 357. S. C. and ſaid a quo warranto ought to be brought to try the title of ſuch grantee, and the validity of his grant; as where one claimed *ſolam piſchariam in the river Ex*, by a graat from the Crown.

In replevin for taking ſix boat-oars the defendant avowed the taking; for that the place in queſtion is his freehold, and that he took them damage feaſant. The plaintiff pleads in bar to the avowry, that the place where, called Creſwell Haven, time out of mind has been a waſte ground in the townſhip of Creſwell in the pariſh of Woodhall; and that one Edward Coke was ſeiſed in fee of certain ancient tenements conſiſting of diverſe meſſuages, and ſeveral (to wit) 200 acres of land, with the appurtenances lying in the ſaid townſhip; and *that he, and all thoſe, whoſe &c. time out of mind have had, and of right ought to have, common of fiſhery in the ſea* there, *as belonging and appurtenant to the ſaid tenements*; and likewiſe a liberty of landing and putting on ſhore their boats upon the aforeſaid place for the neceſſary uſe of their common of fiſhery aforeſaid; and avers that he as ſervant to, and by command of the ſaid Edward Coke, did fiſh in the ſea there, and upon that occaſion did put on ſhore his boat with the ſaid ſix boat-oars, being part of the tackle thereof, in and upon the aforeſaid place, as it was lawful &c. and that defendant of his own wrong took and unjuſtly detained them. Upon a demurrer to this plea, and ſeveral arguments, the Court held (firſt) that *all* the ſubjects of England *may fiſh in the ſea of common right*, as appears expreſsly in * 8 E 4. 18. b. 19. pl. 30. it being for the good of the commonwealth, and for the ſuſtenance of all the people of the realm. So is 1 Mod. 105. 6 Mod. 73. Salk. 357. Nor is it the law of this country only; for Grot. de Jure &c. lib. 2. cap. 2. ſect. 3. and cap. 3. ſect. 9. lays it down as the law of nations; and ſays the ſea is as free as the air. Trin. 14 and 15 Geo. 2. C. B. Ward v. Creſwell.—Secondly, The Court held, that fiſhing in the ſea being a matter of common right, a preſcription for it, as appurtenant to a particular townſhip, is void; and is as abſurd as a *preſcription* would be *for travelling in the King's highway*, or for the *free uſe of the air*, as appurtenant to a particular eſtate. Accordingly the plea in bar was held to be ill, and the avowant had judgment. Trin. 14 and 15 Geo. 2. C. B. Ward v. Creſwell.—* Br. Cuſtom. 46, and Fitzh. Barre 93. S. C.

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2. In caſe of a *private river*, the Lord's having the ſoil is a *good evidence* to prove that he has the right of fiſhing, and it puts the proof on them that claim *liberam piſcariam*; but in caſe of a river that *flowes and reflowes*, and is an arm of the ſea, there *prima facie*, it is common to all, and if any will appropriate a privilege to himſelf, the proof lies on his ſide. Per Hale Ch. J. Mod. 105. Hill. 25 and 26 Car. 2. B. R. Anon.

In the *Severne* there are particular *reſtraints*, as *gurgites*, &c. but the ſoil belongs to the Lord on either ſide, and a ſpecial ſort of fiſhing belongs to them likewiſe, but the common ſort of fiſhing is common to all. The ſoil of the river *Thames* is in the King, and the Lord Mayor is the conſervator of the river, and it is common to all fiſhermen, and therefore there is no ſuch contradiction between the ſoil being in one, and yet the river common for all fiſhers &c. Per Hale Ch. J. Mod. 106. Anon.

3. A man may have a *free fiſhery in his own ſoil*, as he may have a river in his manor, and another may have a right of fiſhing there with him. Per Holt. 3 Salk. 291. Trin. 7 W. 3. B. R. Gipps v. Wolliſcot.

(C) *The ſeveral Sorts* of Fiſheries, and *what* is a *ſeveral Piſcary.*

1. PIſchary is three-fold, viz. *ſeparalis*, *libera*, and *communis*. In the firſt caſe, he that has it is owner of the ſoil. 2. Has a property in the fiſh, and may bring a poſſeſſory action for them without ſhewing a title. 3. Is like the like caſe of all other commons. And 1 Inſt. 122. was denied to be law. 2 Salk. 637. Trin. 4 W. & M. B. R. Smith v. Kemp.

Separalis piſcharia is where no one elſe hath libertatem piſcandi

2. *Separalis piſcharia is* in his own ſoil, and libera piſcharia is in another's ſoil; per Brian; quod Littleton conceſſit. Br. Treſpaſs, pl. 336. cites 17 E. 4. 6.

; per Rookby J. Comb. 434. Trin. 9 W. 3. B. R. Gips v. Woolicot.—And one may have it *in alieno ſolo.* Ibid. 464. S. C.

3. A *ſtew-pond* is a man's ſeveral piſchary; per the Ch. J. Vent. 123. Paſch. 23 Car. 2. B. R. in the Caſe of Pollexfen and Aſhford v. Criſpin.

(D) *Incidents.*

1. IN rivers, a man ſhall have action of *treſpaſs* for fiſhing there, and if another takes fiſh there, he that has the water may *retake* them. Arg. Kelw. 30. pl. 2. anno 13 H. 7. Anon.

Ibid. 14. pl. 36. S. C.

2. If one has piſchary in any water, he has no *power to land* without the aſſent of the tenants of the franktenement. Savil. 11. pl. 29. 13 April, 23 Eliz. in Caſe of the inhabitants of Ipſwich v. Brown.

3. A man, to preſerve his ſeveral fiſhery, cannot *cut the nets and oars* of one that comes to catch his fiſh; but he might have taken the nets and oars, and detained them as *damage feaſant*, to ſtop their further fiſhing. Cro. Car. 228. Mich. 7 Car. B. R. Reynell v. Champernoon.

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(E) *Actions and Pleadings.*

1. TReſpaſs *of fiſh taken*, the *defendant ſaid that he is ſeiſed in fee of a houſe and eight acres of land in D. and that he and all thoſe whoſe eſtate he has in it have had common of piſcary from ſuch a place to ſuch a place as appendant* &c. and that the place where &c. is within thoſe bounds, by which he fiſh'd, as lawfully he might; and a good plea; per Choke and Danby, and it may be well appendant; and note that he alleged *appendancy and preſcription.* Br. Treſpaſs, pl. 306. cites 4 E. 4. 29.

2. Treſ-

2. Treſpaſs *quare in ſeparali piſcaria ſua piſcatus eſt*, the *defendant pleaded that the place where &c. is his franktenement;* and per Choke J. it is no plea but argument; but Brian contra; for by him, ſeparalis piſcaria is in his own ſoil, and libera piſcaria is in another's ſoil, quod Littleton conceſſit. Br. Treſpaſs, pl. 339. cites 17 E. 4. 6. and that it was adjudged a good plea per tot. Cur. 18 E. 4. 4. S. P. Ibid. pl. 426. cites 10 H. 7. 24.

3. Treſpaſs *of fiſhing in his ſeparate piſcary in D.* the *defendant juſtified by preſcription in him and his predeceſſors* time out of mind to have free fiſhery there; and a good plea, and good colour; but it was entered ſeparalem piſcariam according to the writ and declaration. Br. Treſpaſs, pl. 282. cites 7 H. 7. 13.

4. In treſpaſs quare clauſum fregit the defendant *juſtified* becauſe he ſaid he had a *right* of fiſhing there by *preſcription*, but does *not ſet forth what kind of fiſhery* he claim'd, viz. whether liberam, ſeparalem, or communiam piſcationis, or whether he has it as appertaining to a manor, meſuage &c. or not, but makes it a mere perſonal thing, and for that cauſe the plea was held naught. Per Cur. Hard. 407. Paſch. 17 Car. 2. Anon.

5. In treſpaſs for fiſhing in his ſeveral piſcary, and for taking 20 buſhels of oyſters there ſuch a day, *continuando piſcationem prædictam* from the ſaid day to the time of the action brought. Upon Not guilty pleaded, and a verdict for the plaintiff, it was moved in arreſt of judgment, that the fiſhing in the *continuando* was altogether incertain, not expreſſing the quantity or quality of the fiſhes, as it ought according to PLAYTER's CASE, 5 Co. and of his opinion were Wyld and Jones. But the Ch. J. inclined to think it well enough, and ſaid Playter's Caſe had not been very well approved of late years, and that is, that it is neceſſary to expreſs the kind of the fiſhes, which has been held ſince needleſs, and he knew not why it might not be, as well as an *indebitatus aſſumpſit pro diverſis mercimoniis*. But the other Judges ſaid, Tho' it was reaſon it ſhould be as the Chief Juſtice ſaid, yet they knew not how to depart from the authorities in the point, and that Playter's Caſe had remained unſhaken. Sed adjornatur; judgment *quod quer' nil cap. per bill'*. Vent. 329. Trin. 30 Car. 2. B. R. Hovel v. Reynolds. 2 Jo. 108. S. C.

6. In *treſpaſs* for fiſhing in his free *fiſhery* the Jury find ſpecially, that the place where is *parcel of the manor of D. and* that the *plaintiff is ſeiſed of this manor in fee*, and conclude that they find for the plaintiff, if he could have an action for fiſhing in his free fiſhery within his own land; and *adjudged that* the plaintiff may have ſuch a fiſhery; for tho' divers may have liberty to fiſh there beſides himſelf, *this is libera piſcaria* in his manor. Skin. 677. Paſch. 9 W. 3. B. R. Gipps v. Woollicot.

7. *And* Holt Ch. J. ſaid, that he was not ſatisfied, but that where the *owner of the ſoil* had a right to fiſh with others, that he might have an action of *treſpaſs*; for there is ſuch a writ in the regiſter, and it does *not lie for one who has but a liberty* to fiſh; and tho' he might have clauſum fregit, & in aqua ſua piſcatus, yet

he thought that treſpaſs lay; and if it be not proved e contra, it ſhall be *intended his ſeparate fiſhery* of common right; but as to the objection of piſces ſuos or ibidem, the Court ſeemed to think it was ill. Cur' adv' vult. Skin. 678. Gipps v. Woollicot.

[For more of Piſcary in general, ſee Preſcription, Treſpaſs, and other proper Titles.]

Place.

(A) *Pleadings.* In what Caſes the Place is material.

Heath's Max. 8. cites S. C.

1. IN *real actions* it is not uſual to count of a year, day and place, as of the gift in formedon, alienation in dum fuit infra ætatem &c. *nor in mixt actions*, as aſſiſe, waſt, and quare impedit; *contra in perſonal actions*. Br. Count, pl. 59. cites 7 H. 7. 5.

2. In *tranſitory actions* time and place are *not* material, but the plaintiff may declare at any time or place. 10 Mod. 251. 348. Hill. 3 Geo. 1. B. R. Cole v. Hawkins.

3. In *aſſiſe*, the *tenant ſaid, that the plaintiff was not born in England, nor within the allegiance of the King*, and the *others e contra*; and there he ſhewed place where he was born; and ibi veniet jurata. Br. Viſne, pl. 71. cites 22 Aſſ. 25.

Br. Lieu, pl. 34. cites 24 E. 3. 64. and that after the denial, the other in his rejoinder ſhall ſhew the place. Quod nota.—

4. *Scire facias upon a fine to execute remainder to the plaintiff, becauſe N. tenant in tail by the fine is dead without iſſue*; the *tenant ſaid that N. had iſſue K. who is in full life; and* per Seton J. he *need not ſhew where he is alive till the other denies it*; by which the *other ſaid that there was no ſuch K. Priſt*; and the others e contra, that ſuch K. at M. in another county; quod nota. Br. Replication, pl. 24. cites 24 E. 3. * 33.

* This ſeems to be miſprinted, and that it ſhould be (64) according to Br. Lieu ſupra.

Br. Lieu, pl. 34. cites 24 E. 3. 64.— In formedon, exception was taken, becauſe no place *of the aſſets* was alleg'd in the bar; but it was anſwered, that it *ſhall be alleg'd in the rejoinder after that the demandant has reply'd, that riens per deſcent.* 38 E. 3. 24.—Br. Aſſets per Deſcent, pl. 15. cites S. C.——Br. Lieu, pl. 22. cites S. C.

5. For in *formedon*, where *nothing by deſcent is pleaded againſt warranty and aſſets*, there he *ſhall ſhew where the aſſets lie, and not before.* Ibid.

If

If a man *pleads that the defendant administred as executor, or has assets in his hands, or* assets *by descent*, he shall shew in what place, but he need not shew what thing or land. Br. Pleadings, pl. 151. cites 11 H. 6. 1.

6. The place *where the Lord distrains for more services* [than are due] shall not be alleged in *monstraverunt*. Br. Lieu, pl. 86. ——Br. Monstraverunt, pl. 1. cites 40 E. 3. 44. S. P.

7. In *assise of rent*, the *defendant said, the grant is that the plaintiff should chant in the church of W. or elsewhere, for the souls of &c. and that the plaintiff had not chanted secundum formam chartæ*; and the *plaintiff said he had* chanted secundum formam chartæ, and good, *without shewing in what place*. Br. Assise, pl. 359. cites 41 Ass. 3. Br. Lieu, &c. pl. 46. cites S. C.

8. *Trespass* upon the Case, that the defendant by reason of his land *ought to repair certain ditches and banks*; and because it was not said in what vill the ditches and banks lay, therefore the writ abated; per Cur. Br. Lieu, pl. 15. cites 46 E. 3. 8. [358]

9. *Debt against A. executor* &c. who *said that there is another executor* in full life, not named &c. Judgment of the writ, and *did not shew the place where* &c. and good; for if the plaintiff denies it, the other *may rejoin, and say that he is alive at B.* &c. and well; per Cur. Quod nota bene. Br. Pleadings, pl. 144. cites 10 H. 6. 1.

10. *Præcipe quod* reddat *in D.* he need not shew that D. is in the same county. Br. Lieu, pl. 8. cites 35 H. 6. 46. *And* so of *trespass in D without saying in D. in comitatu tuo* quod nota; and this seems to be *in writ or count*; for those shall be brought in the same county where the thing is, or where the act was done; but *contra in bar, title and pleading*; for there he *ought to shew the place and county*; note the diversity. Ibid.

11. *Debt* upon arrears *of annuity till he be promoted to a competent benefice*, and *shewed that such a day he took feme*, and for the arrears due before he brought the action; Chocke demanded judgment of the count; for *this act changes the action of annuity into debt*, and therefore ought to shew place, and the best opinion was, that for this default the count is not good. Br. Count, pl. 26. cites 35 H. 6. 50. S. P. Heath's Max. 8 cites S. C.—— S. P. And so where the *grantee brings debt upon annuity granted for term de auter vie*, he *shall allege the death of cesty que vie, and at what place*, and there, by the best opinion, the death may make issue, and so of trial, and therefore place certain where &c. shall be alleged. Br. Lieu, pl. 9. cites S. C.——*But in debt by executors* they shall not shew at what place they were made executors; contra of *administrators*. Ibid.

12. In maintenance, the defendant demanded judgment of the writ, inasmuch as it is supposed that he *maintain'd a suit* between A. and B. *in C. B.* and *did not say at Westminster or any other place*, and yet well per Needham, Danby, and Ashton Justices, contra Danvers and Prisot Justices; but after they advised. See *Magna Charta communia placita* &c. Br. Brief, pl. 241. [245.] cites 36 H. 6. 12. Br. Lieu, pl. 4. cites S. C.—— Br. Pleadings, pl. 52. cites S. C.—— Br. Record, pl. 37. cites S. C. If one allege a record in Bank, he must say at Westminster or other place. For it is not a record, if it does not say place and judgment.—Where a thing is *set forth to be in* * *B. R. or Chancery*, it ought likewise to be set forth *where those Courts were kept*, and 7 H. 6. 10. a writ was abated for want of it; per Cur. 12 Mod. 316. Stringer v. Allison.—* S. P. Br. Pleadings, pl. 67. cites 5 E. 4. 8.

But *contra of C. B.* becauſe the ſtatute is, that it ſhall be in a place certain.—S. P. as to C. B. Br. Pleadings, pl. 121. cites 5 E. 4. 8.

13. In *debt againſt a ſucceſſor of* 10 *l. lent to the predeceſſor, which came to the uſe of the houſe*, &c. he ſhall ſhew the place where it came to the uſe of the houſe. Br. Lieu, pl. 53. cites 2 E. 4. 14.

14. In *debt for a ſalary*, he need not to declare *in what place he did the ſervice*; per Danby Ch. J. and others; for it may be that he did it in ſeveral counties; quod nota. Br. Lieu, pl. 54. cites 3 E. 4. 21.

15. In *debt* the plaintiff counted that he was *vicar of S.* and *leaſed his vicaridge* for two years, rendring 10 l. per ann. and for the arrears for two years &c. And it was ordered by the Court, that he ſhall ſhew in what county the vicaridge is; for per Cateſby he may ſay, that no ſuch vicaridge in the ſame county. Br. Count, pl. 61. cites 5 E. 4. 28.

Br. Lieu, pl. 52. cites S. C.—*Contra in a writ*, as in treſpaſs in D. or precipe quod reddat of land in D. this ſhall be intended to be in the ſame county expreſſed in the writ; but in a plea, no county is expreſſed before as in a writ. Br. Lieu, pl. 52. cites S. C.—Br. Pleadings, pl. 89. cites S. C.

16. *Debt* of 20 l. *againſt executors upon the obligation* of their teſtator, who *pleaded fully adminiſtered, and ſo to iſſue*, and *at the Niſi Prius, the defendant pleaded that the plaintiff after the laſt continuance had received* 10 *l. parcel of his demand at B.* Judgment of the writ, and the Court agreed upon argument that it is no plea, if he *does not ſhew in what county B. is.* Br. Pleadings, pl. 89. cites 5 E. 4. 138.

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17. *Debt* upon obligation of 20 l. with *condition to pay* 20 *marks at ſuch a day*, the *defendant pleaded that he paid* the 20 marks ſuch a day, and it is no plea without *ſhewing in what place* he paid it; quod nota. Br. Pleadings, pl. 90. cites * 5 E. 3. 141.

* It ſhould be 5 E. 4. 141. b.

18. In replevin, it was agreed per Chocke and Littleton, and not denied, that where a man *alleges a deed in count, avowry, or otherwiſe, where he recovers nothing, or to have return* &c. there he ſhall ſhew the *place and county where the deed was made, by reaſon of the viſne*; and there no ſuch place is a good plea. Br. Pleadings, pl. 97. cites 6 E. 4. 11.

But where a man *pleads a releaſe, acquittance*, &c. *which is in bar*, and where he recovers nothing, there it ſuffices to plead the deed without ſhewing the place. See the diverſity. Ibid.—Br. Lieu, pl. 55. cites S. C.

Br. Lieu, pl. 56. cites S. C.

19. Debt *againſt executors upon arrears of annuity* granted to the plaintiff *for life of the teſtator out of his manor of D. with clauſe of diſtreſs.* Judgment was demanded of the count; for it is not ſhewn in what county the manor is &c. But Littleton J. awarded him to anſwer. The reaſon ſeems to be inaſmuch as now the *manor is diſcharged by the death of the teſtator*, and ſo was the opinion of Pigot; quod nota. Br. Dette, pl. 154. cites 7 E. 4. 26.

But contra where he juſtifies *as ſervant* &c. by his command, there he need not ſhew the place. Ibid.—*So in capias againſt N.* the *ſheriff returned that M.*

20. In *treſpaſs*, the *defendant juſtified by command of a ſtranger*; he *ſhall ſhew the place where the command was* given. Br. Pleadings, pl. 102. cites 12 E. 4. 10.

by

By command of N. rescued N. at B. and ill, inasmuch as he *did not return the place where the command was given.* Br. Pleadings, pl. 70. cites 3 H. 7. 11.—*But in trespass*, where he *pleads that the franktenement is to N. P. and he by his command* &c. he need not *say where the command was, till* the command be *traversed, and then* he shall shew the place, and this *in the rejoinder*, as it seems. Br. Ibid.

21. *Debt upon an obligation against a feme*, who *pleaded espousals at C. in another county, and that she was covert baron at the time* &c. And per Cur. she *shall not allege the place of espousals*, but shall say generally, that covert &c. And *so of an infant*; for it shall be try'd where the writ is brought, and not where the espousals, or where the obligation is supposed to be made. Br. Visne, pl. 58. cites 15 E. 4. 32.

22. Scire facias upon a fine *of the manor of C. and of two houses and* 20 *acres of land*, and because *it is not shewn in what vill the land lay*, therefore the writ was abated; *contra* if it had been *of a manor only*; for a manor may be out of every vill, and known by name of a manor; quod nota. Br. Brief, pl. 383. cites 19 E. 4. 9.

23. *Case* was brought *for over-riding a horse to York*, so that for several days after the horse was not able to do the plaintiff any service, but the plaintiff *did not shew in what county York was*, and for that reason Choke held the writ ill. 21 E. 4. 79. b. pl. 93. Br. Lieu, pl. 64. cites S. C.

24. In trespass of two coffers, the *defendant said, that before the plaintiff any thing had* &c. *the property was in J. S. who gave to the defendant at B. and made the plaintiff his executor, and died, and the plaintiff was possessed, and the defendant took it* &c. and good, tho' *no place be alleged where J. S. was possessed*, notwithstanding that issue may be taken thereupon; for where no place is alleged, it shall be *intended to be where the action is brought*, and there the visne shall come; and after the *plaintiff said, that before the gift to the defendant the said J. S. gave to the plaintiff; and the others e contra*; and now per tot. Cur. *because the property is confessed and avoided, and issue taken upon another point*, therefore *it is no jeofail by the not shewing of the place where the property was*, tho' it was material. Br. Pleadings, pl. 157. cites 1 E. 5. 3. *So in formedon*, the *tenant pleaded warranty and assets*, and did *not shew the place where the assets is*, and *the other* [*replied*] *that after the descent a stranger recovered the assets by elder title, and had execution*, and this record certified against the defendant. This is not jeofail, inasmuch as *the assets was confessed and avoided*, quod omnes concesserunt; and yet at first the other might have demurred, because no place of the assets was shewn. Br. Pleadings, pl. 157. cites 1 E. 5. 3.

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25. In trespass, the *defendant said, that he himself was possessed, and delivered the goods to W. who delivered them to the plaintiff, and he re-took them*; there, by the Justices, he need not shew the place where he was possessed. Br. Pleadings, pl. 72. cites 4 H. 7. 5. Br. Lieu, pl. 48. cites 4 H. 7. 4. S. C.—Br. Visne, pl. 79. cites S. C.

26. Where a man pleads *lease for* * *years, exchange* or *surrender*, he shall shew the place where &c. Contra of *attornment*; but *quære* inde, and the same seems to be of *release* pleaded. Br. Lieu, pl. 50. cites 5 H. 7. 24. per Fairfax and Keble. * S. P. *Contra* in a lease *for life*, for this takes effect by livery, which is always upon the land; by the best opinion. Br. Pleadings, pl. 93. cites 3. E. 4. 27.—In *false imprisonment*, where a man *pleads release in bar*, he need not shew at what place it was made; for it is

is *matter in writing*. Br. Lieu, pl. 40. cites 21 H. 7. 22.—— Br. Pleadings, pl. 45. cites S. C.—*So of a † ſurrender or leaſe*; for it ſhall be intended upon the land. Br. Lieu, pl. 40. cites 21 H. 7. 22.—Br. Pleadings, pl. 45. cites S. C.—— *So of tender of homage.*—— Br. Lieu, pl. 40. cites 21 H. 7. 22.—— Br. Pleadings, pl. 45. cites S. C.—— *But if the other party traverſes thoſe things*, then place ſhall be alleged in the *rejoinder*. Br. Lieu, pl. 40.—*But he who pleads arbitrement* &c. which are *merely matters in fact*, ſhall allege place in his bar where &c. *Quære* of this diverſity. Ibid.—Br. Pleadings, pl. 45. cites S. C. But it was not adjudged but adjourn'd.—S. P. Br. Pleadings, pl. 157. cites 1 E. 5. 3.—He ſhall ſay the place of the ſubmiſſion, and the place of the award. Br. Pleadings, pl. 70. cites 3 H. 7. 11.

† S. P. And ſo of a *releaſe of land*; *confirmation* &c. Quod nota, per tot. Cur. Br. Pleadings, pl. 157. cites 1 E. 5. 3.—Contra of a *releaſe of actions* &c. Ibid.

27. Note where a man *pleads that the inteſtate had moveable goods in divers dioceſſes*, he ought to *ſhew in what place, and what goods they are*, ſo that the Court may adjudge whether they are goods moveable or not, and ſhall not ſtay till the matter be traverſed, and then to ſhew it in the rejoinder; per Rede, Fineux, and Brian; but Keble ſerjeant contra. Br. Pleadings, pl. 165. cites 10 H. 7. 19.

28. Debt upon an *obligation* conditioned *not to hunt in the plaintiff's warren*. The defendant pleads that he did not hunt in his warren; the plaintiff replies, and ſays, that after the making of the bond, & ante diem impetrationis brevis &c. venatus fuit cum retibus. The defendant demurs, and adjudged againſt the plaintiff; becauſe he doth *not allege where his warren lay*, that the defendant might have taken iſſue; and Vaughan ſaid, that venatus fuit cum retibus was nonſenſe; for it is the dogs that hunt, and not the nets. Freem. Rep. 31. pl. 39. Paſch. 1672. in C. B. Bud v. Weſt.

29. Upon a demurrer to a plea in abatement, the defendant ſaid, that ſhe was *baptized by the name of Mary, and not of Patience*, and the plaintiff *demurs*, becauſe no place where ſhe was baptized is mentioned, and alſo ſhe does not ſay that ſhe was *ſo called at the time of the bill ſued*; for where an act is alleged there ought to be a place mentioned, becauſe it is traverſable, *but* if it had been that ſhe was known by *ſuch name only*, it might be tried where the action is brought, becauſe it only concerns the perſon; but becauſe the defendant did not ſay that ſhe was called Mary at the time of the bill ſued, ſhe ought to give the plaintiff a better writ. Skin. 620. Nichols v. Shepherd.

30. There are two ſorts of writs, viz. *Breve nominatum* & *innominatum*; the *firſt contains* the time, *place* and demand very particularly; the *other contains only a general complaint*, without the expreſſion of time or damage; as the action of *treſpaſs*, which might have been at any time done, and was intended to defend the eſtate itſelf againſt the invaſion of the neighbours; and ſeems to have been thus generally allow'd before the diſtinction of bounds; and therefore the *will only was alleged where the treſpaſs was ſuppoſed* to be done, and the plaintiff might count of any treſpaſs committed before the ſuing out of the original. G. Hiſt. C. B. 3. cap. 1.

[For more of Place in general, ſee Manor (S), Maſter and Servant (S), Travers, Treſpaſs, and other proper Titles.]

Plea

Plea and Demurrer.

(A) Plea and Demurrer *in Equity. Notes.*

1. A Plea *is a ſpecial anſwer to a bill, or* ſome *part thereof*, ſhewing and relying upon one or more things, as a cauſe why the ſuit ſhould be either diſmiſſed, delayed or barred. P. R. C. 273.

2. It is of 3 ſorts,

1ſt, To the Juriſdiction.

In this firſt ſort of pleas it is to be ſhewn, that the Court has *not juriſdiction* of the cauſe; *as if lands lie in a county palatine, or exempt franchiſe*, you may plead it, and that time immemorial &c. (or as the caſe is) all ſuits at common law and in equity, touching the ſame, have or ought to have been impleaded, and yet are impleadable in the Courts of the ſaid county palatine &c. before the Chancellor &c. and not elſewhere. P. R. C. 275.—*One plea only is to be admitted* to the juriſdiction; wherefore if the defendant plead ſuch plea as is not ſufficient in its nature, or plead the matter inſufficiently, he will be put to anſwer. P. R. C. 275.—As *plea to the ſubſtance* and body of the matter, *ſo* pleas *to the juriſdiction* ſhall be *determined in open Court*. P. R. C. 272.—Curſ. Canc. 181. 184.

Said, If a *bill* be brought *in the Exchequer* touching tithes, or other matter, and the defendant exhibits his bill here againſt the there complainant touching the ſame matter, the Court of Exchequer has gained juriſdiction by priority of ſuit, and it may be pleaded in abatement of the bill here. P. R. C. 275.

2dly, To the Perſon.

As to the ſecond, viz. in reſpect of the perſon, it may be ſhewn, either that the plaintiff is by law diſabled to ſue, as that he is *outlawed*, or *excommunicated* (which works a temporary diſability), or that he is *attainted* &c. (which is a perpetual diſability); that he is a *papiſt convict*, or that the plaintiff or defendant is *not ſuch a perſon as alleged*, as *feme ſole, heir, executor, or adminiſtrator* &c. and is not therefore to ſue or be ſued as ſuch for the matter in queſtion. P. R. C. 276.——So the defendant may plead *excommunication* in the plaintiff, which muſt be *certified by the ordinary*, either by letters patents containing a poſitive affirmation that the complainant ſtands excommunicated, and for what, or by letters teſtimonial, reciting quod ſcrutatis regiſteriis invenitur &c. and either of them muſt be *ſub ſigillo*, and ſo pleaded. P. R. C. 277, 278.—Outlawry or excommengement *in a prochein amy or guardian*, cannot be pleaded or alleged in diſability, where an infant ſues or defends by him. P. R. C. 278.—Curſ. Canc. 185, 186.

3dly, In Bar. P. R. C. 273.

A plea *in bar is* commonly where ſome foreign matter or thing is ſhewed, whereby, ſuppoſing the bill &c. true, yet the ſuit or bill, or ſome part thereof is barred. Sometimes it is an *act of parliament*; as the *ſtatute of limitation* of actions, the ſtatute of frauds &c. Sometimes a *record*; as a *common recovery*; a *verdict* at law; a verdict *and judgment &c.* Sometimes *both a ſtatute and record*; as a *fine with proclamations* according to the ſtatute, *and* five years *non-claim*. Sometimes it is a *matter in pais*; as a *releaſe*; an *account ſtated*; notwithſtanding which, a defendant muſt ordinarily anſwer a particular fraud &c. if any be alleged. P. R. C. 279.——If the *defendant's title* be *paramount the plaintiff's*, he may plead it in bar. *So* if the plaintiff has granted or *releaſed* his right *to the defendant*. So, a *leaſe*, or a *purchaſe for a valuable conſideration* &c. may be pleaded in bar; the defendant by way of anſwer denying any notice of the plaintiff's title or claim. So, a *long peaceable poſſeſſion*, as 60 years or more, may be pleaded in bar. P. R. C. 279.—Sometimes this plea is to the very ground and foundation of the ſuit; as in a bill for diſcovery of title &c. the defendant may plead, that the complainant has *conveyed the premiſſes in queſtion*, or his right to them &c. *to another* perſon. P. R. C. 279, 280.——*All or ſeveral* of the matters in bar may be *pleaded together*. Sometimes a

ſuit

ſuit depending here, or elſewhere, is pleaded in bar. So a *decree or diſmiſſion* in this Court. P. R. C. 280.—If a decree is had, and the party brings a *bill intending to review the decree, but* does it *by way of original bill*, and *not in form of a bill of review*, the defendant may plead the decree in bar. P. R. C. 280.—Curſ. Canc. 187, 188.

3. When a *bill is in the diſjunctive*, the defendant by his plea may take it either way; per Ld. North. Vern. 219. Hill. 1683. Creſſet v. Kettleby.

[362] 4. The defendant cannot plead *after a proclamation* return'd, nor can a plea be *taken on a general commiſſion* to take the anſwer only, and not to plead anſwer or demur; per Ld. North. Vern. 275. Mich. 1684. Loyd v. Gunter.

5. Where the defendant *anſwers to part, and pleads to the reſt*, the plaintiff cannot put in *exceptions* to the anſwer till he has firſt argued the plea, or obtained an order that the plea ſhall ſtand for an anſwer, with liberty to except to the matters not pleaded to. Vern. 344. Mich. 1685. Darnel v. Reyney.

6. If the plaintiff *replies to* the defendant's plea, he thereby admits it to be good, if it be true, and the validity of the plea can never after be conſidered, but only the *truth of it*, as he proves it, or the plaintiff diſproves it. Ch. Prec. 58. Mich. 1695, Parker v. Blythmore.

7. Tho' a plea in bar be *allowed*, yet the *plaintiff may reply to the truth of it, and put defendant on proving it, and* may *except to any other part of the anſwer*. G. Equ. R. 184.

8. Pleas which *tend to ſupport wrong-doing muſt have the greateſt ſtrictneſs and exactneſs*. G. Equ. R. 187. Gaſcoyne v. Sidwell & al.

(B) *To Bills of Account.*

1. BILL was brought to be relieved againſt an *action by guardian for detaining infants*, and to have an account of the rents and profits of the real eſtate. The defendant pleaded that he is *remainder-man in tail*, if the infant die without iſſue, and that the *guardianſhip was deviſed to him*, and he was made executor, and the plaintiff had a legacy of only 10s. left her. The plea was allowed, unleſs the will ſhould be diſproved. Fin. R. 200. Hill. 27 Car. 2. Corcellus v. Corcellis.

2. Bill was brought, was for an account of copartnerſhip. The defendant pleaded an *award, averring the matter in queſtion comprized in the award*. The *plaintiff replies generally* that there was no ſuch award; and tho' the plaintiff ought to have ſet down the plea to be argued, and not to have replied to it, yet decreed that the defendant account: but after (tho' that decree was ſigned and inroll'd) the Court ordered the defendant only to anſwer over. Vern. 72. Mich. 1682. Farrington v. Chute & Ux.

3. Bill was brought by one *incumbrancer* againſt an aſſignee of incumbrances, and in poſſeſſion, for an *account*, and that defendant might accept what, if any thing, was due to him, and

plaintiff

plaintiff be let into a ſatisfaction of his debt; but omitted praying payment of the ſurplus to the plaintiff. On the account it appeared that the defendant was overpaid 4000 l. The plaintiff then *proceeded at law*, and ſued a *ſcire facias* on his judgment, and took out *execution by elegit*; after which the plaintiff brought his bill to have the 4000 l. towards his debt; to which the matter before mentioned was pleaded in bar, and the Court allowed the plea. Jefferies C. Vern. 349. Mich. 1685. Hale v. Thomas.

4. *Detinue of charters* is a good plea in bar of *account* in equity, as well as at law. 2 Vern. 33. Hill. 1688. Counteſs of Plymouth v. Bladen.

5. A. the mortgagee brought a *bill to foreclose*, and B. the mortgagor brought a *croſs bill to redeem*; and it was *decreed to pay principal, intereſt and coſts, or elſe to be foreclosed, and on payment to be let in. B. died*, and the account being taken, the *plaintiff finding the eſtate inſufficient, brings a new bill of revivor, and partly a ſupplemental bill*, both to review the former decree and proceedings, and likewiſe *to have an account of the aſſets of B.* and thereout *to have ſatisfaction for a bond which was given for a collateral ſecurity with* the mortgagee. [363] To this bill the *executor of B. pleads* the former decree in bar, that the plaintiff *elected his ſatisfaction, and had not ſo much as ſuggeſted that that ſatisfaction was deficient*; *ſo that* it does not appear but that *he may receive a double ſatisfaction* for his debt, and that it was plain that he *had not waved the mortgage by his bill of revivor*. A. inſiſted that it was the practice of the Court, that taking out of proceſs, or making uſe of any counter ſecurity, was in itſelf *a waver of the foreclosure*, and that a mortgagee had always his *election to wave* and open the foreclóſure, and have recourſe to his bond or covenant, if he thought proper. But per Cur. the plaintiff by his revivor has not waved the mortgage, or ſo much as ſuggeſted a deficiency; ſo that the plea muſt ſtand for an anſwer without liberty to except. G. Equ. R. 186. Hill. 12 Geo. 1. Birch's Caſe.

(C) To *Bills of Diſcovery of Perſonal Things.*

See (E) pl. 1. 2.

1. BILL was brought againſt a *clerk of a company* to produce the company's books of account; he pleaded that *he is ſworn not* to ſhew or deliver the ſaid books without the conſent of the maſter and wardens &c. And becauſe the other defendants might be compell'd to produce the ſaid books, the plea was allow'd. Fin. R 24. Mich. 25 Car. 2. Gregg and Stileman governors of Tunbridge ſchool in Kent & al. v. Cotton & al. defendants.

2. Bill was brought againſt an *executrix of an executrix to diſcover* the perſonal eſtate of the firſt executrix, ſuggeſting that 'twas the intention of her teſtator that a moiety of the eſtate, of which ſhe ſhould be poſſeſs'd at her death, ſhould go to and

be divided among the plaintiffs &c. The defendant pleaded that ſhe was made executrix of the firſt executrix; and demurs, for that her *teſtator had no power to impoſe on her how to diſpoſe her eſtate*, and that ſhe had taken an oath truly to adminiſter. The plea and demurrer were both allowed. Fin. R. 31. Mich. 25 Car. 2. Cowpland & al. v. Carter.

3. Bill was brought to *diſcover the perſonal eſtate of an inteſtate*, who was the plaintiff's grandfather; defendants pleaded a *deed of bargain and ſale from one adminiſtrator* under whom they claim, and that *one of the defendants is adminiſtrator likewiſe* to the ſaid inteſtate; and demurr'd, for that the *plaintiff has no title*. And the Court allowed both the plea and demurrer. Fin. R. 44. Mich. 25 Car. 2. Newman v. Holder.

4. Bill was brought for an *account* of the ſale of *goods taken in execution* at an *under-value*, and of the *equity of redemption* of a mortgage, and of *money received to compound debts*; the defendant pleaded that before he bought the goods of the ſheriff, and afterwards, they were *offered to the plaintiff at the ſame price* for which he bought them; and pleaded a *releaſe of the equity of redemption* of the mortgage for 600l. paid, and a receipt given, and a *general releaſe* from the plaintiff to ſuch a day, and that the releaſe was without fraud; and that by his anſwer he has given an account of what monies he received to compound the debts of the plaintiff. And the pleas were allowed. Fin. R. 111. Hill. 25 Car. 2. Dean v. Gavel, Briggs & al.

5. *Releaſes* given on payment of portions were pleaded to a bill of *diſcovery and account* of a will, and the rents and profits of the teſtator's real and perſonal eſtate, but without ſetting forth that there was any *diſcourſe concerning the* eſtate or lands of the teſtator when the releaſes were executed: the word plea was ordered to be ſtruck out, and defendant to anſwer the bill; but as to the other part of the bill, which demanded an account of
[364] the rents and profits of the lands, the defendant was not to anſwer, unleſs on hearing the Court ſhould think fit to decree an account thereof. Fin. R. 117. Hill. 25 Car. 2. Ld. Herbert and Brownlow v. Mountague.

6. Bill was brought by *a judgment creditor's adminiſtrator, to diſcover* the inteſtate's perſonal eſtate; the defendant put in an inſufficient anſwer, and ſome time after pleaded that *adminiſtration was ſince granted to another* by the Prerogative Court, which was a repeal of the adminiſtration granted to the plaintiff, that being out of an *inferior court*. But the plea over-ruled with coſts. Fin. R. 233. Mich. 27 Car. 2. Carliſle v. Hardreſs the widow of the inteſtate.

7. Bill was brought to *diſcover a debt, the bond* given for ſecuring the payment thereof on the ſtating the account *being loſt*; the defendant pleaded the *ſtatute of limitations*, and demurr'd, for that the *plaintiff did not make oath of the bond's being loſt*, and not to be found. And the plea and demurrer was allowed. Fin. R. 266. Mich. 28 Car. 2. Latchwell v. Foſter.

8. Bill was brought *againſt an executor of a citizen* of London by

by one intitled to a ſhare, for an account: the defendant pleaded an *inventory and diſcharge by the Court of Orphans*, and that having afterwards received more money, plaintiffs and executor accounted, and gave the executor a *releaſe of all actions*, ſuits and demands whatſoever relating to the ſaid account. The Court thought this *an iſſuable plea*, and not in bar, and that the plaintiff might reply to it, and take iſſue, as he ſhould be adviſed, without coſts on either ſide. Fin. R. 327. Mich. 29 Car. 2. Banks v. Banks.

9. Bill of *diſcovery* was brought *by adminiſtrator* for the perſonal eſtate; the defendant pleaded that the *adminiſtration is litigated* on account of a will produced, in which the adminiſtrator is made executor; but the plea was over-ruled, as containing no equity. Vern. 106. Mich. 1682. Wright v. Blicke.

(D) To Bills of Diſcovery *of Titles.*

See (F) pl. 4

1. BILL was brought to *diſcover the title of a member of parliament* to lands, ſuggeſting that they were conveyed to him *on purpoſe to hinder proceedings at law by his privilege*. He pleaded a *mortgage* from another of the defendants for a conſiderable ſum of money *not paid*, and ſo diſcovers nothing whereof the plaintiff prayed a diſcovery as to his title, eſtate, or intereſt in the premiſſes; but the Court over-ruled the plea, and ordered him to anſwer the bill. Fin. R. 205. Hill. 22 Car. 2. Holland v. Bludworth and Parker.

2. A bill was brought to *diſcover a title* to lands, *and a releaſe*. The defendant ſets forth the date of the deed, and that the *plaintiff for a valuable conſideration conveyed to defendant's father*, and then ſets forth a *verdict* on full evidence, and pleaded the ſame in bar thereof, and of all other demands in the bill, and demurs as to the diſcovery of the purchaſe deed, it being the plaintiff's own act, and will ſerve only to help to impeach the ſame if there ſhould be any defect in the body of the deed, or in the form of executing thereof; and to diſcover the *names and habitations of the witneſſes* would be to give the plaintiff and the other defendant ward an opportunity of *tampering* with them in order to ſtifle their evidence. The Court allowed both plea and demurrer. Fin. 205. Hill. 22 Car. 2. Hellam v. Grave.

3. Bill was brought to *diſcover a title to a term for years*, the plaintiff claiming the reverſion. The defendant pleaded that *he is ſeiſed of the inheritance* by ſeveral conveyances for valuable conſiderations, and has *enjoyed quietly for* 50 *years*. The Court [365] allowed the plea, but left the plaintiff to reply, and proceed as he ſhall be adviſed. Fin. R. 266. Mich. 28 Car. 2. Peacock v. Neale.

4. Bill was brought to *eſtabliſh an old ſettlement*. The defendant pleaded that tenant in tail in poſſeſſion levied a *fine, and* ſuffered a *common recovery* to bar the entail, and declared the uſes to himſelf and his heirs; the plea was allowed, with liberty for plaintiff

plaintiff to reply. Fin. R. 306. Trin. 29 Car. 2. Roſs & Pudſey and Stephens.

5. Bill was brought by iſſue in tail to *diſcover a ſettlement*; the defendant pleaded that the *plaintiffs are baſtards*. And a trial at law was directed upon that point, and that defendants pay the plaintiffs 50l. to carry it on; but the money not being paid, nor the trial had, the plea was over-rul'd. Fin. R. 324. Mich. 29 Car. 2. Devereux v. Devereux and Thelwell.

6. Bill was brought to *diſcover deeds* concerning lands which the plaintiff claim'd as heir. The defendant pleaded that a *fine was levied, and the uſes declared by deed*, under which the defendant and his anceſtors had *quiet enjoyment for* 60 *years*; and demurr'd, for that the plaintiff hath *not ſet forth the time when any ſettlement was made* by the anceſtor, and under which the plaintiff claims a title, nor *the date* thereof, nor that the plaintiff, nor thoſe under whom he claims were in *poſſeſſion of the premiſſes for* 60 *years* before the bill, nor when they were in poſſeſſion; and both plea and demurrer were allowed. Fin. R. 336. Hill. 30 Car. 2. Fith v. Courtney.

7. Bill was brought to *diſcover a title to a houſe in London burnt down in* 1666. The defendant pleaded a *decree of the Court of Judicature* for rebuilding the city, and demurs; for that the plaintiff is *barred by the ſtatute for rebuilding*, and if not barred he has a proper remedy *at law* as any other reverſioner hath, the privity being made and continued by act in law. The Court over-rul'd the plea and demurrer, and ordered an anſwer in chief. Fin. R. 427. Mich. 31 Car. 2. Culpepper v. Wigg & al.

8. Mortgagees brought a bill to *diſcover ſettlements*, and *what eſtate the mortgagor had* in him. The defendants pleaded two ſeveral ſettlements whereby the mortgagor *was only tenant for life*; the plea was over-ruled, becauſe the defendants did not *offer by way of anſwer to admit the tenant for life to be dead*, that ſo the plaintiffs might try the validity of theſe ſettlements at law; for if they ſhould expect till tenant for life be dead, their witneſſes that could prove the fraud might be dead likewiſe. Beſides, the defendants pleaded theſe ſettlements to be made after marriage, in purſuance of promiſes and agreements made before marriage, and did not ſet forth what thoſe promiſes and *agreements* were. Vern. 139. Hill. 1682. Ld. Keeper & al. v. Wyld & al.

(D. 2) To Bills of Diſcovery *of Truſts.*

1. BILL was brought for *diſcovery of a truſt* of an eſtate purchaſed, and if defendant had not the money from the eſtate of the ſuppoſed ceſty que truſt the anceſtor of the plaintiffs, and to have an *account*. The defendant denied the truſt, and as to the money he pleaded a *releaſe of all demands* concerning any money received or diſburs'd by him for (Mr. Cook) the anceſtor, or for or concerning Mr. Cook's eſtate; and that if any

of

of the purchaſe-money was raiſed out of his eſtate, it was intended to be releaſed thereby, and demurred; for that if the money was raiſed out of Mr. Cook's eſtate, it was not ſufficient to raiſe a truſt, or to diſcharge the defendant againſt the *executors* of Cook; becauſe they were *not parties* to the ſuit; and that defendant ought not to diſcover the profits *till the truſt be proved*. Ordered, that till a probable proof be made of the truſt, the demurrer ſhall ſtand. But as to making the executors of Cook parties, the demurrer was over-ruled. Fin. R. 4. Mich. 25 Car. 2. Aſtley v. Fountain.

2. Bill was brought to *diſcover* on what *truſt* a leaſe was made; [366] the defendant pleaded a *decree* made *againſt the plaintiff*, and a *diſmiſſion of a former bill*; and demurs, becauſe it is to *draw again into examination a matter already determined*; and for that *a decree cannot be altered by an original bill*; but in this caſe the plaintiff having got to himſelf a *new title* by purchaſing in the fee and the original leaſe, he ſtands in the place of the feoffor and his original leſſee, ſo that now ſuch diſcovery is juſt and reaſonable; and ordered the defendant to anſwer as to the truſt charg'd between the defendant and the original leſſee, and on what truſt the leaſe was aſſigned to him, and if after payment of the money the eſtate was to return; and the benefit of the plea was ſav'd to the hearing the cauſe. Fin. R. 228. Trin. 27 Car. 2. Aſtry v. Ballard.

(E) To Bills of Diſcovery. *Want of Parties.*

See (D. 2) pl. 1.

1. BILL was brought *againſt an adminiſtrator* by a creditor to diſcover judgments, ſuggeſting them to be fraudulent; the defendant pleaded the ſtatute of *limitations*, and that before the exhibiting the bill, *his adminiſtration was repealed by ſentence* in the Prerogative Court, *and adminiſtration granted to another* during the minority of the children, and that neither *the children or their guardians are made parties* to the bill. The Court allowed the plea as to the perſonal eſtate, but over-ruled it as to the *real eſtate*. Fin. R. 243. Hill. 28 Car. 2. Davis and Harvey v. Dee &c al.

2. Bill was brought by a judgment creditor to *diſcover the eſtate of* the debtor, who was dead *inteſtate*. Defendant demurred, becauſe the *adminiſtrator is not made a party*, the defendant being only debtor to the inteſtate, and alſo pleaded the ſtatute of *limitations*, the contract between the defendant and inteſtate being above ſix years ſince, and both the plea and demurrer were allowed. Fin. R. 303. Trin. 29 Car. 2. Rumney v. Mead.

See Purchaſor. (F) To Bills of Diſcovery. *That he is a Purchaſor* &c.

1. BILL was brought by *aſſignee of an equity of redemption* againſt the mortgagee and mortgagor to *ſet aſide a releaſe* made to the mortgagee in fee after notice of the aſſignment. Mortgagee pleaded the *releaſe for a valuable conſideration*, and that the *mortgagor had brought his bill* for a reconveyance (which was decreed, but after diſmiſſed by conſent of mortgagor and mortgagee), and that the ſaid bill was diſmiſſed, and the ſaid *diſmiſſion ſign'd and inroll'd*. The plea was allow'd, but left the plaintiff to reply, and take iſſue if he thought fit. Fin. R. 46. Hill. 25 Car. 2. Madge v. Wheeler and May.

2. Bill was brought to *diſcover a title*; the defendant pleaded *two verdicts* (whereof one was at bar) *and judgments* in ejectment by his father, *and a writ of poſſeſſion*, and a conveyance to B. for a valuable conſideration, and a conveyance by B. for a valuable conſideration to the plaintiff. The plea was allowed, and bill diſmiſſed with coſts. Fin. R. 70. Hill. 25 Car. 2. Pitt and Lady Chandois v. Hill and Broadway.

3. A. indebted to B. in 260 l. *aſſigns over to B. the benefit of a decree againſt C.* Afterwards A. *agreed with C. to releaſe to him* all benefit of the decree, and all ſuits and demands. B. brought his bill to *ſet aſide the releaſe*. C. pleaded the releaſe for a valuable conſideration, and that he had *no notice*. The Court allowed the plea; and there being ſeveral ſecurities mentioned in the releaſe as made over by C. to A. in conſideration of ſuch releaſe, decreed thoſe ſecurities to be made good to the plaintiff B. to enable him to receive ſatisfaction for the 260 *l.* and A. and
[367] C. covenant not to releaſe ſuch ſecurities till B. is ſatisfied. Fin. R. 218. Trin. 27 Car. 2. Hookes v. Simball.

4. Bill was brought to *diſcover a title*, and to *examine* witneſſes *de bene eſſe*. The defendant pleaded that he is a *purchaſor* for a valuable conſideration, and without notice; and demurr'd as to the examining witneſſes, for that he is a real purchaſor, and the plaintiff *may compel the witneſſes by a particular ſtatute* to appear in any Court to give their evidence, or recover damages againſt them. The Court allowed the plea and demurrer, and that ſuch depoſition as had been already taken de bene eſſe be ſuppreſſed. Fin. R. 255. Trin. 28 Car. 2. Everenden & al. v. Vanacre & al.

5. A *conveyance* was made in conſideration of 250 l. The bill ſuggeſted that it was in truſt for the plaintiff and *no money paid*, but that it was to ſcreen the plaintiff from other creditors, and therefore prays a *re-conveyance*. The defendant pleaded that the plaintiff was indebted to him by bond 250 l. which *bond defendant delivered up to plaintiff*, and thereupon plaintiff gave defendant a *releaſe of all his right &c.* The Court ordered, that if defend-

defendant would positively ſwear that plaintiff was indebted to him 250l. for money really lent and paid before the bond given, and that all was due when the conveyance was executed, then the plea ſhould be allowed. Fin. R. 335. Hill. 30 Car. 2. Hart v. Hergard.

6. The defendant pleaded that he was a purchaſor bona fide for a valuable conſideration; but there being ſeveral *badges of fraud* alleged in the bill, which the defendant *denied in the plea, and not by way of anſwer*, the plea was over-ruled. Vern. 185. Trin. 1683. Price v. Price.

(G) *Former Suits, Decrees &c.*

See (D. 2) pl. 2.

1. A *BILL was firſt preferred in the Court of Requeſts*, and the ſame being miſtaken, another was preferred in Chancery; the defendant pleaded the proceedings in that Court. But it was over-ruled. Toth. 84. cites 9 Car. Samuel v. Samuel.

2. Bill was brought by an heir againſt leſſees to have an account of profits, and dies; the next heir (an infant) revives the ſuit. The account is ſettled, and the infant at 19 years old and his guardian take 93l. ſurplus of the profits from the leſſees, purſuant to the decree. The infant coming of age takes adminiſtration to him to whom he was heir, and exhibits a bill original without taking notice of the former ſuit. The defendant, the ſurviving truſtee, pleaded the *former decree and payment* in bar; and the queſtion was, whether the plaintiff, *having had account as heir, ſhall have it again as adminiſtrator?* and the plea over-ruled. 3 Ch. R. 77. 1072. Strickland v. Lock.

Nelſ. Ch. R. 149. S. C. by name of Strickland v. Laſke.

3. Bill was brought by the heir at law to *diſcover a revocation of a will*, under which the defendant claimed as a *purchaſor*, and pleaded *another bill in the Exchequer for the ſame matter*, and after a full hearing *diſmiſſed*, and the diſmiſſion *ſigned and inrolled*. The plea was allowed. Fin. R. 102. Hill. 25 Car. 2. Baſſett a's. Seymour v. Noſworthy.

A decree was obtained in the *Exchequer againſt two* of the *inhabitants of Bridgnorth, to eſtabliſh a cuſtom for all the inhabitants* there *to grind at the King's mills*; and this *decree* was *had without any trial, and* afterwards *affirmed in the Houſe of Peers*; and now this *bill* was brought in Chancery *by other inhabitants* of Bridgnorth, to prevent multiplicity of ſuits, and to examine witneſſes in perpetuam rei memoriam, and to diſcover evidences in the defendant's hands. And in the bill they deny that there is any ſuch cuſtom for grinding &c. and alledge that the former decree in the Exchequer was obtained by colluſion, and that the defendants would not bring any action at law, 'till the plaintiff's witneſſes were dead; and they likewiſe pray a diſcovery, whether the inhabitants in new foundations, as well as old, are obliged to grind at the King's mills? To this bill the defendants pleaded the former decree in the Exchequer, and affirmance of the Houſe of Peers in bar, and alſo demurred to the bill, but had not, as was affirmed, denied the colluſion charged by the bill; and the Court held, that the tenor of the bill was directly to queſtion the juſtice of the former decree, and that the charge of colluſion need not be anſwered, being only inſerted to give the Court juriſdiction; and if there was any redreſs, it muſt be by application to the Houſe of Peers. Mich. 1699. Abr. Equ. Caſes 135. Jay & al. v. Braine. [368]

4. A *former bill* depending was pleaded in bar to a *ſecond*; but though both bills were of the ſame matter and effect, *the*

latter had ſome new matter. Ordered, that ſince the plea was good, the plaintiff ſhould pay the uſual *coſts* of a plea allowed. But the defendant to anſwer the ſecond bill, and the former bill diſmiſs'd with 20 s. coſts. Chan. Caſes 241. Mich. 26 Car. 2. Crofts v. Wortley.

Tr. 27 Car. 2. Fin. R. 231. In Caſe of Coke v. Biſhop and Verdon.

5. Defendants pleaded a *former decree* made in a cauſe, in which defendants were plaintiffs, (but againſt another perſon not party to this ſuit, and the now plaintiff was no party to that), and confirmed upon an appeal; and demurs, for that this bill *contains the ſame matters* as were in iſſue in the former cauſe. And the plea and demurrer was allowed. Fin. R. 124. Mich. 26 Car. 2. Rutland v. Brett.

6. Defendant pleaded *a former bill depending*, and brought by the ſame plaintiff for the ſame matter, and demurred; for that there was *no equity* in the bill, and that the ſame being 200 ſheets of paper, was ſtuffed with repetitions, *tautologies, and impertinencies.* The plaintiff's counſel inſiſted that by reaſon of the demurrer he could not procure a *reference to the Maſter*, to examine if a former ſuit was depending or not; ſo the demurrer was over-ruled with coſts, and a reference to the Maſter to examine into the former and this bill, and if he found it for the ſame matter, then to tax coſts for defendant. Fin. R. 179. Mich. 26 Car. 2. Dumford v. Dumford.

7. Plea of a *former decree*, and that defendant made conveyances purſuant to it; and demurr'd, for that the plaintiff is concluded by the former decree, and therefore ought not to *bring an original bill for any matter in iſſue in a former cauſe.* Fin. R. 230. Tr. 27 Car. 2. Coke v. Biſhop.

8. Bill was brought to be relieved for goods in the defendant's hands. The defendant pleaded a *former bill for the ſame matter*, which upon hearing the cauſe was *diſmiſſed*, and an *action* brought for the ſame matter, in which the *plaintiff was non-ſuited*, and that there was a *judgment after a verdict* on full evidence, which was affirmed in error; and the plea was allowed. Fin. R. 239. Mich. 27 Car. 2. Cornel v. Warren and Ward & al.

A decree of diſmiſſion may be pleaded in bar to a new bill, tho' not ſigned and inrolled. Vern. 310. Hill. 1684. Pritman v. Pritman.—It is not neceſſary in a plea of a *former ſuit* brought for the ſame matter to aver that ſuch ſuit is ſtill depending, and ſuch plea ought to be referr'd to a Maſter to examine the truth of it, and ſuch plea is always put in *without oath.* Vern. 332. Trin. 1685. Grim v. ....

9. A former decree being pleaded in bar, it was objected that the *diſmiſſion and decree* could not be pleaded *in bar*, becauſe the decree was *not ſigned and enrolled*, and if defendant would have it that it was a ſuit ſtill in being, then the plea was a plea in abatement only. But per Ld. North either that ſuit was for the ſame matter as the preſent, or not; if not, you ought to have moved to have had the *plea referred*; but if it is, then that ſuit is either depending or determined, and either way is pleadable. Vern. 310. Hill. 1684. Pritman v. Pritman.

10. A plea of a *former ſuit* depending here for the ſame matter, *need not be ſet down with the regiſter*, being a matter record-

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ed in this Court: but if the plaintiff be not ſatisfied with the plea, it ſhall be *referred to a Maſter to certify* the truth thereof; and if it be determined againſt the plaintiff, he ſhall pay the defendant 5 *l. coſts*. P. R. C. 281.

S. P. Curſ. Canc. 176.—An original bill had been brought by an adminiſtrator of a judgment-creditor; the adminiſtrator died, and a bill of revivor was thereupon brought by the executor of the adminiſtrator. This bill was thought to be wrong, and thereupon another bill of revivor was brought by the ſame plaintiff, having taken out adminiſtration de bonis non to the judgment-creditor himſelf, and in the ſecond bill of revivor deſcribed himſelf as executor to the adminiſtrator, and likewiſe as adminiſtrator de bonis non of the original judgment-creditor. To this ſecond bill of revivor, the pendency of the former bill was pleaded; thereupon it was referred to a Maſter, to examine [369] whether theſe two bills were for one and the ſame matter. The Maſter made a ſpecial report, whereby he certified that the latter bill related to the ſame matter, and that they were both brought by the ſame perſon; but that they were brought by him in the different rights that have been mentioned. Thereupon it was moved, that the firſt bill of revivor might be diſmiſs'd with 20*s.* coſts; that the plea might be ſet aſide, and that the ſuit might ſtand revived on the ſecond bill.—Lord Chancellor. The practice under this order has been, that when a reference is made to a Maſter of a plea of the pendency of a former ſuit for the ſame matter, if the Maſter reports that both bills are for the ſame matter, the plea ſhall be allowed and the party is intitled to coſts, and the plea, in ſuch caſes, cannot be ſet down to be argued; for then there would be two dilatories; but the plea is ipſo facto overruled; and thereupon the plaintiff takes out a ſubpœna for 51. coſts, in like manner as upon the arguing of a plea. In the preſent caſe, the Maſter has done neither of theſe things; for he has only made a ſpecial report, and left the matter to be determined by the Court. Thereupon the matter now comes on by motion; and one part of it is, that the plea may not ſtand in the way; and the foundation of this part of the motion is, that where the ſame perſon ſues in different rights, it is the ſame as if there were different perſons; and this is certainly true, for which reaſon the plea muſt be ſet aſide. However, it muſt be ſet aſide with coſts for two reaſons; 1ſt. becauſe the plaintiff gave ſome colour for the plea, by bringing the firſt bill of revivor wrong; and 2dly, becauſe, in the ſecond bill of revivor, the plaintiff deſcribed himſelf executor to the adminiſtrator, as well as adminiſtrator de bonis non to the original judgment-creditor. Barn. Ch. Rep. 83, 84, 85. Paſch. 1740. Huggins v. the York-Buildings Company.

11. Such *reference* muſt be procured by the plaintiff, *and a report* thereon, *within a month* next after filing ſuch plea; otherwiſe the bill ſtands diſmiſs'd of courſe, with 7 nobles coſts. P. R. C. 281.——S. P. Curſ. Canc. 176.

12. If a *ſuit* be depending *at common law*, or in any other inferior court, it *may be pleaded*, and the defendant ſhall not be put to a motion for an election or diſmiſſion: *and* ſuch plea ſhall be *proceeded in as a plea of a former ſuit depending in this Court* between the ſame parties for the ſame matter. P. R. C. 281.

S. P. Curſ. Canc. 176.

13. One *Pordant* had *brought a bill* in the Court of Chancery againſt the defendants *for ſeveral ſhares* in their ſtock, *and after ſold a ſixth part* of what he was intitled to from the defendants *to the plaintiff*, who now brought this bill for his ſixth part: the defendants *pleaded* that *Pordant had before brought his bill for ſeveral ſhares, of which the plaintiff's now demand was part, and* that the former ſuit was *ſtill depending; but* becauſe he had *not averred that the defendants had appeared* to the former ſuit, or put in their anſwer, *or* that they were *ſo much as ſerved with proceſs* to appear, the plea was diſallowed; for 'tis no ſuit depending till the parties have appeared, or been ſerved to appear, but only a piece of parchment thrown into the office, which may lie there for ever, and never become a ſuit; but if the former ſuit depending had been well pleaded, the Court was clear of opinion it would have been a good plea, tho' the bill was brought by another perſon, and not by the now plaintiff; for otherwiſe the plaintiff in the other ſuit, after his bill brought, might aſſign

his ſhares to 20 ſeveral perſons, who might each of them bring ſeveral bills, and ſo harraſs the defendants for what the firſt ſuit was ſufficient. Abr. Equ. Caſes 39. pl. 14. Trin. 1729. between Moor and Welſh Copper Company.

(II) That it is a Matter at *Law*.

1. BILL was brought to be relieved againſt a verdict and judgment: the defendant pleaded the *verdict and judgment*, and that all the matters prayed in the bill were *examined at law*; and to another part of the bill, which ſeeks relief for the defendant's *diet and lodging* at the plaintiff's houſe, the defendants demur, for that the plaintiff has her *remedy at law*. The plea was diſallowed, and defendants ordered to anſwer, and that the plaintiff ſhould be concluded by ſuch anſwer, and if defendants ſhall not in their anſwer diſcover that ſome of the goods for which they had got a verdict do belong to the plaintiff, then plaintiff ſhall pay them full coſts of ſuit. But the demurrer was allowed. Mich. 26 Car. 2. Fin. R. 171. Armſted v. Parker & Ux.

[370] 2. Bill was brought to be relieved againſt a *judgment irregularly obtained*; the defendant pleaded *the judgment*, and likewiſe demurred; for that if the judgment was obtained as ſuggeſted, *it is examinable only in the Court where it was obtained*, and not in this Court. The Court allowed both the plea and demurrer. Fin. R 204. Hill. 27 Car. 2. Huddleſtone v. Aſbugg.

3. Bill was brought to be relieved againſt a *writ of inquiry executed without notice* given to him or to his attorney, and that the judgment was not fairly obtained; defendant pleads and demurs, for that the *remedy is at law*, and plea and demurrer allowed. Fin. R. 335. Hill. 30 Car. 2. Boyce v. Lomax.

4. Indeb. Aſſ. was brought for goods ſold and delivered, and a verdict for the plaintiff; the defendant brought a bill ſuggeſting that he was maſter of the buck hounds, and *acted only in relation to his office*, and that the King ought to pay for thoſe goods; the defendant pleaded the *verdict and judgment*, and that the plaintiff had inſiſted on the ſame matter at law, where it was ruled with him, and that a writ of error being near ſpent, he now brought this bill *for delay*; and demurred, for that the matter was *conuſable at law*, and the bill contained no equity; but it was over-ruled, and defendant ordered to anſwer the bill; per commiſſioners. 2 Vern. 146. Trin. 1690. Graham v. Stamper.

(I) *Limitations. Statutes.*

1. BILL was brought to have ſatisfaction for 220 l. paid by plaintiff's huſband for the uſe, and by direction of defendant's huſband, as appears by a note or letter wrote by de-

fendant's

fendant's husband to plaintiff's husband 22 years before, and charges the defendant to set forth, whether the note now insisted on be not the proper hand writing of her husband, and further charges her with assets sufficient to pay &c. The defendant pleaded the *Stat.* 21 *Jac. of limitations*; but per Cur. this plea is not good, because plaintiff charges a *discovery of the note*, and if it is her husband's hand writing; and ordered the defendant to answer to that matter, and that the plaintiff might proceed at law on the note as he shall be advised. Fin. R. 14. Mich. 25 Car. 2. Downing v. Kirby.

2. Bill was brought by a judgment-creditor to *discover the estate* of the debtor who was dead *intestate*. Defendant demurred, because the *administrator is not made a party*, the defendant being only debtor to the intestate, and also pleaded the statute of *limitations*, the contract between the defendant and intestate being above six years since; and both the plea and demurrer were allowed. Fin. R. 303. Trin. 29 Car. 2. Rumney v. Mead.

3. A bill was brought for an account of a real and personal estate, and to have the same applied towards satisfaction of a debt; the defendant pleaded the statute of limitations. The Court decreed, that where both estates are subjected to the payment of debts, if the personal is sufficient, the real is no further to be accounted for; but if the *real estate is expressly charged* with the payment of *debts*, then so long as it remains subject to the payment thereof it will *draw both estates to an account at any time*; because the personal estate ought in the very nature of the thing to go in ease of the real estate, and therefore the statute of *limitations* cannot interpose or be any bar to an account thereof; and so over-ruled the plea as to the statute. Fin. R. 458. Trin. 32 Car. 2. Davis v. Dee.

(K) Outlawry. [371]

1. WHere a man was outlawed, and *sued as executor to another*, the plea to the same was over-ruled. Toth. 139. cites 12 Jac. Arnold v. Arnold.

Outlawry *in a plaintiff, executor* or administrator is no good plea; for they sue in auter droit. P. R. C. 277.——S. P. Vern. 184. Trin. 1683. Killigrew v. Killigrew.

2. A plea of *outlawry* was over-ruled because it was not put in upon oath. 2 Vern 37. Hill. 1688. Parrot v. Bowden.

Being only the common averment of identity of person it was allow'd good without oath; per Cur. Ibid. 198. Mich. 1690. Took v. Took.—— Ruled accordingly by Ld Keeper. Chan. Cases 258. Hill. 26 & 27 Car. 2.

3. An information is exhibited by the attorney-general of the Dutchy Court in behalf of one part owner of coal mines against the other for not contributing to the charge of working them, by which the King would lose his duty; the defendant pleads

outlawry in the relator, and held good; for the relator is to have the whole benefit or loſs of the ſuit, and the King not directly concerned, and very little by conſequence. Ch. Prec. 13. Trin. 1690. Attorney-General at the relation of Vermuden v. Sir John Heath.

4. If outlawry is pleaded, the record or capias thereupon muſt be pleaded *ſub pede ſigilli*, and is uſually annexed to the plea. P. R. C. 276.

5. The defendant may plead and *ſhew as many* outlawries *as he can*. P. R. C. 277.

S. P. Curſ. Canc. 175. 6. If the outlawry pleaded be *in a ſuit for that very duty*, or thing *for which relief is ſought* by the bill, the plea will of courſe be diſallowed, and the plaintiff ſhall have a ſubpœna againſt the defendant for five marks coſts, and to make a better anſwer. P. R. C. 277.

S. P. Curſ. Canc. 175. 7. If a plaintiff think a plea of outlawry inſufficient thro' miſpleading, or otherwiſe, he may, upon notice to the clerk of the other ſide, *ſet it down with the regiſter for the judgment of the Court*; but if *within eight days after filing the plea the plaintiff do not ſo enter it* with the regiſter, the defendant may take out proceſs for five marks coſts, as if the plea had been argued; for the defendant is not bound to ſet it down, ſeeing it is a matter pleaded under ſeal. P. R. C. 277.

S. P. Curſ. Canc. 175. 8. After the outlawry is *reverſed*, the defendant, on a *new ſubpœna* ſerved on him, *and* 20*s. coſts* paid him, ſhall anſwer the bill. P. R. C. 277.

(L) *Releaſes.*

1. A. Contracted to ſell land to B. and B. aſſigned it to C. Upon a bill A. had a decree againſt B. for performance, he being the party to the contract, but decreed that *C. ſhould ſtand in place of B. and indemnify him againſt that and all other decrees*. After this *B. and C. came to an account, and mutual general releaſes given, in which* the words, *all orders and decrees* of the Court of Chancery are inſerted; afterwards upon petition *A. has an order for intereſt from the time of B.'s taking poſſeſſion*, amounting to 700l. *founded upon the decree made before the releaſes were given*. B. brings his bill to compel C. to pay it, he being by the decree to ſtand in B.'s place. C. pleaded *this releaſe ſubſequent to the decree*, and it was allowed per Cur. tho' it was not
[372] taken notice of at the time of ſtating and ſettling the accounts. G. Equ. R. 184. Hill. 12 Geo. 1. Waters v. Glanville.

2. A bill was againſt an executor to have an account of aſſets and ſatisfaction of a debt of 660l. ſecured by judgment againſt the teſtator, alleging a devaſtavit &c. The defendant by ſchedule ſet forth the aſſets, and denied by her anſwer any waſte; and for plea to any relief ſaid, *that teſtator was in execution on the ſaid judgment* in his life-time, *and was diſcharged from thence by the expreſs order of the plaintiff*, and therefore pleaded ſuch diſcharge

charge in bar, ſuch diſcharge being a releaſe of the debt both in law and equity, and the plea was allowed. G. Equ. R. 190. Paſch. 12 Geo. 1 Beatniff v. Gardiner.

(M) *After Verdict, Nonſuit, Judgment* &c.

See (H) pl. 1, 2.

1. A Demurrer, becauſe the defendant had *execution at law*, over-ruled. Toth. 139. cites 10 Jac. Artſon v. Wolverſton.

A. *won* of B. *at cards* 15 *l.* which B. *upon account did own to be due* to A. Whereupon A. *brought* his action of the *caſe* and declared on an indebitatus aſſumpſit for 150l. and upon an inſimul computaverunt for 150l. To which B. pleaded non aſſumpſit, and on a trial a *verdict paſs'd for* A. *for* 150*l. damages*, and he hath ſince taken out judgment and execution. B. brought a bill; but in reſpect there were only damages recovered, whereof the jurors were the proper judges, and for that the bill was exhibited after judgment and execution, A. demurs and pleads, and demands judgment, whether he ſhall farther anſwer that part of the plaintiff's bill as concerns the verdict and judgment. This Court allowed the plea and demurrer. Chan. Rep. 243, 244 15 Car. 2. Hunby v. Johnſon.

2. Bill was brought for a *modus* of 15*s.* per ann. in lieu of tythes, the defendant pleaded a *verdict and judgment* in debt, on 2 E. 6. .... againſt one of the defendants for not ſetting forth tythes &c. and the plea was allow'd. Finch's R. 13. Mich. 25 Car. 2. Bluck & al. v. Elliot.

3. Bill was brought to be relieved againſt a *verdict and judgment and an agreement ſince*. The defendants pleaded the *agreement* and a *former bill brought for the ſame cauſe diſmiſs'd*. The plea was diſallowed; but ſince defendant in the action had brought a *writ of error* on the judgment he might proceed, and if the judgment be affirmed it ſhall be with a ceſſet executio till the hearing of the cauſe, and that the plaintiff do within 4 days pay the money recovered at law, into Court, and the defendant Weſtland, who recovered at law, to give ſecurity to abide the hearing &c. Fin. R. 223. Trin. 27 Car. 2. Child v. Weſtland and Ingram.

4. Bill was brought to ſupply a defective execution of a power to make leaſes. The defendant pleaded, that *upon a ſpecial verdict at law, judgment was given that the leaſes were void*. The plea was allowed and the bill diſmiſſed. Fin. R. 275. Hill. 29 Car. 2. Temple v. Lady Baltinglaſs.

5. The defendant pleaded that the plaintiff here was *nonſuited at law* on full evidence. As to the validity of the plea no certain rule was given. Vern. 77. Mich. 1682. Wilcox v. Sturt.

6. The *aſſignee* of a leaſe rendring rent, *having enjoy'd* the land 6 *years*, *aſſigns over*. The bill was to call him to an *account for the rent*, for ſuch time as he had enjoy'd the land; the defendant pleaded judgment upon a demurrer at law; and the plea was over-rul'd: for tho' in ſtrictneſs of law there is no privity of contract to charge the aſſignee, yet in equity he is moſt certainly chargeable for ſuch time as he received the profits. The counſel alleged, there were 20 precedents in the caſe, and the Ld. Keeper ſaid if there had not been one he ſhould not have doubted

doubted to have made a precedent in this caſe. Vern. 165. Paſch. Treackle v. Coke.

7. After 2 nonſuits and a verdict for the defendant on iſſue, *within age*, on debt on bond, bill was brought ſuggeſting that the regiſter on which the verdict was given was raz'd and altered. Defendant pleaded the *nonſuits and verdict*, and that the matter
[373] ſuggeſted was examined at the trial, that the verdict was *twelve years ſince*. But ordered to anſwer the bill, and mentioned the Caſe of HARDER v. SYSE, where after *five trials*, leaſe or no leaſe, it was at laſt diſcovered, that in an office poſt mortem the leaſe was found and ſet out in hæc verba. 2 Vern. 285. Hill. 1692. Garth v. Egerton.

See (C) pl. 3.

(N) Where Plaintiff ſets forth *No Title*.

1. THE plaintiff as executor or *adminiſtrator out of an inferior diocеſs* came to be relieved for a debt; the defendant pleaded, that there was *bona notabilia*, ſo that the plaintiff could give no diſcharge; and allowed ex parte; but Ld. Keeper declared, he was not ſatisfy'd of the law, but there being no body for the plaintiff, he would not defend it, and it was after reheard by Judge Archer, who again allow'd it. 3 Ch. R. 71. 1671. Knight v. Bee.

2. A. in conſideration of 500l. paid by B. covenanted to ſettle all the lands he then had, ſo that they ſhould after A.'s death come to B. and his heirs; and *that all the lands which the ſaid A. ſhould purchaſe afterwards ſhould be ſo purchaſed, and that after A.'s death they ſhould come to B. as aforeſaid; and alſo to leave him all his perſonal eſtate.* A decree was made accordingly; after which A. purchaſed *other lands*, and B. brought a bill to diſcover what lands he had before, and what he had purchaſed ſince the decree, that all may be ſettled on B. As to the lands *purchaſed ſince the decree*, A. demurred, becauſe the plaintiff has not intituled himſelf by any title accrued ſince, and the decree extended not to lands he ſhould after purchaſe, and ſo is bound by it, and the demurrer was allowed as to that part, but without coſts. Fin. R. 230. Trin. 27 Car. 2. Coke v. Biſhop.

3. A. brought a bill for *money on an agreement*, and a purchaſe made 60 years before. The defendant pleaded, that it ought to be preſum'd the money was paid, becauſe a *fine was levied 7 years after*, and the money has remained without any demand theſe 60 *years*; and demurs, for that the *plaintiff claims not as executor or adminiſtrator, nor charges defendant as heir, executor or adminiſtrator* of the purchaſor. The plea and demurrer were allowed. Fin. R. 344. Paſch. 30 Car. 2. Heupert als. Hoopert v. Benn.

4. Bill was brought to *ſet aſide a will as irregularly obtain'd*, and to *diſcover what portion* defendant brought to the pretended teſtator. The defendant denies by anſwer, that the will was irregularly obtain'd, and pleaded the *will in bar*, and demurs, for

that

that it appears by plaintiff's own ſhewing, that he has *no title* to have ſuch a diſcovery as pray'd. The demurrer was allowed with coſts, but the plaintiff was ordered to reply to the plea. Fin. R. 397. Mich. 30 Car. 2. Loyd v. Williams v. Owens.

(O) Where the Plea muſt be *upon Oath.*

See Oath (D).

1. A *Bill* was exhibited *againſt R. H. ſupervifor* of the laſt will of T. C. and *one R. H. who was no ſupervifor* of T. C.'s will, *was ſerved with proceſs*, and alleged, that the ſaid R. H. who was the ſupervifor was dead; ordered that the defendant put in his allegation upon oath by way of anſwer, and then deſire judgment, whether he ſhall be compelled to anſwer the ſaid bill or not; and therein pray his coſts for his wrongful vexation, which ſhall be thereupon allowed to him. Cary's Rep. 87. cites 19 Eliz. Harriſon v. Haule. P. R. C. 278. S. P.

2. Where a plea is not tranſitory, the defendant may plead a *foreign plea*; but then he ought to ſwear it, otherwiſe it ſhall not be received. Sid. 234. Mich. 16 Car. 2. B. R. Collins v. Sutton. [374]

3. It was ruled, that a plea of the *privilege of Oxford* ſhould be put in without *oath*. Chan. Caſes 258. cites Mich. 26 Car. 2. The Caſe of Maſters v. Buſh.

4. Plea of *privilege* was over-ruled becauſe not put in *on oath*. 2 Vern. 83. Mich. 1688. Gibſon v. Whitacre.

5. *Baron puts in a plea in the name of him and his wife*, and ſwears to the plea, but the *wife would not ſwear to it*. The baron moved that the plea might be accepted, ſuggeſting that the wife did it by combination with her to other the plaintiff. It was ordered that the plea ſtand as for the huſband, and the plaintiff to proceed againſt the wife. Hill. 28 & 29 Car. 2. per Finch C. Chan. Cases 296. Pain v. ....

6. Pleas *in diſability of the perſon or to the juriſdiction*, need not be *upon oath*; and ſo that they be *under counſel's hand*, they ſhall be received and filed, tho' the defendant do not deliver the ſame in perſon, or by commiſſion. P. R. C. 274. S. P. Curſ. Canc. 1 7. —— S. P. Ibid. 174.

7. Pleas of any matter of record, or *of matters recorded* in this Court, need not be upon oath. But pleas in bar of *matters in pais* are to be upon oath. P. R. C. 274.

8. Where there are *matters alleged* in the bill, *to which the bar reaches not*, or ſome circumſtance relating to the matter in bar that requires a particular anſwer, as fraud &c. the defendant muſt anſwer on oath as to theſe. P. R. C. 280.

9. If a *cauſe* has been *formerly diſmiſſed* this Court, *but* the diſmiſſion *not ſigned and inrolled*, the plea of ſuch diſmiſſion muſt be upon oath; for till the inrollment it is not recorded. P. R. C. 282.

10. Defendant pleaded articles made on his marriage, and that he was a *purchaſor for a valuable conſideration*, and had no notice of the firſt ſettlement; but would not ſwear this plea; and

and ſo the plea was over-ruled. Chan. Prec. 481. Hill. 1717. Marſhall v. Frank & Ux.

(P) *Return* of the Plea. *How.*

P. R. C. 274. S. P. —S.P.Curſ. Canc. 181.

1. AN anſwer and plea taken by commiſſion, was *return'd*, *Iſta reponſio capta fuit per ſacramentum.* &c. So the plea was not on oath, and therefore rejected, but without coſts; becauſe Ld. Keeper apprehended it as the fault or neglect of the commiſſioners, who took it, rather than of the defendant. 2 Chan. Caſes 208. Mich. 27 Car. 2. Jefferſon v. Dawſon.

(Q) *Put in. At what Time.*

*S. P. and affidavit made of the party's inability to travel, or other good matter to ſatisfy the Court touching the delay. Curſ. Canc. 176. cites Ord. Chan. 121.

1. AFTER *an attachment with proclamation return'd*, no commiſſion to anſwer is to be made, nor demurrer to be admitted, * but upon *motion in open Court.* P. R. C. 274.

2. *So* neither is a *plea* in ſuch caſe to be admitted without like motion. P. R. C. 275.

3. Whether a plea can be received after defendant has *ſtood out to ſequeſtration?* MS. Tab. cites 24 March 1716. Harry v. Sample.

[375] 4. A demurrer *after a petition for time to anſwer* is irregular, but a plea is an anſwer, and is upon oath as well as an anſwer. Arg. ſaid it was ſo determined in Ld Strafford's Caſe, who pleaded after time prayed to anſwer. And the Maſter of the Rolls ruled accordingly. 2 Wms's Rep. 464. Trin. 1728. Anon.

(R) *How* the Plea or Plea and Demurrer muſt be.

1. *EXcept* the matter of the *bar be* ſingle, and *ſo full* a bar *as that the bill requires no further anſwer, the whole* matter *is* generally *ſet forth* by way of anſwer; and then ſo much of it as goes in bar is relied upon by way of plea; and this is intituled, the plea and anſwer of the defendant. Or the defendant may plead the matter proper in bar, and then add by way of anſwer, what further is neceſſary in point of fraud &c. charged. P. R. C. 274.

2. If the *defendant is doubtful, whether* if he plead the matter of his defence, *his plea will be allowed* good by the Court; he may *ſhew the whole matter by anſwer*, and then inſiſt and rely upon it almoſt as if he had pleaded it, only he is *not to call it a plea*, nor to have the benefit thereof till hearing. P. R. C. 280.

3. If a defendant do not *enter his plea with the regiſter* 8 *days after filing*, it is over-ruled of courſe, and the plaintiff may take out proceſs for an anſwer and coſts. P. R. C. 282.

S. P. Curſ. Canc. 107. —S. P. Ibid. 175. —This is *intended* of a plea *of a matter in pais*, and *not* of a matter *of record* or recorded; for it is the plaintiff's part to enter theſe if he ſo likes, elſe the defendant within eight days after filing of the plea may take out 5 marks coſts, as in outlawry. P. R. C. 282.

4. On a demurrer and plea to a bill to have an *account of the profits* of the Mendippe mines in Somerſetſhire they plead a *ſpecial act of parliament* which *had given juriſdiction* of the matters ariſing within the mines to the Courts of ..... *excluſive of all other juriſdiction*; per Ld. Chancellor the plea is not good, becauſe altho' you plead an excluſive juriſdiction, yet you do *not aver that there is any Court of Equity there*. Vern. 58. Trin. 1682. Strode v. Little.

5. A plea was held ill, becauſe it went *as to any fraud ſuggeſted &c.* and alſo becauſe it did *not aver that the accounts* which were pleaded, *were juſt and true* accounts. Abr. Equ. Caſes 39. pl. 13. Mich. 1727. Haſtings and Draper.

(S) Pleas. Of *ſetting down* the *Plea to be argued &c. and what* ſhall be ſaid *a Waver*.

1. WHERE the *plaintiff conceives the plea naught* for matter or manner, *he may* put it to the judgment of the Court, and *have it argued*. P. R. C. 281.

Or if he *think the plea good, but not true*, he may take iſſue upon it, and proceed to proofs &c. P. R. C. 282.

2. As pleas that go *to the juriſdiction*, ſo thoſe that go *to the merits*, ſhall be *determined in open Court*. P. R. C. 282.

3. If a *matter not* of record or *recorded* be pleaded, and the plaintiff deſires the opinion of the Court, whether if it be true it be a ſufficient bar, it muſt be *argued*; *and* if it be *adjudged ſufficient, and* the *plaintiff take iſſue*, the *defendant muſt proceed to prove the truth of his plea* by depoſitions, or other proofs as on anſwer &c. P. R. C. 282. [376]

4. Said, If by the defendant's neglect or default his plea is *over-rul'd*, the Court on motion or petition, in time will order it to be *re-argued*, the defendant *paying* 5 *l.* the *coſts* on over-ruling. P. R. C. 283.

5. Where a *plea* is *ordered to ſtand for an anſwer*, (as ſometimes on arguing it is) coſts are ſeldom given on either ſide, and *the benefit* of the matter pleaded *is generally ſaved to the hearing*. P. R. C. 283.

This ſeems to be *where it is* ſomewhat *doubtful* to the Court, whether there be not ſome equity againſt the matter pleaded. P. R. C. 282.

6. As no demurrer, ſo *no plea* is to be *ſet down for hearing on any certain day*, *except* the order be *brought to the regiſter* to enter 2 *days*

2 *days at leaſt before*; and after the paper of pleas &c. is ſet up in the regiſter's office, no alteration is to be made in it. P. R. C. 283.

7. The plaintiff brought his *bill to be relieved againſt a fraud* in the defendant *in cauſing a ſhip to be ſunk, upon which he had made* ſeveral inſurances, and the *plaintiff had ſubſcribed ſeveral* of the *policies*. Defendant as to part *pleads pendency of a former ſuit, and* then *anſwers to part*, and denies all the fraud charged on him by the bill: plaintiff replies generally to the anſwer, without taking notice of the plea, and witneſſes were examined on both ſides, and the *cauſe heard, and a trial at law directed which went againſt the defendant*, who petitions for a rehearing, and on the rehearing, the defendant inſiſted that the plaintiff had been utterly *irregular* in his proceedings for not ſetting down the plea to be argued, and diſpoſed of by the Court before he replied, for the plaintiff himſelf cannot take upon him to over-rule it, be it what it will, but muſt bring it for judgment before the Court, and for want of that all was irregular, and ought to be ſet aſide; but my Ld. Keeper and the Maſter of the Rolls were both of opinion, that the defendant by theſe proceedings had *waived* his plea, and therefore the proceedings regular, ſo the cauſe went on, and the former decree was affirmed. Mich. 1701. Abr. Equ. Caſes 41. Lucas v. Holder.

(T) *Over-ruling his own Plea. What* ſhall be ſaid to be.

1. A Surrender was made to a *feme covert* of copyhold lands, with a *power reſerved to her to ſurrender it to ſuch uſes as ſhe by writing or laſt will in the preſence of three witneſſes ſhould direct* or appoint. She made a will in purſuance of her power executed in the preſence of 3 witneſſes, and gave it to her daughter and heir. Afterwards ſhe made a ſurrender together with her huſband, to the uſe of her huſband and his heirs. But this was made in the preſence of 2 witneſſes only, who ſubſcribed their names (as witneſſes). But the deputy ſteward who took the ſurrender had ſet his name to it. On a bill by the huſband after the wife's death to eſtabliſh this ſurrender who would have the ſteward to be conſidered as a 3d witneſs, the daughter (defendant) pleaded a title by the will, and alſo demurred, for that the plaintiff's title, if any, was only at law, and he might bring ejectment if he thought fit; and it was objected that this plea and demurrer were for one and the ſame thing, and therefore inconſiſtent and contradictory to themſelves; for the plaintiff may reply to the plea, and go on upon that in this Court, but the demurrer ſays he has nothing to do in this Court, but muſt go to law; ſo that the one is to keep him here, and the other to ſend him to law; and tho' it is frequent to plead to one part of a bill, and demur to another part, yet it was never known that the defendant pleaded and demurred to one and the ſame part of the bill by reaſon of the inconſiſtency.

ſtency. On the plea, being firſt, it was inſiſted that gave this Court juriſdiction, and then the demurrer afterwards (to ſend the plaintiff to law) came too late; or at leaſt it was urged, that the demurrer had over-ruled the plea, and that both could not ſtand: my Lord Chancellor ſeemed to think the plea good as a plea of the defendant's title, and the demurrer good likewiſe as a demurrer to the plaintiff's title. But at laſt he over-ruled the plea and allowed the demurrer. Trin. 1728. Abr. Equ. Caſes 42. Cotter v. Layer.

[For more of Plea and Demurrer, ſee Demurrer, Diſcovery, Purchaſer, and other proper Titles.]

Plea and Pleadings.

(A) *What is*, or amounts to a Plea.

1. THE *prayer of* the *privilege of the Court* is not properly a plea; for it was anciently demanded by writ, although it be now uſually allowed by the Court upon the prayer of the party who claims it; per Latch apprentice in the Law, of the Middle-Temple. And *every plea is either* a plea *in abatement*, a plea *in bar*, *or* a plea *to the juriſdiction* of the Court; and the praying of the privilege is none of theſe, but only a deſire of the party, that he may not be ſued elſewhere than in the Court where he prays his privilege. 2 L. P. R. 314. tit. Pleas &c.

2. *Demanding of oyer* is no plea. Freem. Rep. 400. pl. 524. Mayor and Commonalty of London v. Bre.

(B) Of Pleadings in general; *Good or not.*

1. IT was agreed in præcipe quod reddat, that *plea to the writ and other pleas dilatory ſhall be good to every common intent*; becauſe they are in delay &c. And that if it may be taken to two contrary intents, it ſhall be * *taken* the *moſt ſtrongly againſt the party who pleads it*; quod nota. Br. Pleading, pl. 155. cites 32 H. 6. 12.

Br. Reſceit, pl. 133. cites S. C. —*But a bar* is good if it be good to a common intent. Ibid.

—— *But a declaration* ought to be good *to every intent* as it is ſaid elſewhere. Br. Pleading, pl. 155. cites 32 H. 6. 12.

* S. P. For every man is preſumed to make the beſt of his own caſe. 2 L. P. R. 296. tit. Pleas &c.

2. A *matter of fact* may ſometimes be a good plea *againſt matter in writing*. Br. Barre, pl. 110.

As, in *detinue* of charters the plaintiff counted on *bailment by indenture*, yet *non detinet* is a good plea. Ibid. cites 10 H. 7. 24. —— *So* in *debt* where the plaintiff counts *on a leaſe for years by indenture*, yet the defendant may plead *nil debet* per patriam. Ibid. —*So* upon an *obligation* he may plead *non eſt factum*. Ibid.

3. There

3. There requires in every plea two things, the one, that it be *ſufficient in matter*, the other, that it be *deduced and expreſſed according to the forms of law*; and if either of theſe be wanting, it is good cauſe of demurrer. 2 L. P. R. 296. tit. Pleas &c.

[378] 4. If the defendant's plea does *not anſwer the plaintiff's whole declaration*, the plaintiff may well demur. 2 L. P. R. 302. tit. Pleas &c.

5. Every plea *muſt* be ſo framed that it may *give a full anſwer to the matters* ſet forth *in the declaration*, to wit, all ſuch *as are material* to be anſwered unto; and if it do ſo, it is a good plea, be it a general plea or a ſpecial. 2 L. P. R. 305. tit. Pleas &c.

6. If the *falſhood in the* defendant's *plea* is *neither hurtful to the plaintiff nor beneficial to the defendant*, there it ſhall never hurt the defendant; but where the defendant pleads a falſe plea, which falſhood is detrimental to the plaintiff, and beneficial to the defendant, there it ſhall; as by a defendant's executor pleading ſeveral judgments, and concluding that he hath not aſſets ultra, the plaintiff may reply, that one of the judgments is ſatisfied, which replication ſhall be fatal to the defendant, if it proves true; but to plead that he hath fully adminiſtred, and that he hath not bona & catalla præterquam bona quæ non ſuffic. to ſatisfy the judgment, is void for the uncertainty; for no ſum being mentioned, no iſſue can be taken; but if it had been ſaid that he had not bona & catalla præterquam bona & catalla ad valentiam, quæ erga ſatisfactionem judicii præd. onerabil. ſunt, it is good pleading. 2 L. P. R. 297.

7. Every plea *muſt be pleaded either in bar to the action* brought, *or in abatement of the writ* upon which the action is framed; otherwiſe it is but a diſcourſe and not a plea; becauſe the plaintiff cannot take an iſſue upon it; and therefore if the plaintiff do demur upon it, and his demurrer be judged good, he ſhall have judgment againſt the defendant for want of a plea. 2 L. P. R. 303. cites Paſch. 23 Car. B. R.

8. If *upon a plea in abatement*, the *defendant pleads that which is falſe* and *iſſue is taken* thereupon, *and found for the plaintiff*, this ſhall be fatal to the defendant, and the plaintiff ſhall have his judgment; *but if* the *plaintiff demurs* to this plea, *and hath judgment* upon the demurrer for him, the *judgment is quod defendens reſpondeat ulterius in capite* ſuch a day, which is the day in the rule given by the Court; *but if* the *defendant hath judgment*, then there is a *nil capiat per billam* entered. 2. L. P R. 303.

9. Objected that defendant pleaded that J. S. was tenant in tail, as appears by an inquiſition poſt mortem, whereas he ſhould have pleaded the ſettlement by which he was tenant in tail; for *matters of fact* are not pleadable. MS. Tab. cites 22 Jan. 1717. Kennedy v. Pigott.

10. Every plea muſt have its *proper concluſion*. Vide 10 Mod. 166. and what ſhall be ſaid a good, tho' a leſs uſed plea. Vide ibid. 167. Weltale and Glover. B. R. And ſee Tit. Concluſion of Pleas ſupra.

(C) Of

(C) Of the *Parts of Pleading*, Regular and Irregular.

1. THERE are *two parts* of pleadings, viz. *regular, and irregular, or collateral.* The *regular* parts are, 1. Count or Declaration.—2. Bar or Plea.—3. Replication.—4. Rejoinder.—5. Surrejoinder.—6. Rebutter.—7. Surrebutter.—*And* if iſſue be not joined upon any of theſe, or misjoined, or any of the pleadings hath been ill or vicious, or part of the matter contained in the plaintiff's ſuit is omitted to be anſwered, the Court will award, 8. a Repleader. *But not after demurrer*, except in ſpecial Caſes. Of theſe, thoſe *by which the plaintiff proſecutes* his ſuit are, 1. Declaration.—2. Replication.—3. Surrejoinder.—4. Surrebutter.——And the pleadings made uſe of by the adverſe party for his defence are, 1. Bar or Plea.—2. Rejoinder.—3. Rebutter; and as the Court may award—4. Repleader. Brown's Anal. 2.

2. The irregular or collateral parts are, 1. Demurrers to any [379] parts of the pleadings above mentioned. Or,—2. Demurrers *upon evidence* given at trials.—3. Pleas to entries of writs of *ſcire facias*.—4. Bills of *exception* to *verdicts*. 5. Pleas to entries of *writs of error*. Brown's Anal. 2.

3. But ſome take pleadings to be only what comes after the declaration only, (viz.) what is contained in the bar, replication and rejoinder, contrary to the ſentiments of the Ancients, who reputed the count or declaration, and all acts entered upon record relating to plaints, ſuits or actions before the ſame, as well as thoſe after, to be pleadings, which appears to be evidently manifeſt from the order of pleadings mentioned by Littleton in his Tenures, and allowed in all ages, viz.——1. To the juriſdiction of the Court.——2. * Pleading to the perſon of the plaintiff —3. † To the count or declaration.—4. ‡ To the writ.—5. ‖ To the action of the writ, and in bar of the action.—Here note, that the 1ſt, 2d, 4th, and 5th pleas muſt undeniably be ſaid to be pleadings before the declaration. Brown's Anal. 2.

* Pleadings to the perſon are, villenage, outlawry, alien, hors de protection, profeſſion, excommengement.—— Heath's Max. 21.—

† *Pleas to the count* are divers, as *variance* from the *writ*, wanting *form*, or ſufficient declaring upon the condition, and the like, as the caſe requires. Heath's Max. 21, 22.

‡ *Pleas to the writ* are of two ſorts, viz. the *one apparent in the writ*, of which the defendant may at all times take advantage; and the *other reſting upon the plea of the defendant*, as *miſnoſmer*, *jointenancy*, *non-tenure*, *non habetur aliqua talis villa*, or *Over-dale* and *Nether-dale* of the *place where the action is laid*, and not of which the defendant is named; unleſs in caſes where utlary lieth; and that the lands lie in A. and not in B. and the like; which the defendant is bound to take in time, and to look that he be not concluded of them by his general appearance, continuance or imparlance, as before is mentioned. Heath's Max. 22.—*And* note, that it appears in a Report, 3 Eliz. that if the defendant, for *matter apparent*, plead to the writ, he ſhall in the beginning and ending of his plea *petere judicium de brevi*; but otherwiſe in the concluſion only. Heath's Max. 22.

‖ *Pleas to the action of the writ* are where, by the plaintiff's own declaration, or the defendant's plea, it appears that the plaintiff ought not to have the ſame, but another writ. And as 26 H. 8. Brook, Brief 409. the defendant may chooſe either to conclude to the writ, or to the action of the writ. And ſo 9 Ed. 4. 31. where dower was brought againſt a guardian; and he ſaid, he was not guardian, judgment de brevi. Heath's Max. 22, 23.

Contra where the tenant anſwers in the affirmative, there the *demandant ſhall anſwer with a negative*. Br. Ibid. —— *As* the *tenant pleads jointenancy with a ſtranger*, judgment of the writ, the *demandant ſhall ſay that he is ſole tenant* as the writ ſuppoſes. *Aſſque hoc that the ſtranger any thing has*. Br. Ibid. —— *And* ſo ſee that where *a negative goes before, the affirmative ſubſequent* ſhall make a perfect iſſue. Br. Ibid.

4. Where the *tenant anſwers in the negative, as nontenure*, or *in præcipe againſt two, the one takes the entire tenancy, and vouches* abſque hoc, *that the other any thing has*; in thoſe and the like caſes the defendant may *maintain his writ in the affirmative without traverſe*; for traverſe ſhall not be upon traverſe, and if one traverſes it is ſufficient. Br. Traverſe per &c. pl. 130. cites 9 E. 4. 36.

(D) Plea *not anſwering the Declaration*, and where it does or may vary from it.

S. Fraight (F.) pl. 5.

1 IN treſpaſs, the defendant *juſtified in three acres*; *the plaintiff ſaid that the place is three acres, and 20 acres more*; and becauſe the defendant did not juſtify in the 20 acres, he *demanded judgment and his damages*; and good pleading. Br. Pleadings, pl. 40. cites 7 H. 6. 3. 4.

S. P. For the manor is entire, and by this he ſhall recover the whole manor. Br. Præcipe quod reddat, pl. 14. cites S. C.

2. A *demand was of the manor of B.* where it *extended into B. and C.* and yet well; nota. Br. Demand, pl. 28. cites 4 E. 4. 15.

[380] If the *manor of B. extends into B. and S.* and is *demanded by the name of the manor of B. in B.* he *ſhall recover only that which is in B.* But ſome e contra, and that foreprife ſhall be made. Quære. Br. Demand, pl. 50. cites 9. E. 4. 17.

3. In *treſpaſs*, if a *manor extends into A. B. and C.* and *aſſiſe or præcipe* quod reddat *is brought thereof in A. and B.* the tenant may ſay that the manor extends into C. alſo; judgment of the writ; and it ſhall abate, becauſe the demandant has not made foreprife. Br. Demand, pl. 26. cites L. 5. E. 4. 103.

And that if the *plaint is of an acre of land*, the *tenant may ſay that it is* an acre of *wood*. Judgment of the plaint. Ibid. — *But* per Vaviſour and others, the plaintiff ſhall not ſay that the *tenements are other than the tenant has ſaid*. Ibid.

4. In aſſiſe, the *plaint* was *of a rent out of a houſe*, and the *tenant ſaid that it is an acre of land which is put in view*; judgment if the plaintiff ſhall ſay that 'tis a houſe: and per Townſende, Sulyard, Brian and Catesby, the tenant may vary from the plaint as above, becauſe the plaintiff did not ſhew what thing ſhall be charged. Br. Pleadings, pl. 68. cites 2 H. 7. 4.

S. C. Goldſ. 111. pl. 18. by the name of ROOKER v. GOMERSALE, and ſays that the word *prædict.* *was alſo omitted.*

5. In *debt againſt A. and M. his wife, executrix of J. S. of L. taylor*, the defendants *plead a recovery againſt them by W. R. by the names of G. and M. his wife, executrix of J. S. of L. barber-ſurgeon*, and that ultra that ſum they had nothing &c. Upon demurrer it was adjudged no plea, becauſe they *took no averment that J. S. taylor and J. S. barber-ſurgeon were the ſame perſon*. Cro. E. 127. Hill. 31 Eliz. B. R. Hooper v. Gomerſal & uxor.

6. In

6. In an action of *assault and battery*, and declared that *he so threatened his life that he dared not go about his business*. The defendant *pleaded son assault* in bar, and said nothing as to the *threats*. This was held good on error brought; and judgment was affirmed, because the mentioning the threats was only *to inforce an increase of damages, and was not the substance of the action*. Mo. 704. 705. pl. 983. Penruddock v. Errington.

In trespass for *battery of his servant, per quod servitium amisit*. The defendant *justified the battery*, as in defence of his possession, but *said nothing as to the loss of service*. Upon a demurrer, Bridgman thought the plea not good, and that this was no answer to the declaration, by reason of the saying nothing to the loss of service. But Houghton e contra, because the *loss of service is only a consequence of the battery*, so that the justifying the battery is a sufficient answer to the loss of service, the battery being the principal. And of this opinion was Coke Ch. J. The plaintiff had judgment. Roll. R. 393. Trin. 14 Jac. B. R. Norris v. Baker.

7. An *ejectment was brought as of a lease of land at common law*, and the *plea* of the defendant proved *that the land was copyhold*. And adjudged for the plaintiff that the plea is ill; for there is not any confession and avoidance of the lease alledged by the plaintiff. Cro. E. 728. Mich. 41 and 42 Eliz. C. B. Kensey v. Richardson.

8. An action was brought for *trespass cum equis, bobus, vaccis &c.* The defendant *justified for two horses*, and *said nothing of the residue*. This was held ill, and judgment for the plaintiff. Cro. J. 27. Pasch. 2 Jac. B. R. Thornel v. Laffels.

Trespass was alleged *with a continuando to the 25th of June*. The defendant *justified from the 8th of May to the aforesaid 25th of June*, and so *says nothing of the four last days*. This was held ill, and judgment for the plaintiff. Cro. J. 27. Thornel v. Laffels.—So trespass was brought *for entry into house and lands*. Defendant *pleaded a lease of the house*, but said nothing as to the lands mentioned in the declaration; and it was adjudged for the plaintiff. Cro. J. 204. Hill. 5. Jac. B. R. Stodden v. Harvey.

9. In *trespass for breaking his close, and carrying away two cart-loads of timber*; the defendant *made title to the close &c. and that he took the timber*: plaintiff demurr'd because defendant *said nothing to the two load of timber*; for the declaration did not set forth that the timber was growing on the land, neither did the [381] defendant say that it was, nor has he justified the taking it for damage feasant. And because neither plaintiff or defendant shewed that the timber was growing on the land, Haughton J. said that the plea is no answer as to the timber; quod fuit concessum per tot. Cur. Roll. R. 406. Trin. 14 Jac. B. R. Dense v. Dense.

10. *Trespass* was brought *of assault, battery and imprisonment, on the last day of October* 6 *Car.* at W. &c. The defendant *justified by a warrant from the sheriff on a supplicavit*, and that thereupon he arrested the plaintiff the 21st September &c. Exception was taken, that the plea did not answer the time in the declaration, viz. the last day of October, neither by answer nor by traverse. But it was answer'd, that the *justification was of an act in the same county, and justified all the time in the declaration*; and therefore, tho' it agrees not with it in the day, but *concludes quæ est eadem transgressio*, is good enough, the day not being material.

And where the defendant *pleaded* that *transgressio, injuit. &c. prædict. were done at such a day in such a year*, and which were very different from

those in the declaration, exception was taken terial. And all the Court were of the ſame opinion. Cro. Car. 228. Mich. 7 Car. B. R. Tyler v. Wall.

that the plea in bar was ill. by not anſwering to the battery. But to this it was anſwered, and ſo reſolved by the Court in Hill. Term next following, that *tranſgreſſio prædicta is an anſwer to the whole.* Lev. 31. Paſch. 13 Car. 2. B. R. Prideaux v. Webber.——S. P. and it was held by the Court to be good enough, either if it be conſidered that in battery the time is not material, and therefore the plaintiff may lay it at any time, and ſo, tho' the defendant juſtifies another day, it ſhall be intended the ſame battery; or elſe, there being that word (prædict.) to the day and year of the King miſtaken, it ſhall be ſurpluſage and void. Freem. Rep. 212. Mich. 1676. C. B. pl. 219. Anon.

So where the defendant juſtified the detaining by virtue of a recovery for a leſs ſum, and ſaid nothing as to the reſidue, it was looked upon as a fault incurable. Sed adjornatur. Freem. Rep. 63. 64. Mich. 1672. Colleſe v Jackſon.

11. In an action of aſſault, battery and *impriſonment, till the plaintiff had paid* 11 *l.* 10 *s.* the defendant pleads and *juſtifies by* reaſon of *an execution*, and a warrant thereupon *for* 11 *l.* and doth *not mention the* 10 *s.* And upon demurrer for this cauſe judgment was given for the plaintiff upon the firſt opening, becauſe it appeared the defendant took more than was warranted by the execution. 2 Mod. 177. Hill. 28 & 29 Car. 2. C. B. Harding v. Ferne.

12. In *debt* upon a bill obligatory, the plaintiff ſet forth the *condition, that if within three months it ſhould ſufficiently appear before the Lord B. &c. that a horſe called Cripple was not his proper horſe*, that then the defendant would do ſo and ſo; and ſaid that within the three months it did ſufficiently appear to the Lord B. &c. that the horſe called Cripple was not his proper horſe. The defendant *pleaded that the horſe called Cripple was his proper horſe.* It was reſolved that the plea in bar was inſufficient, and no anſwer to the declaration. 3 Lev. 240. Mich. 1 Jac. 2. C. B. Beayne v. Beal.

13. In treſpaſs for taking a *cow*, and the juſtification is of taking of a *heifer*; and judgment for the plaintiff, becauſe the bar does not anſwer the declaration. Lutw. 1355. Hill. 2 & 3 Jac. 2. Mellor v. Bocking.

14 In replevin for *taking bona catalla & averia* &c. the defendant made *cognizance for the taking of averia only*, for that a rent-charge of 100 l. per ann. was granted out of the lands &c. payable half-yearly at Michaelmas and Lady-day, and 33 *l. parcel of* 50 *l. for half a year's rent being behind and unpaid, he diſtrained*; and ſo juſtifies the taking, and inde petit judicium & retorn. averiorum bonorum & catallorum prædict. Upon a demurrer to this avowry, it was held to be inſufficient, becauſe he did *not ſhew when the other* 17 *l. was paid* to make up the half-year's rent; beſides, the action was brought for taking bona catalla & averia, and defendant *avowed the taking of averia only*, which
[382] is an anſwer only for the live cattle, and not for the whole: and for theſe reaſons the plaintiff had judgment. 4 Mod. 402. Hill. 6 W. & M. B. R. Hunt v. Braines.

(E) *At what Time* Defendant muſt plead.

1. DEBT *upon obligation of* 20 *l. againſt executor*; the *defendant pleaded Plene adminiſtravit*, and ſo to iſſue; and *at the Niſi Prius* when the * jury appeared, the *defendant ſaid that this inqueſt ought not to be taken*; *for after the laſt continuance the plaintiff had recovered* 10 *l. parcel of the demand at D. in the county of E.* Judgment of the writ; which plea was recorded by the Juſtices, and the inqueſt diſcharged; quod nota, at the day of the Niſi Prius. Br. Jours, pl. 50. cites 5 E. 4 138.

* Orig. (jour).

2. Defendant cannot plead *before declaration* made in any caſe. Br. Dette, pl. 171. cites 21 E. 4. 37. Per Pigot.

Not before declaration entred, quod nota bene inde. Br. Count, pl. 70. cites S. C.

3. If the defendant doth *not plead according to the rules of the Court*, ſo that the plaintiff may enter judgment upon a nil dicit, yet if *after the rules are out*, the *defendant do put in his plea* into the office *before the plaintiff hath entered his judgment*, this plea is to be accepted, and the plaintiff ought not then to enter his judgment; and therefore it behoves attornies to be vigilant in their practice. 2 L. P. R. 298. tit. Pleas &c. cites 21 Car. B. R. & Hill. 23 Car.

For a judgment upon a nil dicit is for want of plea, but in this caſe here is a plea, and if ſuch a judgment ſhould be entered, it would be in facto a falſe and irregular judgment; and therefore the Court will not ſuffer him to enter it. 2 L. P. R. 298, 299. tit. Pleas &c.

4. When the Court doth *order* one to plead *forthwith*, it is to be underſtood that he ſhall plead *in* ſuch *convenient time* after as the Court ſhall judge reaſonable; but if it be *inſtanter*, then he muſt plead the ſame day. Mich. 22 Car. B. R. For the law accounteth things which are done in convenient time to be done without delay. 2 L. P. R. 300. tit. Pleas &c.

5. If the defendant will plead a *dilatory plea*, he muſt plead it *upon the giving of the firſt rule in the office* for the defendant to plead, and he muſt plead a *plea in chief after the ſecond rule* given in the office for the defendant to plead; and this is the reaſon that judgment cannot be entered againſt the defendant for want of a plea until the time given by the two rules to plead be paſt. Mich. 24 Car. B. R. But if he then put in a dilatory plea, the plaintiff may move the Court for him to plead as he will ſtand to it. 2 L. P. R. 309.

6 If the plaintiff's attorney deliver an *imperfect declaration* to the *defendant's attorney*, and he *accepts of it*, yet he is not bound to plead until the *plaintiff* hath perfected his declaration. Mich. 1649. B. S. Paſch. for until it be perfected it is no declaration; but he *may well demur* if he thinks fit, which is the uſual practice. 2 L. P. R. 310. tit. Pleas &c.

7. If an *action* be brought *in the Sheriff's Court in London, or Marſhal's* Court *in Southwark*, and be afterwards *removed by habeas*

For the Court will not grant

the party to take any advantage by the removing the Cauſe further, to delay the other party in the courſe of his proceedings, which would be, if he ſhould not be compelled to plead the ſame Term the Cauſe was removed; alſo he is ſuppoſed to have ſufficient notice of the cauſe of action, that appearing in the plaint levied in the inferior Court, ſo that he may have time enough to provide for his plea during the bringing of his habeas corpus and his putting in of bail, and the plaintiff's declaring and giving of rules to plead. 2 L. P. R. 311.

habeas corpus into this Court, the defendant ought to plead the ſame Term the Cauſe is removed; and proceed to a trial. 2 L. P. R. 311. cites Hill. 1649. B. S. 9 Feb.

[383] For the Term was begun when the declaration was delivered, and it cannot be accounted a declaration of the preceding Term; for the Eſſoign day is part of the Term. 2 L. P. R. 314. tit. Pleas &c.

8. If a *declaration* be delivered to the defendant's attorney, or put into the office *after the Eſſoign day* of the Term, the defendant cannot be compelled to plead to try it that Term, but he *ought to plead to enter*. 2 L. P. R. 314. cites 1652. B. S.

9. It was agreed by Glyn Ch. J. Trin. 1657. that if one be ſued in an action of treſpaſs and *ejectment by original*, he needs not to plead until the original be ſhewed him, if he hath demanded oyer of it before the rules are out. 2 L. P. R. 299. tit. Pleas &c.

S. P. 2 L. P. R. 301, 302. — It muſt be *actually* a Term's notice, and not by acceptation of law only. 6 Mod. 57. Mich. 2 Ann. B. R. Leſault v. Dyer.

10. If a *Cauſe doth continue four Terms without proſecution before iſſue joined*, the defendant is to have a *Term's notice to plead* &c. before judgment can be entered by default; *if after iſſue joined*, a *Term's notice of trial*. Per Magiſtrum Liveſay & al. &c. Paſch. 21 Car. 1. 2 L. P. R. 236. tit. Notice.

11. If a man be *bound* by recognizance *to appear the firſt day of the Term*, and *is charged* upon his appearance *with an information*, in caſe the information be *laid in Middleſex* the party has time to plead during *all that Term*, ſo that it cannot come to trial in the Term; *but* in caſe it be *laid in any other county*, the party ſhall have time to plead *till the Term*; for he is as much concerned to defend himſelf in thoſe caſes as in any civil action; and ſince the law allows him counſel, the law allows him time likewiſe to conſult with them; for not to allow the means of defence, is to take away the ſubjects defence; otherwiſe it is of capital offences: but note, in theſe caſes there is no counſel. 2 Salk. 514. Mich. 1 W. & M. B. R. Anon.

A difference has been taken, that if one *comes in upon a cepi corpus in cuſtody*, he muſt plead *inſtanter*; *ſecus* where he has been *bailed* and comes in upon the cepi; but ſure there is no *reaſon* for this difference; for the return is the ſame in both caſes; and the party ought not to be the harder uſed becauſe he could not find bail; per Holt. 12 Mod. 372. Paſch. 12 W. 3. Anon.

12. Alſo where the party *comes in by cepi corpus, or* upon an *outlawry*, he ſhall plead preſently, for then he has been guilty of a contempt; per Cur. contrary to the Caſe of the 7 biſhops. 2 Salk. 514. Mich. 1 W. & M. B. R. Anon.

So in *Faſter Term*, if the declaration be *delivered before Menſ. Paſchæ*, the defendant on a habeas corpus muſt plead to try; but upon a cepi corpus, to enter only. Ibid.

13. Upon a *habeas corpus returnable in Michaelmas Term*, if the *declaration* be *delivered before craſtinum animarum*, the defendant muſt *plead to try*; but *upon a cepi corpus* he is only to *plead to enter*. 2 Salk. 515. Mich. 8 W. 3. B. R. Hall v. Eggleſton.

14. Upon

14. Upon a declaration filed againſt a priſoner or a privileg'd perſon, the defendant ſhall have liberty to plead in abatement at any time during the 8 days rule: but where a declaration is delivered or filed before Eſſoign day of the Term, there the defendant muſt plead in abatement within the firſt 4 days of the Term, and not after the end of 4 days whether rules are given or no. 2 L. P. R. 320. tit. Pleas &c. cites Mich. 8 W. 3. B. R.

15. If a *declaration* be delivered *againſt one in cuſtody*, he ſhall have the whole Term to *plead in abatement*. 2 Salk. 515. Mich. 8 W. 3. B. R. Anon.

16. If *judgment in ejectment* be *ſigned* in country cauſe *for want of a plea*, but *no poſſeſſion delivered*, a Judge in his chamber at any time before the aſſiſes may compel the plaintiff to accept a plea; but if poſſeſſion be delivered, he is without remedy; per Holt Ch. J. 2 Salk. 516. Mich. 9 W. 3. B. R. Anon.

17. It was mov'd for an imparlance till the next Term, be- [384]
cauſe the *defendant was an officer of the Court*, and the *bill was not filed* againſt him, *ſo as to give him* 8 *days within Term to plead*; but the Court held, that the *day of the bill filed is one day*, ſo that the plaintiff may give rules that day; alſo they agreed, that *Sundays* and Holidays *are to be reckoned in*; and the Clerks ſaid, it was *ſufficient that he had four days in Term*; quod Curia conceſſit. 2 Salk 517. Trin. 11 W. 3. B. R. Paſmore v. Serjeant Goodwin.

18. Mr. Clerk ſaid, that *anciently* there were *two rules* given, *both four-day* rules; the 1ſt was, *Ad reſpondendum*; the 2d, *Ad reſpondendum peremptorie*; which two were now turned into one 8 days rule. 2 Salk. 517. Trin. 11 W. 3. B. R. Paſmore v. Serjeant Goodwin.

19. In a common action of *treſpaſs*, the plaintiff *ſigned* his *judgment for want of a plea*; the *defendant after Term and before the Aſſiſes offered* him *a ſpecial plea, or to plead the general iſſue, provided* the plaintiff would conſent to enter into a rule, that *he ſhould* at the trial *be allowed to give ſpecial matter in evidence*; the *plaintiff* refuſed, and *executed a writ of enquiry*: and now it was moved, that upon paying coſts the judgment might be ſet aſide, and the plaintiff obliged to accept the plea and go to trial, the plea being fair and containing ſpecial matter of title. The motion was granted; for per Holt Ch. J. where the defendant's plea was a *fair plea, and no delay affected*, we will interpoſe; otherwiſe where a plea contains ſpecial matter that is queſtionable, and was deſigned to draw the plaintiff to demur. 2 Salk. 518. Paſch. 12 W. 3. B. R. Wood v. Cleveland.

20. There was a queſtion if a man *appears voluntarily before menſem Paſchæ* in Eaſter Term, whether he be *obliged to plead to enter?* Sir Samuel Aſtrey and Mr. Clark were of opinion he was not. But per Holt Ch. J. there is no difference between a voluntary appearance and an appearance upon a cepi corpus; for a voluntary appearance is not good, unleſs a writ has been

taken out; and there is no reaſon for it; for if the plaintiff be content with a voluntary appearance in eaſe of the defendant, there is no reaſon why the plaintiff ſhould be in a worſe condition than if he had arreſted him: let the rule be, *if* a writ be taken out, and the *defendant agrees to appear, he ſhall* appear and *plead according to the return of the writ*, and *if* the return be *before menſem Paſchæ, he ſhall plead to enter*; but *if* no writ were taken out he ſhall not be obliged to appear; but if a writ were taken out returnable *after* menſem Paſchæ *he ſhall have an imparlance till next Term.* 2 Salk. 518. Trin. 12 W. 3. B. R. Anon.

21. In the Court of *Common Pleas*, *upon a ſpecial capias* iſſued forth, with the cauſe of action therein expreſſed, the defendant is, by the rules of that Court, to appear and plead in one and the ſame Term. But it is not ſo in the *King's Bench*, where the ſuit commenced by bill; for there he hath liberty to imparl to the next Term. But the practice is the ſame in the King's Bench with that in the Common Pleas where the action is by *original*: and the reaſon of it is, that when it is by ſpecial original, the declaration is compriſed in the writ, which is not ſo in a *latitat*. L. P. R. 86.

22. If one be *ſued upon an obligation*, he cannot be compelled to plead before he hath *oyer of the condition* of the obligation, *and a copy* (if required) to be made at his own charges, becauſe he cannot tell what to plead till he knows for what he is ſued. 2 L. P. R. 323.

23. If one be *ſued by original writ*, he muſt plead *the ſame Term in which the original is returned*; if the defendant be arreſted by a *capias containing in it the cauſe of action* exactly as the original is, if ſuch capias be returnable the ſame Term with the original: but whenſoever the capias is returnable, the defendant *muſt plead within four days* if required; and the reaſon thereof is becauſe the ſpecial matter is contained in the writ whereof the defendant has notice upon the arreſt. 2 L. P. R. 324.

[385] 24. *But* it is not ſo where one is ſued *by latitat or bill of Middleſex*; for if they be de placito tranſgres. yet the plaintiff may declare in debt or what other action he will: but in the other caſe the declaration muſt not vary from the writ; if it does, the defendant may plead in abatement. 2 L. P. R. 324.

25. If a *declaration* be *delivered the day before the laſt day of a Term*, the defendant has 2 days in the next Term to put in an anſwer; for he ought to have 4 days in Term; per Cur. 12 Mod. 231. Mich. 10 W. 3. Anon.

26. Judgment and execution thereupon were ſet aſide, becauſe the plea was put in before *judgment ſigned*. 12 Mod. 248. Mich. 10 W. 3. Baker v. Chandler.

27. If *ſcire facias* be returned ſerved, and the *defendant has an act of parliament for his diſcharge*, and *omits to come and plead it*, he has for ever loſt the advantage of it; per Cur. 12 Mod. 441. Hill. 12 W. 3. Anon.

28. Thoſe

28. Thoſe that *come in on a* * *habeas corpus or attachment* muſt plead the ſame Term without imparlance, giving the ordinary rules, which are 8 days; per Aſton. Cumb. 3. 1 Jac. 2. B. R.

* S. P. In regard of the delay and extraordinary charge the plaintiff hath been put unto by ſo bringing him in. 2 L. P. R. 298. cites 21 Car. B. R.

29. Where a man is brought in cuſtody to anſwer an *information*, he muſt plead inſtanter. So upon an *attachment*, if non eſt inventus be return'd, he muſt plead inſtanter; but if he is not taken, but *comes in voluntarily* before the return of the writ, it ſeems otherwiſe; per Sir Sam. Aſtry. Cumb. 310. Hill. 6 W. 3. B. R. Hains's Caſe.

30. The queſtion was, what time the defendant has to plead *after appearance to the exigi facias?* The Court held, that he *muſt plead inſtanter*. And tho' it was objected, that if the appearance were to an exigi facias returnable the laſt return of any Term, the defendant would have no opportunity of applying to the Court to bring in money, change the venue or other matter; but in anſwer to that it was ſaid, that the defendant might, if he had any reaſon, apply to a Judge for relief, but that the Court would not without manifeſt reaſon delay the plaintiff after the defendant had ſtood out ſo many proceſſes. Rep. of Pract. in C. B. 18. Mich. 6 Geo. 1. Aplin v. Chambers.

31. It was held by the whole Court, that a plea *in abatement* is void if not delivered *within* 4 *days after declaration* delivered or *left in the office*, *tho' no rule* to plead be given. Rep. of Pract. in C. B. 23. Trin. 7 Geo. 1. Anon.

32. A motion was made the laſt day of the Term to plead *ancient demeſne*, but denied, becauſe it was *not moved* within the time limited to plead in abatement, viz. *within* 4 *days after declaration* delivered or left in the office. Rep. of Pract. in C. B. 43. Hill. 1 Geo. 2. Holdfaſt v. Carlton.

S. P. Notes in C. B. 242. Trin. 10 Geo. 2. Peaſe v. Badtitle.

33. A motion was for an *imparlance till Michaelmas Term* next becauſe the *declaration was delivered laſt Michaelmas Term, and no plea called for in* 3 *Terms*, according to the rule Mich. 1654. which was ordered by the Court accordingly. Rep. of Pract. in C. B. 57. Trin. 3 Geo. 2. Cole v. Pinnell.

34. It is ordered, that upon all *proceſs* ſued out of this Court, *returnable the firſt or ſecond return* of any Term if the plaintiff declares in London or Middleſex, and the *defendant lives within* 20 *miles of London*, the *defendant ſhall plead within* 4 *days after* ſuch declaration delivered *without any imparlance*; *and ſuch declaration may be delivered de bene eſſe*. And in caſe the plaintiff declares *in any other county*, *or* the defendant *lives above* 20 *miles from London*, the defendant ſhall plead *within* 8 *days after* the declaration delivered, without any imparlance; and in default of pleading as aforeſaid, the plaintiff may ſign his judgment. Rules &c. in C. B. Mich. 3 Geo. 2. 1729.

Judgment was *ſigned before* the expiration of *eight days after declaration delivered to the attorney*, the *defendant living above twenty miles from London*. The Court ſaid it was their intent that the late rules ſhould extend to declarations delivered to attornies as well as to declarations filed in the office de bene eſſe, and notice thereby delivered to defendants; and ſet aſide the judgment. Rep. of Pract. 94. Mich. 7 Geo. 2. Lazonby v. Bradley.—

[386]

A motion

A motion to ſet aſide a judgment, becauſe the plaintiff did not *ſtay four days* for a plea *after the eight days for appearance were expired*, but ſigning his judgment the ſame day that he entered the appearance for the defendant, which was the 9th day; but it appearing that the *declaration* had been *de bene eſſe*, and that the rule to plead was out before the appearance entered, the Court denied the motion. Rep. of Pract. in C. B. 95. Mich. 7 Geo. 2. Charlton v. Hankey & Aſſop.

Ibid. cites Mich. 1733. S. P. Taylor v. Slocham.

35. A motion was to ſet aſide a *judgment ſigned the morning next after the day given* by a Judge's order *for time to plead*. The Court were of opinion, that the day given by the Judge muſt be intended a whole day, and that this was inlarging the rule to plead one whole day, and therefore plaintiff could not ſign his judgment till the opening of the office in the afternoon of the next day after the day given by the Judge was expired. Rep. of Pract. in C. B. 67. Mich. 4 Geo. 2. Herne v. Chapman

Rep. of Pract. in C. B. 103. S. C.

36. In ejectment; declaration was of Eaſter term to appear in Trinity. It was *moved to be at liberty to plead an ient demeſne*. A rule was made to ſhew cauſe; upon ſhewing cauſe it was inſiſted for plaintiff, that the plea *being to the juriſdiction* of the Court *is a dilatory and ought to have been pleaded within the firſt four days* of this Term; and of that opinion were the Court, and diſcharged the rule. Sir George Cooke quoted 2 caſes in point determined in this Court, * HOLDFAST v. CHARLTON, Hill. 1 Geo. 2. and BINGHAM v. BARKER, Trin. 2 Geo. 2. Notes in C. B. 232. Trin. 7 & 8 Geo. 2. Smith v. Roe.

* Rep. of Pract in C. B. 43. S. C.

37. The *plaintiff* having *entered an appearance* for the defendant according to the late ſtatute *filed a declaration* againſt him, *and gave a rule to plead*, and ſome days after ſerved the defendant with notice of the declaration; the Court held that the *rule* was irregular, for it *ſhould not have been given till after the notice was ſerved*, the declaration being well delivered from the time of notice only. Rep. of Pract. in C. B. 111. Mich. 8 Geo. 2. Grey v. Sanders.

S. C. cited Rep. of Pract. in C. B. 79.— S. P. Ibid. 78. Mich. 6 Geo. 2. Threlkeld v. Goodfellow.

38. The *declaration* was *of Michaelmas Term* laſt paſt, and the *defendant pleaded in abatement the fourth day within Hillary Term* then next, *without a ſpecial imparlance. Plaintiff demurr'd* to the plea, and *defendant joined* in demurrer; whereupon *plaintiff made up the book with a general imparlance*, and the Cauſe was ſet down in the paper to be argued. It was moved for the defendant, that the general imparlance might be ſtruck out of the paper book; inſiſting that the firſt four days of Hillary Term were ex gratia, and that defendant might then plead as of Michaelmas Term before. The motion was oppoſed by plaintiff, and no rule was made; the Court declaring that in this caſe the *defendant could not plead in abatement without procuring ſpecial imparlance*. Notes in C. B. 238. Mich. 9 Geo. 2. Napper v. Biddle.

39. Rule to ſhew cauſe why defendant ſhould not have *leave to plead a tender as of laſt Term, notwithſtanding the general imparlance given by plaintiff*. Objected by plaintiff's attorney, that defendant ought to have applied on the firſt day of the Term. Per Cur. he comes time enough within the firſt four days. Rule abſolute in the Treaſury. January 27. Notes in C. B. 252. Hill. 12 Geo. 2. King v. Nichols.

40. De-

40. Defendant moved that plaintiff may inſert *the true day of filing bill* (viz. February 3. laſt) in the memorandum at the head of his declaration, and that defendant might have *leave to plead a tender of laſt Term*, the *declaration not having been delivered till after the Term*. The rule to ſhew cauſe was made abſolute on hearing counſel on both ſides. Notes in C. B. 253. Eaſter 12 Geo. 2. Potts v. Creſwell attorney.

41. As to rules to be obſerved in C. B. in the proceedings upon declarations againſt *priſoners in county gaols*; and in what time they muſt plead after declaration delivered. See Rules &c. in C. B. Eaſter 5 W. 3.

(F) *What Plea* may be pleaded *after Time to plead granted.* [387]

1. ON a motion for time to plead, the Court refuſed to grant time, but on terms that the defendant ſhould *conſent not to move* the Court *to change the venue*. Rep. of Pract. in C. B. 57. Trin. 3 Geo. 2. Sabor v. Pott. S. P. Ibid. 4 Geo. 2. Treaſure v. Wright.

2. Defendant had obtained an *order for time to plead, pleading an iſſuable plea* &c. and afterwards *pleaded in bar to the* plaintiff's *action (which was upon a ſimple contract) a judgment confeſſed upon a bond ſince the order for time to plead made*. Plaintiff moved to ſet aſide the plea; but the Court, upon hearing counſel on both ſides, were of opinion, that as there was *no particular reſtraint in the order*, and as the bond (whereupon the judgment was confeſſed) might have been pleaded in bar to this action, the plea muſt ſtand. Notes in C. B. 231. Eaſter 7 Geo. 2. Hughes v. Pellet adminiſtrator.

3. A motion was for leave to add the *general iſſue to* a plea of *non aſſumpſit infra ſex annos*, and this was moved after a demurrer to the plea. The Court diſcharged the rule to ſhew cauſe, for they ſaid a defendant cannot add to his plea *after a replication or demurrer*. Rep. of Pract. in C. B. 114. Hill. 8 Geo. 2. Pierſon v. Ives.

4. Defendant was allowed time to plead, he pleading an iſſuable plea. Thereupon he pleaded a *tender*; the plaintiff after this plea delivered ſign'd judgment; the defendant moved to ſet the judgment aſide; but becauſe a tender is no iſſuable plea within the meaning of this rule, the judgment was held good. See Rep. of Pract. in C. B. 134. Mich. 10 Geo. 2. Daverſhill v. Barret. Notes in C. B. 243. S. C. by name of Davenhill v. Barrit.

5. A *regular judgment* was ſet aſide, and the defendant had leave to plead an *iſſuable plea*, but he pleaded the *ſtatute of limitations*. The plaintiff moved to ſet aſide that plea, and it was granted; for where the defendant has had an opportunity of pleading the ſtatute, but lets judgment go by default, and afterwards applies to ſet aſide that judgment, he ſhall not be let in but upon payment of *coſts, and pleading the general iſſue*.

Rep. of Pract. in C. B. 139. Hill. 10 Geo. 2. Leaver v. Whicher.

6. *After* a Judge's *order for time to plead, pleading an iſſuable plea*, defendant moved to plead *double matter*; and the queſtion was, whether a rule for that purpoſe ought to be granted or not? the Court took time to conſider, and after conferring with the Judges of the other Courts, gave defendant leave to plead doubly, pleading *iſſuable* pleas, and taking ſhort notice of trial. Notes in C. B. 244. Mich. 10 Geo. 2. Leighton v. Leighton.

(G) *Helped or aided by the plea, What* is. Writ. Declaration.

1. IF a man *pleads over*, he ſhall never take advantage of any *ſlip committed* in the pleading of the other ſide, *which he could not take advantage of upon a general demurrer*; per Holt Ch. J. 2 Salk. 519. pl. 18. Trin. 13 W. 3. B. R. Anon.

2. The defendant *pleads that the plaintiff had a co-executor*, who was *in life and had releaſed to him*; and upon this they were at iſſue, and found for the plaintiff; and awarded he
[388] ſhall recover, becauſe the defendant might have abated, the action being brought by the plaintiff alone, and had waved it. Cro. El. 69. cites 9 Ed. 4.

3. *Treſpaſs of beaſts taken*, the *defendant ſaid, that B. held the land where* &c. *of him by the ſervices* &c. *which B. leaſed to the plaintiff for years, and for ſo much arrear he diſtrained*; the *plaintiff ſaid, that riens arrear*, and ſo to iſſue, and found for the plaintiff &c. and the *defendant pleaded in arreſt* of judgment; *becauſe it appears that the plaintiff by his plea of riens arrear has confeſſed the tenure*, and then cited the ſtatute of Marlebridge cap. 3. that the lord ſhall therefore not be puniſhed by redemption; and by the opinion of all the Juſtices, for this cauſe, and alſo becauſe it appears by their conuſance in pleading, that the defendant is lord, and ſo *the writ ſhall not be vi & armis*, and the affirmance of it by pleading ſhall not aid, but the Court ought to abate the writ. Br. Repleader, pl. 36. cites 10 E. 4. 7.

As where a man *pleads releaſe and ſhews no place* where it was made, and the *plaintiff replies* that *Non eſt factum*, the replication has made the plea good. Ibid.

4. In debt, the *plaintiff counted upon a leaſe for term of years*, the *defendant traverſed the leaſe, upon which they were at iſſue*, and after the *defendant confeſſed the action*, and then pleaded in arreſt of judgment, inaſmuch as the plaintiff *has not counted at what place* the leaſe was made, and ſo jeofail, and yet the plaintiff recovered by judgment; for the defendant has pleaded in bar, and denied the leaſe, ſo the count is good. Br. Repleader, pl. 38. cites 18 E. 4. 17.

5. In detinue, it was ſaid by Pigot and Chocke for law, that of *jointenancy, ſeveral tenancy, miſnoſmer, taking of baron pending*

pending the writ &c. *which proves the writ only abatable*, there if the party pleads other matter, and admits the writ, he ſhall not have writ of error thereof after; contra of death of the defendant pending the writ, he ſhall have error after; for by this the writ was abated in fact. Br. Error, pl. 176. cites 18 E. 4. 19.

6. *Debt upon two obligations*, of which *one was not then forfeited*, for the day of payment was not come; the *defendant pleads* to that *a releaſe*, and took no advantage of it, that it appeared it was not forfeit; and to the other he pleaded another plea; and upon both they were at iſſue; and found for the plaintiff. And this matter was alledged in arreſt of judgment that it did appear upon the obligation ſhewn, that the day of payment was not yet come; and ſo the plaintiff is not to have judgment upon it. But it was adjudged for the plaintiff for both, becauſe the defendant might have taken advantage of it, but did not, but waved it, and *pleaded a collateral matter which was found againſt him.* Cro. El. 68. Mich. 29 and 30 Eliz. B. R. Frith's Caſe.

7. It has always been agreed for law, that if *debt or trover &c.* be brought *for a moiety*, and the defendant who is a *ſtranger pleads nil debet*, this makes the declaration good. Per Twiſden J. Sid. 49. Mich. 13 Car. 2. B. R. in Caſe of Cole v. Banbury.

8. *Treſpaſs for taking his goods.* The declaration is not good *without ſaying that they were in poſſeſſion of the plaintiff*, or *calling them ſua:* but defendant pleading that he took them out of the hands of the plaintiff, and delivered them to the conſtable &c. has made the declaration good, ſo that plaintiff may well maintain this action upon his poſſeſſion, without any property. Sid. 184. Paſch. 16. Car. 2. B. R. Brook v. Brook & al.

9. A. is poſſeſſed of Black-acre, to which B. has *no manner of right*, and A. deſires B. to *releaſe him all his right* to Black-acre, and promiſes him in conſideration thereof to pay him ſo much money; ſure this is a good conſideration and a good promiſe; for it puts B. to the trouble of making a releaſe. And tho' the *want of averment*, that a releaſe was made, would have been bad, if demurr'd to, yet it is now help'd by going over and pleading. Per Holt Ch. J. 12 Mod. 459. Paſch. 13 W. 3. in Caſe of Thorp v. Thorp.

So in *debt* upon indentures, in which there was a penalty, wherein the defendant did bind himſelf, *if he* [389] *did not perform all the covenants* in the ſaid indentures; and regularly in ſuch caſes the way is for the plaintiff to ſet forth the indentures, and to aſſign breach of one of the covenants in certain; and in debt for the penalty, he *ſaid generally that the defendant had broke all the covenants* in that indenture, *without ſhewing any one* in certain; the *defendant pleaded a collateral matter* in bar; and adjudged the declaration had been bad on demurrer, but that the plea over-ruled it, tho' the breach was double and incertain. 12 Mod. 466. in Caſe of Thorp v. Thorp.——Cites 3 H. 6. 8. 9 H. 6, 16, 19. and that it was ſo adjudged in B. R. Paſch. 23 Car. 2. Bernard v. Mitchell. 1 Vent. 114. S. P. 12 Mod. 459. in S. C.

So if one *covenants* that *if J. S. does ſuch* and ſuch *things, he will pay him* ſo much money. J. S. brings action, and *ſays generally* that he performed all the things; this would be bad on demurrer; but curable by pleading over. Per Holt. Ch. J. 12 Mod. 459. Paſch. 13 W. 3. in Caſe of Thorp v. Thorp.

10. Where the *thing in its own nature requires a demand*, a *bond for doing thereof* is not forfeited till demand. And in that caſe Cro. C. 76. Trin. 3 Car.

C. B. Chapman v. Chapman.

caſe the defendant muſt take advantage of the want of demand by pleading that he was always, and ſtill is ready to pay it; for if he *plead performance generally*, and plaintiff aſſigns a breach in his replication, the defendant ſhall not rejoin and allege want of demand; for that would be a departure; per Gould; quod Holt conceſſit. 12 Mod. 414. in Caſe of Levins v. Randall.——Cites 1 Cro. 76. 77.

11. Error of a judgment in the Court of *Canterbury*; exception was taken that it does *not appear that the juriſdiction of the Court was co-extenſive with the city*, and they *alledge the cauſe* of action only to have *ariſen within the city*; but it was ſaid that the defendant coming in and anſwering had waved that advantage. 12 Mod. 536. Trin. 13 W. 3. Lancaſter v. Lovelace.

12. Debt by adminiſtrator *cui adminiſtratio debito modo commiſſa fuit*; defendant pleads over. Per Cur. This had been bad if demurr'd unto, but is now helped by your pleading over; for you thereby admit he has a right of ſuit, and is adminiſtrator. 12 Mod. 537. Trin. 13 W. 3. Hall v. Bond.

(H) *Amendment* or Alteration *of Pleas.* In what Caſes.

1. ASSISE *againſt a man and a woman*; the *woman pleaded in bar*, and *the man to the writ, that the woman was his feme not named feme*; and they were adjourned upon the plea of the feme, and at the day the man confeſs'd the writ good, and his plea falſe, and ſo he may. Per Cur. Br. Aſſiſe, pl. 250. cites 23 Aſſ. 4.

2. *Treſpaſs upon the ſtatute of forcible entry*; the *defendant intitled himſelf to an eſtate for term of life, and prayed aid of the King becauſe he in reverſion was within age, and in ward of the King*, and had aid, but not de rigore juris; *and after procedendo the defendant pleaded Not guilty, and had the plea, notwithſtanding his juſtification before*; quod nota. Br. General Iſſue, pl. 18. cites 22 H. 6. 18.

S. P. Br. Forcible Entry, pl. 6. cites 22 H. 6. 17.——

3. *And* it is ſaid elſewhere, *that in aſſiſe and treſpaſs after ſpecial plea pleaded, and replication made*, yet the defendant may waive them and plead the general iſſue; quod nota. Ibid.

In aſſiſe the tenant pleaded in bar, upon which they were at iſſue, which was entered, and yet the defendant came *after and wav'd the iſſue and took the general iſſue, and the waving the firſt iſſue was enter'd of record. Br. General Iſſue, pl. 54. cites 34 H. 6. 29.——* At another day and in another term. Br. Iſſues joines, pl. 76. cites S. C.

S. P. Br. Pleadings, pl. 119. cites [390] 2 E. 4. 13. And it ſhall be before the plea entred.

4. In detinue 'twas agreed that he who *pleads a bar may after relinquiſh it and plead the general iſſue* in any action: and per Danby Ch. J. he may wage his law, and relinquiſh the bar, and ſo he did there. Br. Bar, pl. 79. cites 2 E. 4. 14.

5. In *formedon* the *tenant vouched A. who entered into the warranty, and vouched B.* and the *demandant, as to the third part*

part counter-pleaded the warranty, and to the reſt granted the voucher, by which the *proceſs iſſued againſt the vouchee, and againſt the inqueſt*, and at the day the *firſt vouchee pleaded the entry of the demand into part after the laſt continuance*; and therefore the inqueſt was diſcharged, and new iſſue taken upon this matter; for by the new iſſue the firſt iſſue is waived. Br. Inqueſt, pl. 38. cites 5 E. 4. 116.

6. In ward the *plaintiff ſurmiſed that the anceſtor of the infant died in his homage;* the *defendant ſhewed* a gift in *tail to the anceſtor of the infant abſque hoc that he died ſeiſed in fee*; and it was debated if he ſhall traverſe the dying ſeiſed in his homage or not, and *at the end of the Term the defendant would have amended his bar;* and the Court would not ſuffer it. And Vaviſor who was with another defendant would have changed his paper; and the Court would not ſuffer it. Br. Office del &c. pl. 30. cites 2 R. 3. 13.

7. The defendant may amend his plea, although it be *three Terms after* it was pleaded, *if* it be *not entered, and he will pay coſts*. Mich. 22 Car. B. R. But it muſt be *by leave of the Court*, becauſe it is againſt the common rules of practice; which they will grant if there be cauſe for it. 2 L. P. R. 300.

S. P. If it be but *in paper and not entered.* Hill. 23 Car. B. R. For it is not

reaſonable that the Court ſhould grant him favour to the prejudice of the party, who by this amendment is put to new trouble and charge; *but if* the plea be entered *in parchment*, and the record made up, the *Court will not give leave to amend* it. 2 L. P. R. 306.

Since pleading in paper is now introduced, inſtead of the old way of pleading ore tenus at the bar; it is but reaſonable, after a plea to iſſue, or demurrer joined, that *upon payment of coſts* the parties ſhould have liberty to *amend* their plea, *or* to *waive their plea or demurrer while all* the proceedings *are in paper*. 2 Salk. 520. pl. 21. Mich. 2 Ann. B. R. Anon.

8. If one plead a plea that is not good, and the *plaintiff* doth *demur* upon it, the *defendant cannot* afterwards amend his plea *without* the *plaintiff's conſent*. Mich. 24 Car. B. R. For the defendant ſhall not take advantage of his own ill pleading to delay the plaintiff, and to put him to more trouble and charge than by the law he may do. 2 L. P. R. 309.

9. *If* the *plaintiff's attorney* will *conſent* unto it, the defendant may wave his plea pleaded *without moving the Court:* By Roll Ch. J. 2 L. P. R. 312. cites Trin. 1651. B. S.

But if he will not conſent, it cannot be done without

moving the Court; for the common courſe of proceeding is not to be altered but by leave of the Court, which upon cauſe ſhewn, the Court will ſometimes give way unto, if the doing of it be not prejudicial to any party. 2 L. P. R. 312.

10. A man *can never plead* any thing *afterwards, which he might have pleaded at firſt:* for if a man have a *releaſe*, and an action is brought againſt him, he cannot, *after pleading the general iſſue*, make uſe of this releaſe; but he *may at the Niſi Prius plead* a releaſe *poſt ultimum continuationem placiti*, which was made upon the iſſue joined: *but* where a *releaſe* is *made after verdict, and before judgment*, the defendant cannot plead this releaſe, but may bring his *audita querela* upon it. 2 L. P. R. 318.

11. But where there is a *paper-book made up*, the defendant hath *four days to join in iſſue*, viz. to pay the plaintiff for the entry

But if the paper book which is de-

livered to the defendant's attorney, is *made up with an iſſue joined*, the plaintiff's attorney may, upon the delivery thereof, give eight days notice of trial; but the defendant's attorney *may*, if he thinks fit, *within four days, ſtrike out Et prædict. defendens ſimiliter*, &c. *and put in a demurrer to the plaintiff's rejoinder or replication*. 2 L. P. R. 321.—*But if* the *defendant joins in the iſſue*, by paying for the entry of his part, or pleads the general iſſue thereto, then the *trial ſhall go on* according to the notice given upon the delivery of the paper-book. 2 L. P. R. 321.——*But* if it be a *rejoinder in demurrer in the paper-book*, and not an iſſue there, although the *defendant at the four days end waves his demurrer, and pleads the general iſſue*; yet the *plaintiff's attorney cannot give notice of trial upon delivery of the paper book*, becauſe no iſſue in fact was then joined: ſo that if the defendant will not, at the four days end, join in demurrer, but pleads the general iſſue, the notice of the trial muſt be given but from the time of his pleading of the general iſſue. 2 L. P. R. 321.

entry of what is his part; *and at the end* of the four days *may*, if he thinks fit, *wave the ſpecial pleading, and plead the general iſſue*. 2 L. P. R. 321.

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Defendant *pleaded to the ſcire facias upon his recognizance of bail payment by the principal*;

12. *Before joinder in demurrer* the defendant may waive his ſpecial plea, and plead the general iſſue. Per Cur. But if there be a rule to plead, ſo as to ſtand by it, and the defendant pleads a ſpecial plea, as he may, and the plaintiff demurs, the defendant ſhall not then waive, and plead the general iſſue. 2 Salk. 515. pl. 5. Mich. 8 W. 3. B. R. Anon.

to which *plaintiff replied non-payment*, and *tendered an iſſue*; whereupon *defendant demurred* and plaintiff joined in demurrer, moved for conſilium, and ſet down the cauſe in the paper to be argued. Defendant afterwards *moved to withdraw* his plea, *and plead nul tiel record* of the recognizance, which was denied by the Court on hearing counſel on both ſides. Notes in C. B. 237. Mich. 9 Geo. 2. Handaſide v. Wilſon.

13. Where a *plea is pleaded*, and the *iſſue is entered*, and the *record made up* to be tried at the aſſizes, the defendant cannot amend his plea in this caſe without the conſent of the plaintiff, and an order of Court, becauſe 'tis entered upon record. 2 L. P. R. 321. cites Mich. 8 W. 3. B. R.

14. If the *plaintiff alters his declaration after the defendant hath pleaded* to it, the defendant may alter his plea; for by the amendment of it, it may be ſo altered in matter that it may require a different anſwer from what was formerly pleaded. 2 L. P. R. 322. tit. Pleas &c.

15. Upon a motion for leave to withdraw a ſpecial plea, and to plead the general iſſue, the Court declared it might be done the *ſame Term without leave of the Court*, on payment of coſts, *unleſs the plaintiff have replied*, and then it muſt be with leave, and the defendant muſt pay coſts. Rep. of Pract. in C. B. 67. Mich. 4 Geo. 2. Robinſon v. Simmonds.

Notes in C. B. 230. S. C.——*But* where it was moved that defendant might have leave to withd aw

16. Motion was for leave to *withdraw a ſpecial plea of plene adminiſtravit, and to plead plene adminiſtravit generally*, which was granted on payment of coſts; but it was ſaid that if the defendant had pleaded the *general iſſue*, they would not let him withdraw that, and plead any other plea. Rep. of Pract. in C. B. 96. 97. Hill. 7 Geo. 2. Martindale v. Galloway.

his *plea of tender*, and *plead the general iſſue* upon payment of coſts, the Court denied the motion, becauſe this alteration of the plea would put plaintiff to an inconvenience, the money pleaded to be tendered being brought into Court. Notes in C. B. 231. Hill. 7 Geo 2. Reevs v. Probart.

17. A rule to ſhew cauſe why the defendant ſhould not have leave to withdraw his demurrer, and plead the general iſſue; the plaintiff inſiſted that it was not reaſonable to give the defendant that liberty, ſince by the demurrer he had admitted the fact, and depended meerly on the matter in law; but the Court were of opinion, that a *demurrer may be withdrawn*, if the party come *in a reaſonable time, on payment of coſts*; and they gave leave accordingly. Rep. of Pract. in C. B. 135. Mich. 10 Geo. 2. Sherlock executor v. Temple.

S. P. Tho' it was objected by the plaintiff, that by this means he had been delayed of a trial at laſt aſſiſes; but it appearing that the parties had been before a Judge, and that defendant had offered to withdraw his demurrer, and plead the general iſſue *time enough for the plaintiff to have tried his cauſe at laſt aſſiſes*, the motion was granted. Notes in C. B. 243. S. C.

18. The defendants, *in Hillary Vacation, pleaded ſeveral ſpecial pleas;* but *in the ſame Vacation, before replications were delivered, withdrew thoſe pleas, and pleaded the general iſſue.* Per. Cur. After a ſpecial plea pleaded, tho' the plaintiff has prepared his replication, yet the defendant may the ſame Term before the delivery or filing of the replication waive his ſpecial plea, and plead the general iſſue without paying coſts. Rep. of Pract. in C. B. 155. Hill. 12 Geo. 2. Horsfull v. Greenwood and others. [392]

19. *Motion* was made *to withdraw* his *plea of the general iſſue, and plead the ſame de novo, and pay money into Court, the defendant's attorney happening to die before payment of money into Court, as ordered by defendant, and his clerk having delivered the plea by miſtake*; rule to ſhew cauſe; cauſe being ſhewn, the Court ſaid the rules of the Court are againſt the motion; but in the *accident of death* the rules muſt be diſpenſed with. Rule abſolute. Notes in C. B. 254. Mich. 13 Geo. 2. Uſher and others v. Edmunds.

(I) *Rules* as to Pleadings.

1. THE Court will not upon a *motion* order the defendant *to plead peremptorily by a day* before the common rules of the Court for pleading be out. 2 L. P. R. 301. cites Mich. 22 Car. B. R.

2. If the *defendant* do, *after the Term* is ended, *plead a frivolous plea*, to the intent to delay the plaintiff, and *to hinder him from going to a trial at the aſſizes*, a *Judge* at his chamber *will ſet aſide ſuch a plea, and* order the defendant *to plead ſuch* a plea *as he will ſtand to, or* elſe to *accept of a demurrer* from the plaintiff unto his frivolous plea. Hill. 22 Car. B. R. for it is the juſtice of the Court to ſpeed the proceedings in law, and to bring ſuits to determination as ſoon as with conveniency and juſtice to all parties it may be done. 2 L. P. R. 301. tit. Pleas &c.

3. The plaintiff's attorney is not bound to receive a plea for

the defendant *from* any *perſon that is not an attorney*. 2 L. P. R. 303. cites Paſch. 23 Car. B. R. Quære.

4. An *officer* of the Court *ought not to refuſe a plea, although* it be *not put in in time*; but the plaintiff muſt move the Court, and abide by their rule therein. Hill. 23 Car. B. R. For the Court, and not the attornies, are to judge of the legality of the proceedings in all cauſes depending before them, as well as they are to determine the matters in law in them. 2 L. P. R. 306.

5. If a plea be *put into the office* in due time, it is well enough, *although* it be *not delivered to the attorney* for the plaintiff. Trin. 24 Car. B. R. So that he may not enter judgment for want of a plea; but it is *uſual* for the defendant's attorney *to deliver a copy* of the plea *to the plaintiff's attorney*, or to give notice that a plea is put into the office. 2 L. P. R. 309. tit. Pleas &c.

6. Upon a motion betwixt BRISCOE and ARNOLD, 'twas held by Glyn Ch. J. When pleadings are *made up and paid for*, they ſhall be *accounted as* if they were *entered*; for the entry belongs to clerks in the office, and not to the attorneys. 2 L. P. R. 314. tit. Pleas &c.

7. *How rules* to plead and declare are *to be entered, and when to be given*, ſee Rules &c. in C. B. Mich. 1654. ſ. 15.——And ſuch rules *ſhall be out at four days, incluſive* of the day wherein the ſame were given. Ibid.

8. *Imparlances and Incipiturs are to be entered*, or otherwiſe there ſhall be *a further imparlance of courſe*. And no rule ſhall be given to plead without ſuch entry, unleſs the prothonotary give allowance. See Rules &c. in C. B. Trin. 21 Car. 2. Reg. 2.

By the courſe of the Court, if the plaintiff moves to *amend* his [393] declaration *the ſame Term the defendant's plea comes in*, the plaintiff need not give new rules to plead; but the defendant muſt plead in convenient time. 2 Salk. 520. pl. 20. Mich. 2 Ann. B. R. Anon.

9. The queſtion was, whether there ought to be *new rules* to plead *upon an amendment?* Pew, clerk of the papers, ſaid, that if the plea was of *another Term*, there ought to be new rules; otherwiſe if it be a plea of the ſame Term, becauſe there is a rule to warrant the judgment. Holt Ch. J. Anciently they did not plead de novo after an amendment; therefore giving rules to plead again cannot be the ancient courſe; becauſe the practice of pleading de novo is but of late introduced, but with great reaſon: When the *plaintiff amends and gives an imparlance*, there ſhould be new rules; otherwiſe not. 2 Salk. 517, 518. Trin. 11 W. 3. B. R. Anon.

10. *On* a piece of *ſtampt paper* the *defendants ſay* they are *not guilty, without delivering the plea at length*; the plaintiff ſigned judgment for want of a plea. The Court ſaid it was no defence; ſo the judgment was held regular. Rep. of Pract. in C. B. 126. Hill. 9 Geo. 2. Albany v. Griffin and his Wife.

11. The defendant had obtained a Judge's *order for time* to plead, but *did not plead within the time* limited by the order. The

The plaintiff ſigned judgment. It was objected that no rule to plead was given; but the Court ſaid, that the Judge having given time to plead, there was *no occaſion for a rule*; ſo the judgment was held regular. Rep. of Pract. in C. B. 141. Eaſt. 10 Geo. 2. Dawſon v. Garth.

(K) Signed by a Serjeant &c. In what Caſes they muſt be.

1. IF there be a *ſpecial plea, replication, rejoinder, or demurrer*, there muſt be a counſellor's hand to it; becauſe it is ſuppoſed to be adviſed by counſel, who is to maintain it to be good, if it be diſputed. 2 L. P. R. 324.

2. The Court reſented the number of frivolous *ſham pleas* which came before them, ſaying, it was againſt the duty of counſel, and againſt the ſtatute of W. 1. c. 29. and that the old rule ought to be revived, viz. that *counſel ſhould ſet their hands to the books delivered to the Judges*; which was anciently ſo ordered, that the Court might not be troubled with frivolous pleas. 2 Salk. 517. Mich. 10 Will. 3. B. R. Anon.

3. *Per dureſs* was pleaded without a ſerjeant's hand. Upon which occaſion a queſtion aroſe, What ſort of pleas were to have a ſerjeant's hand? It was held by the Court and ſettled, that *comperuit ad diem, ſon aſſault demeſne, plene adminiſtravit, riens per diſcent, ne unques executor, nul tiel record, per minas, per dures, infra ætatem, & ſolvit ad diem*, need no ſerjeant's hand. Rep. of Pract. in C. B. 41. Hill. 1 Geo. 2. Upton v. Pullyn.

4. But *non aſſumpſit infra ſex annos* muſt have a ſerjeant's hand. Ibid.

(L) The *Manner of giving a Plea, and* of *putting Pleas into the Office*, and keeping them there.

1. PLEAS put into the office are of two ſorts, general or ſpecial; *general pleas are entered in the general plea-book* by every attorney for his client; but theſe are no pleas, unleſs the defendant's attorney do pay the plaintiff's attorney, upon demand, 1s. and 4d. or 2s. and 4d. (as the cauſe is) for entering his plea and warrant of attorney. *Special* pleas are *delivered in to the clerks of the papers, and entered* into the book of the proper perſon to whom they belong. 2 L. P. R. 309. [394]

2. A *colourable plea ought to be entered*, but that which is no plea ought not to be entered. Trin. 24 Car. B. R. For a colourable plea *is a plea until it be over-ruled*. For the Court will not ſpend time to diſpute things which are clear. 2 L. P. R. 309.

3. The clerks of the papers of the King's Bench *ought not* to ſuffer the original pleas brought into the office *to be delivered* For by the pleadings in the office are

the pleadings made up for the iſſue to be tried; and if any queſtion ariſe about altering of them, they are to be examined and rectified, and (if any alteration be) by the pleas in the office, and not by any copy of the plea. 2 L. P. R. 310. tit. Pleas &c.

out of the office, *but only copies* of them. 2 L. P. R. 310. cites Mich. 1649. B. S.

S. P. per Holt Ch. J. 12 Mod. 496. Paſch. 13 W. 3. Anon.—And a *ſpecial plea* is *no plea till paid for*; but if the party accept it without inſiſting upon that, it will be well; per Holt Ch. J. 12 Mod. 493. Paſch. 13 W. 3. Anon.

4. When a *general plea* is pleaded, the *attorney ought to ſet his hand* to the plea, *or enter it in the plea-book, and pay for the entry of it*; and then the iſſue is joined. But if he will not ſet his hand to the plea, and pay for the entry of it, judgment may be entered for want of a plea; for the *attorney's hand, and his paying of his part for the entring* of it, and of the warrant of attorney, *warrants the plea*; and before his hand is ſet to it, it is no plea. So likewiſe in the caſe of a paper-book, the defendant muſt ſet his hand to it, and pay for the entry of it. 2 L. P. R. 324. tit. Pleas &c.

[For more of Plea and Pleadings in general, ſee Abatement, Replication, and other proper Titles, diſperſed throughout the whole work.]

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*Pledges.

* *For the King's and the party's benefit* the plaintiff ought to find pledges, that if he be nonſuited, he and his pledges ſhall be amerced; and likewiſe if the verdict finds againſt him in any part; and this was grounded upon great reaſon, that the plaintiff ſhould not trouble the King's Court or the party without cauſe; and if he did he ſhould be puniſhed. Per Cur. Cro. J. 413. Hill. 14 Jac. B. R. Dr. Huſſey v. More.

(A) *What Perſons* ought to find Pledges.

[1. AN *infant* ſhall not † find pledges *in aſſiſe*. 30 Aſſ. 25.]

† Not in *mortdanceſtor*. Br. Pledges, pl. 29. cites F. N. B. 195. 1.—An infant ſhall not find pledges. Cro. C. 161. Mich. 5 Car. B. R. Goodwin v. Moore.

The writ of the King, Queen, or of an infant ſhall not have the clauſe, Si fecerit te ſecurum &c. becauſe they ſhall not in thoſe caſes be amerc'd. 4 Inſt. 180.

2. The *King* ſhall not find pledges; for he ſhall not be amerc'd. Br. Pledges, pl. 29. cites F. N. B. 31.

3. So of the *Queen*, for the ſame reaſon. Ibid. cites F. N. B. 16.

4. Certain perſons may find pledges de proſequendo in Chancery, as *officers of the Court* and *ſervants of the King*, and *poor men*, of which mention ſhall be in the writ, Et niſi &c. predict A. fecerit te ſecurum de clamore ſuo proſequendo per fidem ſuam quia pauper eſt tunc ſummoneas &c. Et hoc conceſſum erit ex mandato cancellarii. Ibid. cites the Regiſter 228.

An *attorney* or *clerk in Banco*, who *ſues a ſtranger there by attachment of privilege*, ſhall find pledges de proſequendo, as well as a ſtranger that ſues an attorney; and for default thereof a judgment in debt was reverſed, notwithſtanding divers precedents were produced that an attorney need not, becauſe he is ſuppoſed always preſent in Court, and that the words Si querens fecerit te ſecurum &c. are wanting in the attachment of privilege. But divers precedents were that pledges had been found. D. 288. pl. 53. Paſch. 12 Eliz. Floteman v. Bygot.——Cro. C. 91. Mich. 3 Car. C. B. S. P. Wolfe v. Hole.——Hurt. 92. S. C.——Het. 59. S. C.

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(B) *In what Actions [or Caſes]* they ought to be found.

[1. IN a writ of *eſtrepement* to put the party to anſwer to an eſtrepement *done* by him *between judgment and execution*, he ought to find pledges. 22 E. 3. 2. b.]

[2. Mirror of Juſtices, fol. 5. cap. ſ. 3. It was ordained that no action was receivable in judgment if he had not proof preſent of witneſſes or of other thing, nor that any ſhould be compelled to anſwer to a writ, nor to come to the action in the Court of the King before Judge, Commiſſary, before the avower found ſurety of the damages, and to reſtore the * expences if he failed in his plaint, except recognizances of † four pieces, aſſiſes, certifications of aſſiſes, attaints, rediſſeiſins, and other caſes, which are ‡ only as offices of the King. To which ordinance King H. 1. made this mitigation in favour of poor plaintiffs, that ſuch as had not ſufficient ſurety preſent ſhould ‖ promiſe and ſwear to make ſatisfaction to their power according to a reaſonable taxation. Vide ibidem fol. 21. cap. 2.]

Fol. 259.

* Orig. (deſpences).
† Orig. (Quatre peaches).
‡ Orig. aniſſ que del office.
‖ Orig. (ferront foy & ſerement.)

[3. In a writ of *recordare facias loquelam* pledges ought to be found, tho' the plaint in the inferiour Court be only returned, and pledges found there before. Tr. 15 Car. B. R. between *Groſſe* and *Beſcarven*. Per Curiam reſolved.]

4. In *replevin* they were at *iſſue upon the place*, and the *plaintiff pray'd that the defendant ſhould gage deliverance*; becauſe adhuc detinet averia; and he was compelled to gage deliverance, and to find pledges to make the deliverance; quod nota. Br. Pledges, pl. 9. cites 22 E. 3. 7.

In replevin the defendant found pledges *to gage deliverance*, where he avowed upon count quod adhuc detinet; and if he appears by attorney, his *attorney ſhall do the like*, or go to the Fleet. Br. Pledges, pl. 18. cites 1 H. 7. 11.

5. If the *plaint* be *removed by pone or recordare*, the firſt pledges ſhall ſtand; and if the plaintiff be nonſuited he ſhall be amerc'd. Br. Pledges, pl. 24. cites 3 H. 6. 3. per Rolf.

6. In *debt* the *defendant tendered his law*, and was compelled to find pledges of the law, and *mainpernors beſide the pledges*, and

the pledges were not permitted to ſtand for both. Br. Pledges, pl. 27. cites 42 E. 3. 7.

And it was ſaid that *where the King ſhall have fin*, ſurety ſhall be found whether he be in ward or not. Br. Surety, pl. 17. cites 5 E. 4. 6.

7. *Error*; if the *defendant* be not in ward he may appear by attorney, and if he be *in ward* he ſhall find ſurety, and ſhall make recognizance &c. Br. Surety, pl. 17. cites 5 E. 4. 6.

Br. Bill, pl. 20. cites S. C.—— S. C. cited per Cur. 3 Bulſt. 61 Trin. 13 Jac. in Caſe of Haver v. Gibbons.—S. C. cited Cro. J. 414. in Caſe of Huſſey v. More.

8. *Bill in cuſtodia mareſchalli*; the *defendant imparled 'till another Term*, and no pledges were found; and Huſſey Ch. J. by advice, made them enter pledges, and ſaid that there is a *diverſity between bill and writ*; for *writ is, Si fecerit te ſecurum* &c. and *bill is not ſo*. Br. Pledges, pl. 19. cites 2 H. 7. 1, 17.

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9. In error on a judgment, the error aſſigned was, that the plaintiff in the firſt action brought a *bill in Banco upon his privilege, and found no pledges in his firſt declaration, but found them only in his ſecond* declaration. Coke and Doderidge agreed, that if no pledges had been enter'd it had been error. Roll. R. 205. Trin. 13 Jac. B. R. Havert v Gibbons.

10. In error brought in B. R. upon a judgment in C. B. *in raviſhment of ward* it was mov'd, that *neither upon the return of the original writ before the ſheriff, nor after in Court, any pledges were returned*; it was agreed by the whole Court that at the common law it was clearly error. And by three Juſtices, contra Haughton J. this is not aided by the body of the ſtatute of 18 Eliz. Altho' it be within the words in the body of the act, yet it is clearly excepted by the proviſo; for this action is founded upon a penal law, which the proviſo excepts clearly out of the ſtatute. And for this cauſe judgment was reverſed. Cro. Jac. 413. Hill. 14 Jac. B. R. Dr Huſſey v. More.

The ſheriff is reſponſible if he do not take ſufficient *ſecurity* before he delivers cattle; it is *inſtead of pledges*, and a better way. Per Dolbein J. Comb. 228. Mich. 5 W. & M. B. R. Lane v. Foulk.

11. In replevin, taking *money inſtead of pledges* to anſwer the party, is not good; tho' per Berkley J. a Juſtice of Peace may take money to lie in depoſito for the ſecurity of the peace, and the money ſhall be forfeited to the King if he doth not keep the peace; yet here it is not ſo, becauſe the party is intereſted to have the benefit of the pledges by a *ſcire facias*, if he recover; but he has no remedy to have the money from the officer, being in his purſe, if he ſhould have judgment to recover. Cro. Car. 446. Hill. 11 Car. B. R. Mayſer v. Grey, Mayor of Beverley.

Bailiffs of a borough took a replevin *bond*, the *condition* of which was, *that if the above-bounden J. B. do and ſhall proſecute and follow with effect his ſuit commenced in the Court of Record of the borough of New-Windſor againſt T. P. for the unjuſt y taking and detaining the goods and chattels of the ſaid J. B. viz. at New-Windſor, within the juriſdiction of this Court, and do and ſhall make return of the ſaid goods and chattels, if a return thereof ſhall be adjudged by law againſt him, then this preſent obligation to be void, or elſe* &c. It was objected that this was an unlawful bond, becauſe the bailiffs ought to have taken pledges, and not a bond; but per Cur. This is a lawful bond, and 'tis the common courſe, even at this day, to take ſuch bonds; and the condition is well penn'd, all the words being general. Carth. 244. 249. Mich. 4 W. & M. B. R. Chapman & al. v. Butcher.

12. *Scire*

12. *Scire facias* lies againſt pledges in *replevin* after elongavit return'd; and pledges to be found both in a writ and a plaint by W. 2. cap. 2. See Cumb. 1. Mich. 1 Jac. 2. B. R. Dorrington v. Edwin.

13. An action was brought in C. B. by an attorney *by bill of privilege*, and no plegii de proſequendo found, and ſo returned on a certiorari; and for that cauſe judgment was reverſed. 12 Mod. 198. Trin. 10 W. 3. Anon.

14. When writs were delivered to the ſheriff to be by him returned into C. B. he was obliged before the return thereof to take pledges of proſecution, which, *when the fines and amercement were conſiderable, were real and reſponſible perſons*, and anſwerable for thoſe amercements. But they being now ſo inconſiderable, there are only formal pledges entered, viz. *John Doe and Richard Roe*. But there is a *difference in debt and in treſpaſs*; for in treſpaſs the attachment of the goods is the firſt proceſs, and becauſe the defendant is thereby hurt, therefore the writ commands the ſheriff to take pledges before he executes the proceſs. But in debt they begin with a ſummons, and ſo the defendant is not hurt in the firſt inſtance, and therefore there is no command in the writ to the ſheriff to take pledges, but unleſs he does there is not a ſufficient authority from the return to warrant further proceſs, unleſs pledges are put in above, as in B. R. they always do on the bill. The reaſon why pledges were *not taken in Chancery*, but committed to the ſheriff, was, that he living in the county was ſuppoſed to know who were ſufficient ſecurity, and being to levy the amercement afterwards, they were to take ample ſecurity for them. G. Hiſt. of C. B. 6. 7.

(C) *Who may receive* Pledges. [397]

[1. WHEN the ſheriff writes to the bailiff of a *franchiſe* to ſerve a writ, *the bailiff* may take pledges. 22 Aſſ. 3.]

(D) *At what Time they ought to be found.*

[1. IF a writ be to be ſerved by the *bailiff of a franchiſe*, yet the *ſheriff ought to take* pledges *before he ſends to the bailiff* to ſerve the writ. 22 Aſſ. 3.]

Br. Pledges, pl. 15. cites S. C. per Sharie. But by the Reporter the plaintiff may take pledges de proſequendo well enough.

2. *Before the plaintiff has found pledges* de proſequendo, the *defendant* cannot appear, nor *is he compellable to appear*. Br. Pledges, pl. 32. cites 22 H. 6. 20.

Br. Averment contra &c. pl. 12. cites S. C.

3. In debt it was awarded per Cur. that if the plaintiff puts in a bill againſt a man in cuſtodia in mareſchalli, and *does not*

find pledges at the commencement, he ſhall not find it after; but the bill ſhall abate. Br. Bille, pl. 15. cites 9 E. 4. 27.

4. They ought to be found either *upon the purchaſe of the writ in Chancery, or before the ſheriff, before he executes the writ*; for otherwiſe the ſheriff is not bound to ſerve the writ, but may return that the plaintiff has found no pledges, yet he may ſerve it if he will; per Cur. Cro. J. 413. Hill. 14 Jac. B. R. Dr. Huſſey v. More.

(E) At what Time they *may be* found.

Inaſſiſe, the *ſheriff returned that the plaintiff had not found pledges de proſequendo*, and the *clerk re-bail'd the writ* to the ſheriff, and the *plaintiff immediately found pledges to the ſheriff*. Br. Pledges, pl. 6. cites 2 H. 4. 20.

[1. IF the ſheriff returns that the plaintiff has not found pledges, *the Court may receive* pledges. 22 E. 3. 3. 1 E. 3. 5. b. adjudged.]

It was held by all the Juſtices of B. R. If *pledges are omitted in bill or writ*, the party may find pledges * *any time pending the writ*: for this is in diſcretion of the Juſtices, and is only *a form*; quod nota. Br. Pledges, pl. 21. cites 18 E. 4. 9. —— S. C. cited 3 Bulſ. 60. per Curiam. Trin. 13 Jac. in Caſe of Haver v. Gibbons. —— S. C. cited Cro. J. 414. in Caſe of Huſſey v. More. —— * S. P. Reg. Plac. 207. cites Pract. Reg. 252.

Roll. R. 201. S. C. 2 Bulſ. 61. S. C. —— * Cro. J. 414. Hill. 14 Jac. B. R. in Caſe of Huſſey v. More.

[2. If a man brings a *bill in Bank upon his privilege*, and does not find pledges in the firſt declaration, but *finds them in the ſecond declaration*, it is good enough; for he may find them * *pending the writ*, and thoſe declarations are but one declaration in effect. Tr. 13 Ja. B. R. between Havert and Gibbons per Curiam.]

Jo. 439. S. C. and ſays that a like caſe was between HICKS and HEARD, [398] and the ſame judgment given. —— Mar. 46. S. C. —— Error was brought in B. R. of a judgment in C. B. in replevin removed out of the Hundred Court into C. B. by recordari facias &c. Error was aſſigned, that it does not appear that pledges were returned upon the plaint, and whether it was error in replevin was much doubted; becauſe the ſheriff may make replevin without pledges found. And here the error is of the judgment in C. B. and it is no error in them; and peradventure the pledges were found, and not returned, and it is at the ſheriff's peril, if he does not take pledges according to the ſtatute of Weſt. 2. cap. 2. Cro. C. 594. pl. 10. Mich. 16 Car. B. R. Tregoſe v. Winnel.

[3. In a writ of *recordare facias loquelam* return'd in *B. R.* if the plaintiff there declares, and defendant avows, and after iſſue join'd a verdict is found for the plaintiff, yet *before judgment* pledges may be found; for *thoſe pledges are at common law, and not by the ſtatute of Weſtminſter* 2. *cap.* 2. For the ſheriff is not charged in this caſe, if the pledges are inſufficient as he is by the ſtatute if he take inſufficient pledges, and the *ſtatute is upon a penalty not to make it error*. Trin. 15 Car. B. R. between *Groſſe and Boſcawen*, adjudged, and ſo adjudged the ſame term in two other actions, which concerned the ſame parties.]

[4. Paſch. 17 Jac. B. R. between *Johnſon and* ..... adjudged that pledges may be put in at any time *pending the writ*. This was cited in the ſaid Caſe of Groſſe and Boſcawen.]

5. In

5. In *appeal of mayhem* the defendant appear'd, and made defence, and no pledges de proſequendo were return'd, and the defendant took exception thereto, and the plaintiff found pledges in Court immediately, and therefore the defendant was compelled to anſwer; quod nota, by Tirwit, abſente Gaſcoign and Huſſ. Br. Pledges, pl. 8. cites 11 H. 4. 7.

S. C. cited Cro. J. 414. in Caſe of Huſſey v. More.

6. Bill of *debt againſt W. F. in cuſtodia mareſchalli*; the *bill was challeng'd*, becauſe the plaintiff had not found pledges, and the defendant out of ward, and the plaintiff offered pledges and could not, but the bill was abated. Br. Pledges, pl. 11. cites 9 E. 4. 27.

But upon original, tho' he has not found pledges to the ſheriff, he may find pledges in Court; but bill which has no pledge is of no value at the commencement. Ibid.——S. C. cited per Cur. Cro. J. 414. Hill. 14 Jac. B. R. in Caſe of Huſſey v. More.

7. In an *appeal of murder, the writ mention'd pledges to be found and named them, but in truth none were found* or enter'd, as appeared by affidavit; for which reaſon, and alſo becauſe the writ was *quia M. C.* (the appellant) *fecerit vos ſecuros per plegios A. and B.* &c. which was argued to be abſurd, and neither grammar nor ſenſe, and alſo becauſe they could not move in B. R. to quaſh this writ, it not being returnable there till the firſt day of the term, and if they could not move in Chancery to ſuperſede it, a man muſt lie in priſon a whole long Vacation as the appellee had done in the preſent caſe without bail or mainprize upon an erroneous writ without redreſs, it was therefore moved in Chancery to ſuperſede the writ. And that as to what 2 Jo. 154. and other books ſay, that the appellor may find ſureties at any time before judgment, it could not be; for that then, if the appellor find that the appellee is like to be acquitted, he will never demand judgment at all, and then the party's life may be brought twice into danger, and yet have no recompence in damages againſt an unjuſt appeal. But to this it was anſwered, and agreed by the Ld. Chancellor, that this writ did not iſſue *erronice or improvide*; that that *muſt be ſomewhat extrinſic to the writ itſelf*; that if there be any defect in the writ itſelf, they may move to quaſh it when it comes into B. R. if they think fit; that by the precedents in Raſtal, and 2 Jo. 154. it appears that the appellor may find ſureties in Court, if the ſheriff return a non invenit plegios, or even at any time before judgment, that the ſtatute of *W. 2. was not made for the finding of pledges, but for the puniſhment of the abettors*, and that there were many precedents where no ſureties were actually found; that the ſheriff may if he will attach the party without finding pledges, becauſe they may be found afterwards, or he may refuſe to attach him, and return quia non invenit plegios; that *quia M. C. fecerit vos ſecuros* viz. becauſe the party will find pledges, *is as good as ſi fecerit*, and that the party may find *pledges to the King* and then it is *quia nos*, or *to the ſheriff* and then it is *ſi vos &c.* And ſo the motion was diſallowed. Abr. Equ. Caſes 416. pl. 4. cites Oct. 14, 1729. Bambridge's Caſe.

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(F) *How*

* Fol. 260.

(F) *How* they may be found.

[1. WHEN the ſheriff returns that the plaintiff has not found pledges, the *Court may receive* pledges, tho' the plaintiff *be not there in proper perſon.* 22 E. 3. 3.]

(G) Pledges. [*The Effect of not finding Pledges.*]

[1. IF pledges *de proſequendo* be not found *in an aſſiſe returned*, yet the writ is ſerved in a manner; for the plaintiff may be eſſoign'd or nonſuited. 21 E. 3. 54. b. 21 Aſſ. pl. 11.]

2. In *attaint* the ſheriff return'd ſummons of jurors as in aſſiſe, and becauſe *no mainpriſe of ſummons and pledges was indors'd*, for this default *ſummons ſicut alias was awarded*, quod nota. Br. Retorn de Briefs, pl. 22. cites 46 E. 3. 18.

3. *Bill* is brought *in B. R. againſt a man in cuſtodia mareſcalli*, and becauſe he wanted pledges de proſequendo, therefore the *bill* was *abated*. Br. Bille, pl. 25. cites 2 H. 7. 17.

(H) *Puniſhment of not taking* Pledges, or taking any inſufficient ones.

So where he takes *inſufficient pledges*, and are returned nihil. Ibid.

1. IF the *ſheriff takes no pledges in replevin* de retorno habendo ſi &c. he *ſhall render to the party ſo many cattle* &c. Br. Pledges, pl. 1. cites 2 H. 6. 15.

—Inſufficient pledges *are as no pledges* within the ſtatute W. 2. cap. 2. 2 Inſt. 340.

And for default of diſtreſs, proceſs of *outlawry* or writ of *detinue* lies againſt the bailiff that made the replevin, without taking ſurety de returno habendo. Br. Replevin, pl. 14. cites 9 H. 6. 42.—Br. Detinue, pl. 6. cites S. C.——And where a ſcire facias againſt the pledges was returned nihil, a *ſcire facias* was granted againſt the ſheriff; quod nota; and the plaintiff was not put to action of detinue. Br. Scire Facias, pl. 3. cites 2 H. 6. 15.—Br. Parliament, pl. 3. cites S. C.——Ibid. pl. 15. cites 9 H. 6. 42.——Br. Return de Avers, pl. 2. cites S. C.

2. And ſo ſee there that the party *may relinquiſh his withernam* upon averia elongata return'd, *and ſhall have proceſs againſt the pledges, and for default* of them *againſt the ſheriff*. Ibid.

3. *Proceſs iſſued* out of an inferior court *to diſtrein the beaſts of B. or that he find ſurety* by ſufficient pledges *to appear at the next court.* The proceſs was *directed to J. S. who was no uſual officer*, and he diſtreined the beaſts of B. and the plaintiff paid him the uſual fee. But J. S. without taking ſufficient ſecurity re-delivered the beaſts to B. and B. did not appear. This was adjudged ſuch a deceipt, upon which an action on the Caſe lies againſt J. S. tho' he was not an officer known there, but only made ſo hac vice for this ſpecial purpoſe. Lat. 159. Wilde v. Dowſe.

4. Upon

4. Upon conſtruction of the Stat. *of Weſt.* 2. *cap.* 2. it was held, firſt, that an action of the *Caſe will lie againſt the ſheriff* for taking *inſufficient pledges*, and is a proper remedy to be purſued; for tho' it is not particularly * mentioned in the ſtatute, as being a ſort of action but little in uſe at the time of making it, yet of late it is become frequent, being found to be an eaſier and more expeditious method of proceeding. Beſides it appears from Cro. Car. 446. Jo. 378. that Caſe will lie for taking *no pledges* at all; and the action ſeems to be equally proper where inſufficient pledges are taken; eſpecially as ſuch pledges are always *conſidered as none* according to 2 Inſt. 340. adjudged upon a writ of error out of the Court of C. B. in an action brought againſt the Sheriff of Middleſex. Hill. 13 Geo. 2. B. R. Rous v. Patterſon.

5. Secondly, It was held that an action of the Caſe will lie againſt the ſheriff for taking inſufficient pledges, ſetting forth a return. habend. awarded, and an elongat' return'd, *without firſt bringing a ſcire facias againſt the pledges* taken: for tho' ſome * books mention ſuch a previous ſtep, yet as the ſtatute does not direct it, nor does any Caſe ſay it is neceſſary, it would be hard to require ſuch a circuitous way of proceeding. Accordingly the judgment given in the Court of C. B. againſt the ſheriff was affirm'd. Hill. 13 Geo. 2. B. R. Rous v. Patterſon.

* 2 Inſt. 340. F. N. B. 4 (F) Br. Sci. Fa. 3. 2 H. 6. 15. Raſt. 266. b Co. Ent. 637. Skin. 244. ——If the ſheriff upon a replevin takes pledges de return' habend. and upon a return awarded, returns, quod averia elongata ſunt, and then a ſcire facias is brought againſt the pledges, and a *nihil is returned*, an action lies againſt the ſheriff, *or* I may have have an action againſt him *upon ſuggeſtion* of this matter; per Babington J. 11 H. 6. 16. b. cited by the Ld. Ch. Juſtice, in the Caſe of Rous v. Patterſon.

(I) *Writ of Plegiis Acquietandis.* Proceedings and Pleadings.

1. WHERE A. was bound in a deed of covenants, and in the ſaid deed *B. was likewiſe bound*, and it was therein expreſs'd, that B. was bound *as a ſurety for A.* And an action being brought againſt B. it was ſaid by Knivet, that the *action ought firſt to be brought againſt A. the principal, and for non-ſufficiency of him againſt the pledges.* Quod nota. Br. Pledges, pl. 12. cites 19 E. 3. 9.

S. P. and if the ſurety who is bound to pay a certain ſum of money, or to do any other thing &c. be diſtrained by the ſheriff &c. they ſhall have a *ſpecial writ upon the ſtatute to diſcharge them.* And it ſeems that this writ lies where a man recovers againſt the ſureties in the county, and the ſheriff diſtrains them to pay the debt, where the principal is ſufficient; but if he ſue the ſureties in the Common Pleas, where the principal is ſufficient to pay the debt &c. now whether the ſureties may plead that, and aver that the principal debtor is ſufficient to pay it, or whether they ſhall have a writ to the ſheriff not to diſtrain them if the principal be ſufficient; quære of theſe caſes? And the proceſs in the writ is ſummons, attachment, and diſtreſs &c. F. N. B. 137. (F.)

2. Debt upon plegiis acquietandis; the *ſheriff return'd the defendant nihil*, and the *plaintiff pray'd capias*, and could not have it becauſe this action *is in nature of a covenant*, and he *ſhall recover only damages.* Br. Pledges, pl. 2. cites 43 E. 3. 1.

3. Plegiis

3. Plegiis acquietandis by W. againſt R. *becauſe he did not acquit him of* 20 *l. againſt J.* becauſe R. was indebted to J. in 20 l. and in default of payment R. requeſted W. to be pledge &c. and becauſe R. did not pay J. impleaded W. in London for nonpayment, and W. requeſted R. to acquit him, and he would not pay, by which W. at the ſuit of J. and by arreſt paid the 20 l. and in default of his non-acquittal, and he often demanded R. to pay him and he would not pay; the *defendant demurr'd*, becauſe he * *did not ſhew that he was his pledge by writing*; and the other *ſaid, that* he was *in London* where *a man may be pledge without writing by uſage*; and the other reply'd becauſe he *had not counted of the uſage*, and yet he was compell'd to anſwer, and yet it was agreed, that a man cannot become pledge in other place where there is no ſuch uſage without writing; by which he took exception, becauſe *it is not ſhewn that R. was indebted to J. by writing*; & non allocatur, becauſe he has counted that he had paid for R. by which *as to* 10 *l. he ſaid, that he had paid to J. and had thereof an acquittance, which he would have delivered to W. in caſe he had demanded it*, abſque hoc, *that W. paid it in default of R. Priſt* &c. and *as to the other* 10 *l.* he *ſaid, that R. was never debtor to J. nor did W. ever become pledge for R. Priſt* &c, and the others e contra. Br. Pledges, pl. 3. cites 43 E. 3. 11.

* *A. and B. are bound conjunctim & diviſim for the debt of A.*—B. is ſued, and requeſts A. to acquit him, but he does not. B. is convicted and pays the debt; the Court held, that the writ de plegiis acquietandi [401] *lies not in this caſe, nor in any caſe without expreſs name of pledge or ſide-ſaffer in writing*, as was 39 E. of the promiſe by words in city or borough by preſcription; and in this caſe both the obligors are principal debtors by their bonds, and not ſurety the one for the other; therefore &c. tho' it was *found* by verdict *quod queremi poſſit ſe in plag. pro def. againſt the dettee*, yet he cannot have judgment. D. 370. a. pl. 58. Paſch. 22 Eliz. Anon.

4. Ld. Coke ſays, ſome have ſaid, that this writ is * grounded upon the words in the ſtatute *Mag. Chart. cap.* 8. *viz.* "*that* "*the pledges ſhall have the debtor's lands and rents until they are* "*ſatisfied, unleſs he can acquit himſelf againſt the pledges;*" and that ſeeing no mention is made in that ſtatute of any deed, the pledges ſhall have that writ *without any deed.* And if the pledges *have any deed*, covenant, or other aſſurance for their indemnity, then they may *take their remedy at the common law*; but he ſays, it appears by Glanvil that this was the common Law; for he ſaith, ſoluto vero eo quod debetur ab ipſis plegiis, recuperare [recurrere] inde poterint ad principalem debitorem, ſi poſtea habuerit unde eis ſatisfacere poſſit per principale placitum, and ſets down the writ de plegiis acquietandis. 2 Inſt. 20.

* F. N. B. 137. (C).

5. In plegiis acquietandis; the plaintiff *counted that he was bound with the defendant and at his requeſt as his ſurety to a ſtranger by a bill obligatory*, and that the defendant did not pay the money at the day, by which the obligee ſu'd the plaintiff in an inferior court, and the defendant confeſs'd the action, and *judgment* was given *quod acquietet the plaintiff againſt the creditor of the ſum and damage aſſeſſed by the Court.* D. 257. pl. 12. Mich. 9 Eliz. Cape v. Thornes.

The Reporter ſays, quære what damages? in as much as it does not appear that the plaintiff had paid the money to the creditor.

(K) *Pleadings.*

1. PLedges may plead *defeaſance made to their principal.* Br. Pledges, pl. 25. cites 3 H. 6. 25. per Cockin.

2. In Caſe againſt an officer (pro hac vice) of an inferior Court for redelivery of the beaſts diſtrained by virtue of proceſs out of that Court without taking ſufficient ſecurity, and the defendant not appearing at the next Court, it was adjudged, 1. That the plaintiff having *declared generally, that the defendant* (in the inferior Court) *had not found ſufficient pledges*, was good enough, being in the negative. 2. That ſetting forth *that he hath given to the officer* (the now defendant) *the uſual fees, without ſhewing what* his fees were, is good; tho' otherwiſe it is in an action brought for his fees. Lat. 159. Wilde v. Dowſe.

3. 16 & 17 *Car.* 2. *cap.* 8. *ſ.* 1. enacts, *That after a verdict judgment ſhall not be ſtay'd nor reverſed in the King's Courts at Weſtminſter, Courts of Record in the counties palatine of Lancaſter, Cheſter, or Durham, or of the Great Seſſions in any the* 12 *ſhires in Wales for want of pledges &c.*

S. 2. *This act ſhall not extend to any appeal of felony or murder, nor to any indictment or preſentment of felony, murder, treaſon or other matter, nor to any proceſs upon them, nor to any action upon any penal ſtatute, other than concerning ſubſidies of tonnage and poundage.*

4. 4 & 5 *Annæ, cap.* 16. *ſ.* 1. enacts, *That where demurrer ſhall be join'd &c. the Judges ſhall give judgment according as the very right of the cauſe and matter in law ſhall appear &c. and no advantage ſhall be taken of the default of entring pledges &c. unleſs the ſame ſhall be* ſhewn ſpecially for cauſe *of demurrer.* [402]

[For more of Pledges in general, ſee Amendment, Error, Replevin, and other proper Titles.]

(A) Policy of Inſurance.

1. 43 *Eliz.* *cap.* 12. *ſ.* 1. ENacts, *That it ſhall be lawful for the Lord Chancellor to award under the Great Seal one* ſtanding commiſſion, *to be renewed yearly at leaſt, for the hearing and deter-*

A. and B. were bail for C. in a ſuit againſt

him in the Admiralty brought by J. S. for 100l. due to him by J. S. for freight, and C going to Barcadoes, where he had a share in a plantation, and likewise a quarter part of the ship he was to go in, his life was insured by A. and B. his bail; a prohibition was prayed to the Court of Policy, surmising that they proceeded there in the trial of the assurance of C's life, which was insisted to be triable at common law; Roll Ch. J. thought the *assurance of a man's life* not within the statute, as upon the buying of an office; but where he is *going to sea upon merchant's affairs*, his life may be assured as well as the safe return of the ship he goes in. But afterwards upon hearing counsel it was objected, that the party might have remedy in B. R. as well as in the Court of Policy, and therefore B. R. ought to be preferred, and the contract has no relation to merchandize, and so belongs not to that Court. It was replied, that the words of the policy shewed that the contract concerned merchandize; but Roll said, the words are not material, for they may be false, and the contract may be for things not touching merchandize notwithstanding, and the intent of the statute is for things merchantable, and if they appear not so a prohibition ought to be granted, and said they could not avoid granting a prohibition. Sty. 166. Mich. 1649. Bendis v. Oyle.—And Ibid. 172, 173. S. C. by name of Denoir v. Oyle.

determining of causes arising, and policies of assurance enter'd within the Office of Assurances in London, which commission shall be directed unto the Judge of the Admiralty, the Recorder of London, 2 Doctors of the civil law, 2 common lawyers, and 8 discreet merchants, or to any 5 of them; *which commissioners, or the greater part of them which shall sit, shall have power to hear, examine and decree, all such causes concerning policies of assurance in a* * summary course *without formalities of proceedings.*

Assurances may be made on men's heads as well as ships and goods; as if a man is going from the Streights, or to any port in the Mediterranean Sea, and is in danger of being taken by the Moors or Turkish pirates, and so made a slave, whereby a ransom must be paid for his redemption, they may advance a præmium accordingly upon a policy of assurance; and if he be taken, the insurers must answer the ransom secured. Gen. Treat. of Trade 81. cites Mich. 29 Car. 2. B. R.

* The plaintiff's bill was an *appeal* from a decree of the Court of Policies and Assurances in London; whereby the *defendant below not appearing upon the first summons, the bill was ordered to be taken pro confesso* against him; and for the plaintiff it was insisted, that though by the statute 43 Eliz. cap. 12. and the statute 14 Car. 2. cap. 23. the commissioners may proceed in a summary course without formalities of pleadings, yet it was very extraordinary to take a bill pro confesso *upon the first summons*; and they ought at least to have had the allegations in the bill proved before they proceeded to make such order; and it was said, though the course in this Court now is [not] to take a bill pro confesso after the party has once appeared and stands out in contempt, till the plaintiff is got to the end of the line, and has run through all the process of the Court against him; yet formerly this Court did not do it even in that case, without putting the plaintiff to prove the substance of his bill; whereupon the Lord Keeper reversed the decree. And though in this case the *appeal was not brought within two months after the decree*, according to the said act of 43 Eliz. yet in regard the *defendant could not make out that the now plaintiff had been fairly summoned*, the Lord Keeper admitted the appeal; and thereupon the parties agreed to try the matter in an action on the case, the plaintiff by order being not to insist upon the statute of limitations. Vern. 223, 224. Hill. 1683. in Canc. Sir James Johnson v. Desminedre.

Prohibition; the defendants had subscribed a policy of insurance to the plaintiff, and a loss happening, the *defendants were sued at law*, and declaration delivered, thereupon the defendants *summon the plaintiff before the Commissioners* for determining of policies, the same being made in the office *pretending* that the said *policy* was had and *procured by fraud*, and endeavoured to have the policy delivered up by order of the Commissioners there according to 43 Eliz. cap. 12. & 14 Car. 2. cap. [23] & 19 Car. 2. cap. ... Shower moved for a prohibition on a suggestion of this matter, for these reasons; viz. That they have no jurisdiction in this case; that *fraud and no interest annuls the policy at common law*; that it is good evidence upon the general issue, that we had our action on the policy here, and so a † *jurisdiction was attached*; that this method would deprive us of our evidence at law, viz. the written policy; that this would erect another Court of Equity in consequence to controul suits at law; besides, that they had no authority in this matter by the acts of parliament; that that *summary method* therein prescribed without trial by jury *was never intended further than the relief of the insured against the insurers*, and being such a law, was not to be extended further than the words; that the *mischief recited was trouble for the insured to sue every several insurer distinctly*; that though the *purview* be *general*, viz. to hear and determine causes arising upon policies of insurance, *yet several other clauses shew the intent*; as *that* upon appeals the party grieved shall first satisfy the decree, or at least deposit the monies decreed in the Commissioners hands, which plainly means *the assurers* to *be appellants*, and upon suit so brought before them by the assurers upon appeal the Chancellor is to award double costs; that any other construction would make a clashing of jurisdictions; and we had a rule for a prohibition unless clause, and to stay in the mean time, but they never moved it again, and so my client was quit of them there. Show. 396. Paich. 4 W. & M. Debbie v. Proudfoot & al.—† See pl. 3.

[403]

S. 2. It

S. 2. *It shall be lawful for the commissioners as well to warn the parties as to examine upon oath any witness, and to* commit *any person that shall contemn their decrees; and they shall once every week at least sit upon the execution of the commission in the Office of Assurances or some other place; and no person by this act may claim any fee.*

S. 3. *Any* person griev'd *by sentence of the commissioners,* may within 2 months *of the decree made,* exhibit his bill in Chancery *for the re-examination of such decree, so as every complainant, before he exhibit such bill, do either execute the sentence, or lay down in deposito with the commissioners such money as he shall be awarded to pay; and the Ld. Chancellor, in every such suit brought by such assurers, and decreed against the assurers, shall award* double costs.

S. 4. *No* commissioner *shall intermeddle in the execution of such commission in any cause where himself shall be a* party; *nor any commissioner (other than the Judge of the Admiralty, and the Recorder of London) shall proceed in the execution of any such commission, before he have taken his oath before the Ld. Mayor and Court of Aldermen, to proceed uprightly and indifferently between party and party.*

2. If the Court of Policy have jurisdiction of the principal matter, they have also *jurisdiction of all matters incident* thereunto, and they may *try them according to the course of their law, so that it be not contrary to the common law.* Per Roll. Ch. J. Sty. 418. Trin. 1654. Oyles v. Marshall.

3. An action on the *Case was brought for a thing pending in the Court of Policy of Assurance; the suit there was dismiss'd.* The question was, if the party might have action at common law for the same thing which he had su'd for in that Court? But the whole Court held, that the action lies. For this Court being erected by the statute, has, like other Courts of Equity, *jurisdiction in personam* only, and *not in rem*; for it is a certain rule that a decree in a Court of Equity shall not be a bar in an action brought at common law; and adjudged that the plaintiff may have his action at common law. 2 Sid. 121. Mich. 1658. B. R. Came v. Moye.

4. 13 & 14 *Car.* 2. 23. *s.* 2. *The commissioners for determining causes upon policies of insurance entred within the office of assurance of London, or three of them whereof a Doctor of the Civil, a Barrester of Law of 5 years standing to be one, may proceed as 5 might have done; and in case of wilful* delay of witnesses *upon the first summons and tender of charges, and of parties upon the second summons, may punish the offenders by imprisonment or costs. Every such commissioners may proceed, having taking an oath before the Lord Mayor of London to proceed uprightly.*

S. 3. *Commissions shall issue out of the Admiralty returnable before the said commissioners to examine witnesses beyond sea or in any remote parts of the King's dominions; the commissioners or three of them may pass sentence and execution against the body and goods, and against the executors &c. of the party evicted, and assess costs of suit.*

S. 4. *Any*

S. 4. *Any one commissioner may administer an oath to a witness, notice being given to the adverse party, and set up in the office, that such witness may be cross examined.*

S. 5. *The commissioners shall not proceed against body and goods for the same debt.*

Lex. Merc. 86, 87. S. C.

5. If these words *(lost or not lost)* are inserted in the assurance, in such case, tho' it happens that *at the time the subscription is made the ship is cast away*, yet the insurers must answer: *but if the party* who caused the insurance to be made actually *saw the ship wreck'd, or had certain intelligence of it*, such subscription will not be obligatory, for the same shall be accounted a mere *fraud*. Gen. Treat. of Trade 70. cites Mich. 26 Car. 2. Stockden's Case.

A vessel being coming home in her voyage laden, the *Owners and Master agreed* together to sell

6. *So* likewise if the assur'd, having a *rotten vessel*, shall insure upon the same more than she is worth, and afterwards *give order that* going out of the port the *ship should be sunk* or wreck'd, this will be adjudged fraudulent, and not oblige the insurers to answer. Gen. Treat. of Trade, 70, 71. cites Mich. 26 Car. 2. Stockden's Case.

the freighters goods privately, and then to go some small distance out to sea, and there *to sink the ship*, and pretend she struck and founder'd by extremity of weather. This being so contrived, the owners make a policy of insurance on the vessel; the goods were afterwards sold, and the master with his own hands *made a hole in the bottom* of the ship with an iron crow, and conveyed himself and mariners athore, the ship being in a sinking condition. The master hereupon sent advice of the loss to the owners, who boldly demanded the money insured, and brought an action for the same; but before this cause came to trial, the merchant that freighted the vessel commenced his action of trover for the goods against the owners, and therein the fraud was detected, and judgment given for the plaintiff the merchant; also with this intimation, that if the owners proceeded in their action on the insurance, they must expect that their practice and fraud would totally poison it; so they went no farther. Gen. Treat. of Trade 71, 72. cites Hill. 32 Car. 2. B. R.

7. Upon evidence in an action upon a charter-party, the case was, that *J. S. for him, and such who should have goods upon such ship*, and *A. B.* brought an action upon this charter-party, and *made averment he had goods upon the ship*, and held good; but per Holt Ch. J. If the goods were assured as the goods of an *Hamburgher* who was an ally, and the goods were the goods of a *Frenchman* who was an enemy; this is a *fraud*, and the assurance is not good. Skin. 327. Mich. 4 W. & M. B. R. Anon.

Also another objection was made, the which was, that the *passes were for goods, which belonged to the subjects of the King of Poland*, and so restrained only to them; but the goods on board were not of the

8. At Guildhall, in an action upon the case upon a policy, the which *warranted that the ship shall have four passes*, viz. a pass from the King of England, from the King of France, from the King of Poland, and the States of Holland; and the goods were to be the goods of such a Polish subject on board the *ship*, *vocat. The City of Warsaw*; an action upon this policy being brought, it appeared upon the evidence, that the *passes bore date in April or May*, and that the ship to which they applied these passes then was regnant. & vocat. by another name; and that she was *not named The City of Warsaw before the August following*; and therefore these were not good and effectual passes for this ship according to the guarranty of the policy, the which intended good passes, and not elusory vain passes; and they being a

fraud

fraud upon the subscribers, the policy shall not bind them. Skin. 404. Mich. 5 W. & M. B. R. Anon.

subjects of Poland, but of *Holland*, and therefore not within the intent of the policy. Skin. 401, 405. Anon.—It was *also* insisted, that the policy being for *goods of such a one without account*, they ought to prove that they had any goods on board, or had shipped any goods by order of a third person, though, being without account, they need not prove the particulars, and that so was the practice, which was not contradicted; per Holt Ch. J. Skin. 405. Anon.

9. 4 *Geo.* 1. *cap.* 12. *s.* 3. *If any owner of, or captain, master, mariner, or other officer belonging to any ship, shall wilfully cast away, burn, or otherwise destroy the ship, or direct or procure the same to be done, to the prejudice of any persons that shall under-write any policy of insurance thereon, or of any merchants that shall load goods thereon, he shall suffer death.*

10. Insurance was *against the perils of the sea, winds, pirates and barratry of the master.* It was found by verdict, that the *ship was lost per fraudem & negligentiam magistri.* The Court held, that every neglect of the master is not within this policy; and if he run away with the ship or imbezzle the goods, the merchant may have an action against him, but yet he may provide against it in another manner, viz. by insuring his ship and goods [405] to secure himself against such acts of barratry; for it is reasonable that merchants who venture a large share of their stocks should secure themselves in what manner they think proper against the barratry of the master and all other frauds; and this must be intended a fraud in the master, and not a bare neglect, so that this breach is well assign'd, it being a general rule that it may be assign'd in as general words as the covenant is; and if it had been assigned per baracterium magistri it had been good, but it is not necessary to assign it in the very words of the covenant, for it is sufficient if it is assigned in the sense; and they all agreed, that fraud is barratry tho' negligence might not; so the judgment was affirm'd. 8 Mod. 231. Pasch. 10 Geo. Knight v. Cambridge.

11. 11 *Geo.* 1. *cap.* 29. *s.* 5. *If any owner of, or captain, master, officer or mariner belonging to any ship, shall wilfully cast away, burn or destroy the ship, or direct or procure the same to be done, with intent to prejudice any person that shall have underwritten any policy of insurance thereon, or any merchant shall load goods therein, or any owner of such ship; the persons offending being thereof convicted shall be adjudged felons, and suffer without benefit of clergy.*

S. 6. *If any of the said offences shall be committed within the body of any county, the same shall be enquired determined and adjudged as felonies done within any county are to be; and if any of the said offences shall be committed upon the high seas, the same shall be tried and adjudged as by* 28 *H.* 8. *cap.* 15.

12. The defendant had *lent money on a bottom-rhea bond, but had no interest in the ship or cargo.* The money lent was 300l. and he insured 450l. on the ship; the plaintiff's *bill* was *to have the policy delivered up, by reason the defendant was not concerned in point of interest as to the ship or cargo.* The Court took it that the law

Note, that in this case *notice was taken* in the policy, *that it was to insure money*

on bottom-rhea; note also, that in this case the *ship survived the time* limited *in the bottom-rhea bond*, and was lost within the time limited in the policy; so if insurance be good, defendant might be intitled to the money on the bond, and also on the policy.

is settled, that if a man has no interest, and insures, the *insurance is void, although* it be *express'd* in the policy *interested or not interested*; and the reason the law goes upon, is that these insurances are made for the incouragement of trade, and not that persons unconcerned in trade, nor interested in the ship, should profit by it; and *where one would have benefit of the insurance, he must renounce all interest in the ship*. And the reason why the law allows that a man having some interest in the ship or cargo *may insure more, or five times as much*, is that a merchant cannot tell how much or how little his factor may have in readiness to lade on board his ship. And it was said, that the usual interest allow'd on bottom-rhea was 3*l.* per cent. per mensem, and you may insure at 6 or 7 per cent. for the voyage: so if this practice might be allowed a man might be sure to gain 30*l.* or more per cent. Per Cur. Decree the policy of insurance to be delivered up to be cancelled. 2 Vern. 269, 270. Trin. 1692. Goddart v. Garret.

2 Vern. 270. Goddart v. Garrett.—Defendant *lent the plaintiff* 250*l.* *on a bottomry bond, and* afterwards *insured on the same ship*; but the insurance was *larger as to the voyage*, there being liberty to go to other ports and places, *than what were contained in the* condition of the *bottomry bond*; the ship being lost, the defendant recovered the money on the policy of insurance, and also put the bottomry bond in suit; the *ship*, though lost, *had deviated* from the voyage mentioned in the bond, in going to Virgin Gardo to buy salt. The plaintiff brought his *bill*, pretending the *defendant ought not to have a double satisfaction* to recover both *on the insurance*, and also on the *bond*, he having insured only in respect of the money he had lent on bottomry, and had no other interest in the ship or cargo, and therefore the *plaintiff would have had the benefit of the insurance, paying the præmium*; sed non allocatur; the defendant having paid the præmium, was intitled to the benefit of the policy, and run the risque, whether the ship was lost or not; and the insurers might as well pretend to have aid of the bottomry bond, and to discount the money recovered thereon, as the plaintiff to have the money recovered on the policy to ease the bottomry bond. 2 Vern. 717. Mich. 1716. Harman v. Vanhatton.

13. A. insured *a ship in which he had no interest* [but with the words interest or no interest.] The ship *was taken by the enemy, and in their possession for nine days, but before it was carried infra præsidia it was retaken* by an English man of war. The question
[406] was, whether this was such a taking as to enable the plaintiff to recover the sum insured? The case was argued by civilians on both sides. And the Court seem'd to be of opinion for the defendant; they thought the finding by the verdict that the plaintiff had no interest in the ship would make no difference. 1st, Because they never would be more favourable to an insurer non bona fide or wagerer than to one that insur'd bona fide. 2d, Because to make a different interpretation of this deed from what is commonly put upon policies of insurance would be to run counter to the designs of the parties who have made use of the same words that are us'd in such policies; nay who have expressly provided for this very case by those words *(interest or no interest)* which signify nothing at all, unless the same loss intitles to a recovery where the insurer has no interest, and where he has. And they held it to be very plain, that the *property was not altered by the taking*. It was directed to be argued the next Term by common lawyers. 10 Mod. 77. Hill. 10 Ann. B. R. Affievedo v. Cambridge.

14. The

14. The general and ordinary policy of assurance, containing all adventures, sheweth that the assurer is to bear the adventure of *thieves and robbers*, and if it were otherwise in particular, it must be declared. Mal. Lex Merc. 117.

Assurance made for pirates is to be understood also for thieves who by night steal the goods from the ship. Mal. Lex Merc. 117, 118.——If goods are *stolen or embezil'd on ship-board*, the master is answerable and not the insurer. Gen. Treat. of Trade 74. cites Lex Merc. 101, 102.

15. By the policy of assurance, the *assuror is to answer* for *all damages*, detriment or hurt which shall happen to the goods after his under-writing, *be it by mice, rats, moths, or other vermin.* But if he can prove the damage was before done in the ware-house, or other place, he is not bound to answer the same. Mal. Lex Merc. 117.

16. Covenant on a charter-party, the defendant in consideration of a sum agreed on for freight, should *make such a voyage, and bear all loss and damage which should befal the ship or her lading, except only perils of the sea.* Defendant pleads, that in making that voyage, the ship *was taken by a man of war unknown*, whereby he was hindered in making his voyage. Demurrer to it, the quære was, if the capture by unknown men of war, was a peril of the sea, or not, according to the meaning of merchants? And argued strongly that it was not. But upon a certificate of merchants read in Court, that it was so esteemed, the Court inclined thereto: yet the Court desired Crawley the master of the Trinity-House, and other sufficient merchants to be brought into the Court to satisfy them viva voce, and it was so done accordingly, and judgment pro def. Show. 322. Mich. 3 W. & M. in Case of Jefferies v. Legendra,—cites Sty. 132. Pickering v. Berkley.

Sty. 132. Mich. 24 Car. S. C. and there Bacon J. objected, that the defendant did not shew that he and his ship was carried per locos incognitos as he should have shewn; but Roll Ch. J. answer'd, that it might be the ship was yet kept upon the sea.—— S.C. cited 4 Mod. 60.

17. If goods be lawfully insured, and afterwards the *vessel is disabled*, by reason of which, with the consent of the merchant, they are *put into another ship, which* after arrival, *proves an enemy's* ship, and by reason thereof is subject to seizure; in this case the insurers shall answer, for that is such an accident as is within the intention of the policy of insurance, where the policy mentions against dangers of the sea, enemies, &c. as policies generally do. Gen. Treat. of Trade, 76.

18. In an extraordinary case, where *salt was laden* on shipboard *by several persons without any distinction*, not putting it in sacks &c. the ship arriving safe, the *master delivered to the parties* concerned according to their bills of lading, *as they came one by one*; but it fell out that *some of the salt was washed* or lost, by reason of the dampness of the ship, *so that the two last* men *could not receive their proportion.* Here the master is not bound to deliver the exact quantity, nor is obliged to re-deliver the very specifical salt; but if there was a fault in not pumping, or not keeping dry the deck of the ship, it might alter the case, tho' there [this] *is a peril of the sea*, which the master could not prevent, and of necessity he must deliver to one before the other.

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It is no queſtion, but that the aſſurers ſhall anſwer in this caſe; but it has been doubted, whether they can bring in the firſt men for contribution; for by ſome it is conceived that they ought not to contribute, but others held that the reſt muſt of neceſſity be contributary to ſuch a loſs, ſo as to make no diſtinction in the unlading, any more than in the lading of the goods. Gen. Treat. of Com. 80. cites Moll. 245.

19. *If by* occaſion of *lightning, the goods* which are *put into the boat* or lighter *periſh*, the ſhip and remaining goods in the ſhip ſhall anſwer for the ſame. *But* on the contrary, *if the ſhip and remaining goods periſh after the boat or lighter is once ſafe*, no contribution ſhall be on the goods in the lighter; for the law is, that the *goods ſhall only be liable to contributions when ſhip and goods are ſafely arrived at their intended port of diſcharge*. According to this rule is the *aſſuror to anſwer* for contribution *pro rata* of the ſum by him aſſured. Mal. Lex Merc. 117.

Where any merchant inſures merchandize *from London to St. Lucar, until it be laid on ſhore at Sevil*; this *adventure is as well in the ſmall ſhips, lighters, or boats*, in which it is carried up to the city of Sevil till the unlading thereof there, as the ſame was in the ſhip whereby the ſaid merchandize was tranſported from the port of London to St. Lucar; and any damage, either totally or in part, is to be anſwered by the aſſurers accordingly. Gen. Treat. of Trade 75.

20. As to an aſſuror's being liable to the adventure of *goods ſhipped from one ſhip into another*; ſometimes in policies of aſſurances it happens, that upon ſome eſpecial conſideration this clauſe forbidding the transferring of goods is inſerted; becauſe in time of hoſtility or wars between princes, it might fall out to be unladen in ſuch ſhips of thoſe contending princes, whereby the adventure would be far greater. But according to the uſual aſſurances, which are made generally without any exception, the aſſuror is liable thereunto; for it is underſtood that the maſter of a ſhip without ſome good and accidental cauſe would not put the goods from one ſhip into another, but would deliver them (according to the charter-party) at the appointed place; which is the cauſe that when aſſurance is made upon ſome particular goods laden in ſuch a ſhip, under ſuch a mark, the *policy maketh mention* of the goods laden to be tranſported and delivered to ſuch a place *by the ſhip, or by any other ſhip or veſſel*, until they be ſafely landed. So that in all theſe and the like, the condition makes the law. Mal. Lex Merc. 118.

If goods are *inſured in a certain ſhip* bound to any foreign parts, and in the voyage it happens *ſhe becomes leaky*, or receives other damage, and the ſuper-cargo on board and maſter agree to *freight another veſſel for the ſafe delivery of the goods*; and then after her relading, the *ſecond veſſel miſcarries*, the aſſurers are diſcharged, without a ſpecial clauſe to make them liable; but if there be theſe words, the goods laden to be tranſported and delivered at ſuch a place *by the ſaid ſhip, or by any other ſhip or veſſel until they be ſafely landed*, then the inſurers muſt anſwer the misfortune happening. Gen. Treat. of Trade 75, 76. cites Leg. Rhod. Moll 242.

21. If a ſhip be inſured *from the port of* London to any place abroad, and *before the ſhip breaks ground, ſhe* happens to take fire, and *is burnt*, the aſſurors in ſuch caſe are not obliged to anſwer; for the adventure did not begin till the veſſel was gone from the firſt port. If in the policy of inſurance the words (*at and from the port of* London) had been inſerted, there the inſurers would have been anſwerable for ſuch a misfortune; *and if* on ſuch an inſurance, the ſhip *had broke ground, and afterwards had been*

driven by storm back to the port of London, *and there had took fire*, the insurers must have answered; because the very breaking of ground was a commencement of the voyage; and the port of London extends from the North Foreland in the Isle of Thanet to London-bridge. Gen. Treat. of Com. 74, 75. cites Rot. Scacc. 15 Car. 2.

22. Action on a policy of insurance; the defendant pleaded non assumpsit, and the Jury found the policy, by which the insurers undertook *against perils of sea, pirates, enemies* &c. *from London to Venice* warranted to depart with convoy. Et per Cur. the words, *warranted to depart with convoy*, mean only, that he will leave the port, and sail with the convoy, *without any wilful default* in the master; therefore, if by default of the master, the ship is separated and taken, the insurers are not liable; but if there be no default, the master having done all that could be done, and the ship is separated and taken by the enemies, the insurers are liable; so if the ship be lost by *stress of weather*, for they insure against these by their own agreement. 2 Salk. 443. Hill. 2 W. & M. B. R. Jefferies v. Legendra.

Show. 320. Mich. 3 W. & M. S. C. —Carth. [408] 216, 217. Hill. 3 W. & M. S. C. —4 Mod. 58. S. C. And there 60. per Cur. the word *(depart)* is only terminus a quo; if the ship *had departed from London, and came back again by fraud*, this had been no departure within the intention of this agreement. 3 Lev. 320. S. C. And it was admitted and agreed, that by the custom of merchants those words (warranted to depart with convoy) *are the words of the assured, and not of the assurer*, and that the assured is to find the convoy. And it was held by Holt Ch. J. and the greater part of the Court, that tho' the words are only (to depart with convoy) yet they *extend to sail with convoy all the voyage*. But the separation being by tempest at first, and the convoy and ship never meeting afterwards, and he *using his endeavour to meet with the convoy, and to go with it the rest of the voyage, and being again driven back by tempest, and taken* by pirates, tho' the convoy remain'd all this time at Torbay, this shall not be such neglect in the convoy as shall discharge the insurer, who might have stay'd at Foy (where he was driven) till the convoy came to him; and therefore gave judgment for the plaintiff.

23. Action on a policy of insurance by the defendant at *London*, insuring a ship from thence *to the East-Indies*, warranted *to depart with convoy*; and shews, that the ship *went from London to the Downs, and from thence with convoy*, and was *lost*. After a frivolous plea and demurrer, the case stood upon the declaration, to which it was objected, that here was a departure without convoy. Et per Cur. the clause *warranted to depart with convoy*, must be *construed according to the usage among merchants*, i. e. from such place where convoys are to be had, as the Downs &c. Holt Ch. J. contra. We take notice of the *laws of merchants* that are *general*, not of those that are *particular usages*. It is no part of the law of merchants to take convoy in the Downs. 2 Salk. 443. Mich. 4 W. & M. B. R. Lethulier's Case.

S. P. obiter 10 Mod. 287. Arg.

24. Case upon a policy, which was to insure the William-galley in a voyage *from Bremen to the port of London, warranted to depart with convoy*: the case was, the galley *set sail* from Bremen *under convoy of a Dutch man of war to the Elb, where they were joined with two other Dutch men of war, and several* Dutch and English merchant ships, *whence* they sail'd *to the Texel, where they found a squadron of English men of war, and an admiral*. After a stay of nine weeks, they *set out from the Texel*, and the *galley was separated in a storm, and taken by a French* privateer,

and taken again by a Dutch privateer, and paid 8ol. fairage. And it was ruled per Holt Ch. J. that the voyage ought to be according to the uſage, and that their *going to the iſle*, tho' in fact out of the way, *was no deviation*; for till after the year 1703, there was no convoy for ſhips directly from Bremen to London. And the plaintiff had a verdict. 2 Salk. 445. February 14, 1704. coram Holt Ch. J. at Niſi Prius. Bond v. Gonſales.

25. If an inſurance be made *on a ſhip* generally, *and the name of the ſhip is expreſſed* according to the ſaid policy of aſſurance made upon the very keel of the ſhip *of ſuch a burthen*, this aſſurance does not extend to the goods laden in the ſame, when the ſhip is only named, and no goods at all. Mal. Lex Merc. 116.

26. An aſſurance made *upon* 1000 *hides laden in ſuch a ſhip*, from ſuch a place to ſuch a place, is good, without naming the ſeveral ſorts of hides laden therein; for, in all policies of aſſurances the *words run generally upon the principal wares, and all other* commodities or *goods laden or to be laden by ſuch a man, for the account of him or any other*; and ſo this (general) includes all particular things, which when aſſurance is made upon them are named and ſpecified. Mal. Lex Merc. 116.

[409] 27. When aſſurances are made upon goods laden or to be laden, tho' it be *uncertain what things may be laden*; the ſame aſſurance muſt needs be of validity; for the words *goods and merchandiſes*, comprehend all uncertain things vendible. And if it were ſome *particular thing*, it *is always expreſſed*. Mal. Lex Merc. 116.

So when aſſurance is made upon commodities or goods *without name*, or not naming the *number, weight or meaſure*, but expreſſing the mark of all goods laden, or to be laden, as aforeſaid. Mal. Lex Merc. 116.

28. An aſſurance made *upon any particular goods* muſt be declared by the *particular mark* of the goods belonging to ſuch an owner, or any other; and if there be more of the ſaid mark, the *number* thereof is added: and if the number were alike, the *weight* may diſtinguiſh the ſame; whereby the one ſack being thrown over-board for the ſafe-guard of the ſhip and goods, may be caſt into a contribution; or being taken by pyrates, the aſſurers are to pay for it. Mal. Lex Merc. 116.

S. P. Gen. Treat. of Trade 72. cites Molloy 243.— S. P. And this was held a reaſonable cuſtom, as being equal between the aſſurer and aſſured; for the laſt return their premium

29. If one *aſſures goods but no goods are laden*, it ſeems the aſſuror by ſuch aſſurance is not liable to bear the adventure. See Mal. Lex Merc. 118.

30. *But* if *part of the goods* were *laden*, then the aſſurors are liable for ſo much as that part of the goods did coſt or amount unto: albeit in that, cuſtom is to be preferred above law; for the civil law (if there be *many aſſurors* in a ſhip upon the goods laden therein) maketh all the aſſurors *liable pro rata*, as they have aſſured according to the ſaid part of goods laden, if a loſs do happen; or (if there be cauſe) to reſtore the premium, or ſalary of aſſurance in part. But the *cuſtom of aſſurances doth impoſe the loſs upon thoſe aſſurers which did firſt underwrite*, and the later underwriters of the aſſurors do not bear any part of the loſs, but muſt make

make reſtitution of the premium, and reſerve only one half upon the 100l. or 10s. for their underwriting in the policy of aſſurance, as is obſerved. The civilians therefore have noted, that *in aſſurances the cuſtoms of the ſea-laws, and uſe amongſt merchants is chiefly to be regarded* and obſerved. Mal. Lex Merc. 118.

(except 10l. [10s.] for ſubſcribing) if there be no loſs, when the value of the goods amount not to reach them; nor in ſuch caſe are the firſt ſubſcribers at any diſadvantage; for they keep their premium if the goods come home ſafe when the after-ſubſcribers return theirs; and in truth thoſe to whom the value will not reach, are never obliged. And tho' ſome may prove inſolvent, yet in aſſurances each engages only for his own ſum, and to make good the loſs of goods ſo far as the ſum he ſubſcribed amounts to, but *not to make good the inſolvency of others*; and there never was a cuſtom better prov'd; for if *to ſubſcribe 100l. each, and the goods are 150l. the laſt ſtands at half loſs.* And the whole Court held the cuſtom reaſonable; and judgment for the defendant. Show. 132. Mich. 1 W. & M. The African Company v. Bull.

If *no goods come home*, the *inſurer has all his premium return'd*; and ſo it is for his advantage to have this cuſtom preſerved. And theſe kind of inſurances are *made upon accounts*, when a merchant does not know whether his factor will ſend home any goods, or how much. Arg. ſays this was prov'd. Show. 134. Mich. 1 W. & M. in the Caſe of the African Company v. Bull.

31. In like manner, if a *ſhip bound for a certain port*, being at ſea, *be driven back to the ſame from whence it departed, and* by tempeſt *be caſt away*, the aſſurors are to anſwer the damage of the goods laden therein, for ſo much as they did aſſure, as they do in other caſualties. Lex Merc. 118.

32. A ſhip is inſured *for more than ſhe is worth*, the money may be recovered on any loſs happening, where the policy of aſſurance is well made, and it is declared therein that the owner did *value his ſhip in ſuch a ſum:* and where a merchant valued one *barrel of ſaffron at* 1000*l. having* privately *put ſo much in gold in the ſame*, the gold was taken, but the ſaffron was delivered; here the aſſurers were obliged to pay for the gold. The like is to be done for pearls, or other things ſo valued. Gen. Treat. of Trade 74.

33. A policy of aſſurance was drawn *from Archangel to Leghorn*, and aſſumpſit being brought upon it, the defendant ſaid, that the *agreement before the ſubſcription was, that the adventure ſhould begin but from the Downs;* but this agreement was *not put into writing*. This being but a mere parol agreement, may be altered or diſcharged by agreement by parol; but without it be put in writing, *it ſhall be taken that the policy ſpeaks the minds of the parties*; for policies are things well known, and go as far as trade goes; and to ſuffer them to be defeated by agreements not appearing, is to leſſen their credit, and to make them of no value, which yet are countenanced by two ſeveral acts of parliament. That the party may as well ſay, he is to have ten guineas premium, tho' the policy ſays but three, as to ſay he inſur'd but from ſuch a place, viz. the Downs, when the policy ſays it was from Archangel. Pemberton ſaid, that *policies* were *ſacred things*, and that a merchant ſhould no more be allowed to go from what he had ſubſcribed in them, than he that ſubſcribes a *bill of exchange* payable at ſuch a day, ſhall be allowed to go from it, and ſay it was agreed to be upon a condition &c. when it may be that the bill had been negotiated;

S. C. cited 2 Salk. 445. by Holt Ch. J. That it [410] was held that the parol agreement ſhould avoid the writing [which is not agreeable to the Caſe in Skin. 54 &c.]

negotiated; for though neither of them are ſpecialties, yet they are of great credit, and very much for the ſupport, conveniency, and advantage of trade. Skin. 54, 55. Trin. 34 Car. 2. B. R. Kaines v. Sir Robert Knightly.

34. A. being at the Weſt-Indies, ſent a *letter to B. to inſure goods on the Mary-galley of* St. Chriſtopher's, *Captain A. Hill, commander,* at London. *B. carried the letters to Stubbs* who writ policies, and he, *by miſtake, made the aſſurance on the Mary, Captain Haſlewood commander &c.* This policy thus made, was ſubſcribed by the defendant. The Mary-galley was loſt, and then Stubbs applied to the *inſurers* to *conſent to alter the policy*, to which they agreed, and the miſtake was mended. It was objected at the trial, that the Mary was a ſtouter ſhip than the Mary-galley, and that the inſurers ought to have an increaſe of premium for the alteration; but it was held by Holt Ch. J. that the action well lay, and that the miſtake might be ſet right, and that Stubbs was a good witneſs. 2 Salk. 444, 445. December 3, 1703. coram Holt Ch. J. at Niſi Prius. Bates v. Graham, & al.

35. If a ſhip was *laden at Aleppo, and comes to Meſſina that ſhe may be inſured*, the *adventure is to begin from Meſſina*; but then it muſt be ſo expreſſed, nay it need not be expreſſed that ſhe was laden at Aleppo (though the opinion of ſome merchants was ſo), as Pemberton Ch. J. ſaid; *but* if the *inſurance* was *of goods laden at Aleppo, and they were indeed laden at Meſſina*, it might make a difference. Skin. 54. Trin. 34 Car. 2 In Caſe of Kames v. Sir Robert Knightly, ſays this was allowed.

36. If the policy of aſſurance run *until the ſhip ſhall have ended and be diſcharged of her voyage*, arrival at the port to which ſhe is bound is not a diſcharge until ſhe is unladed; per tot. Cur. upon a demurrer. Skin. 243. Mich. 1 Jac. 2. B. R. Anon.

B. having the command of a merchant ſhip, and likewiſe a ſhare in her as being an owner, in 1730 deſired A. by letter to get 200 l. inſured on her. An inſurance was *made in the name of A.* (the agent) *by B's direction, the inſurers* (J. S. and T. S.) *knowing nothing*

37. In indebitatus *aſſumpſit by B. for 5 l. received to the plaintiff's uſe*, and non aſſumpſit pleaded, the caſe was, that *A. took a policy* of inſurance *upon account for 5 l. premium in the name of B. and A. paid the ſaid premium to J. S.* and *A. had no goods then on board*, and ſo the policy was void, and ſo the money to be returned by the cuſtom of merchants. It was inſiſted that the action ought to have been in A.'s name; for the money was his, and if the policy had been good, it would have been to his advantage, and it could no ways be ſaid to be received to B.'s uſe, it never being his money. Beſides here may be a great *fraud* upon all inſurers in this, *that an inſurance may be made in another's name, and if a loſs happen, then the inſurer ſhall pay, for that ſome ceſty que truſt had goods on board; [but] if the ſhip arrives, then the nominal truſtee ſhall bring an indebitatus aſſumpſit for the premium, as having no goods on board.* To all which Holt Ch. J. anſwered, that the policy being in B.'s name, the premium was paid in his name and as his money, and he muſt bring the action upon a loſs, and ſo upon avoidance of the policy to recover back the premium; and as to the inconveniencies, it would be the ſame, whoſoever

was to bring the action, *and therefore the inſurers ought with caution to look to that beforehand.* Show. 156. Paſch. 2 W. & M. Martin v. Sitwell.

of B. In the voyage the *ſhip was loſt, and B.* the captain *caſt away.* M. the *adminiſtratrix of B. gave J. S. and T. S. notice of the loſs and the truſt, and required payment to her only.* But A. under a pretence that B. was indebted to him, procured the inſurers to give him credit for the ſum in an account which they afterwards made up with him, and then the balance of that account was carried into a new account, and this ſecond account was afterwards ſettled between them. Upon a bill by M. to be relieved, it was decreed that the inſurers pay her the money, and A. to pay the coſts of ſuit, deducting there out the charges he had been at in obtaining the policy. Barn. Chan. Rep. 319. Mich. 1740. Fell v. Lutwidge.

38. Where a policy of inſurance is *againſt reſtraint of princes*, that *extends not* where the inſured ſhall *navigate againſt the laws of countries, or* where there ſhall be a *ſeiſure for not paying of cuſtom*, or the like. Per Hutchins Com. 2 Vern. 176. pl. 158. Mich. 1690. Anon.

39. If a ſhip be inſured under captain J. S. the part-owners may *change the captain without notice to inſurers.* Quære tamen; for it might be the confidence and knowledge of the captain might be an encouragement to the inſurers. Per Holt. 12 Mod. 325. Anon.

40. If *after a policy* of inſurance a *damage happens*, and *afterwards*, in the ſame voyage *a deviation*, yet the aſſured ſhall recover for what happened before the deviation; for the *policy is diſcharged from the time of the deviation only.* 2 Salk. 444. Hill. 1 Ann. B. R. Green v. Young.

41. A *ſhip inſured* was in her voyage *ſeized by the government, and turned into a fire-ſhip*; the queſtion was, whether the inſurers were liable. Holt Ch. J. thought it was within the word detention, but the cauſe was referred. 2 Salk. 444. Hill. 1 Ann. B. R. Anon.

42. On a policy of inſurance *on goods by agreement valued at 600 l. and the inſured not to be obliged to prove any intereſt.* Ld. Chancellor ordered the defendant to diſcover what goods he put on board; for although the *defendant offered to renounce all intereſt to the inſurers;* yet referred it to a maſter to examine the value of the goods ſaved, and to deduct it out of the value or ſum of 600 l. at which the goods were valued by the agreement. 2 Vern. 716. Mich. 1716. in Canc. Le Pypre v. Farr.

43. In the Caſe of an inſurance, *loſt or not loſt*, in the year 1583, there was a rich *ſhip*, called the St. Peter, coming from the Eaſt-Indies for Liſbon, *miſſing a long time*, and inſurance was made upon her at Antwerp and other places, at 30 per cent. Within *three years after* there *arrived* at Liſbon a *ſmaller ſhip*, very richly laden, which was *made out of the other ſhip* that was caſt on ſhore in a certain iſland abroad; and thereupon divers controverſies did ariſe between the owners of the goods and the aſſurers, as alſo the maſter and mariners. At laſt it was adjudged by the ſea laws, that the maſter and mariners ſhould have one third part, and the aſſurers ſhould come in for ſo much pro rata as they had aſſured, all charges deducted, and the ſhip to be the owners of the former ſhip; with the like

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considerations as aforesaid. Gen. Treat. of Trade 72. cites Lex Merc. 106, 108. Moll. 241.

44. A London merchant caused a ship at Calais to be freighted for Lisbon, and to return back again to Calais or London; and the ship going to Lisbon was there laden with sugar, pepper, and other commodities, to come for London; whereupon the merchant caused 6000 French crowns to be insured on her at Roan; and it happened that the ship was cast away upon the coast of France in coming homewards, and all the goods were lost; and intimation of this was made to the assurers, and all the proof concerning the lading of the said ship was sent to the commissioners of assurances at Roan: but upon examining the bills of lading, which declared truly the quality and quantity of the goods, the merchant's factor at Lisbon (considering it was a dangerous time of war, and the merchant living in London) *left the place of the ship's discharge in blank*, and by letters over
[412] land gave him notice of it, which was made apparent; here after the examination of the sea-laws and customs, and consulting experienced merchants, it was *sentenced that the insurers should* be cleared, and *make only a restitution of the money received by them for their premium*, out of which they abated 10 s. for every 100 l. for their subscribing to the policy of insurance. Gen. Treat. of Trade 72. 73. cites Lex Mercat. 112. The Case of Gerard Malynes merchant.

45. The assuror is to *have his premium* or salary *upon* a conditional assurance; for there is no *conditional assurance* made, but *with exception of some adventures* not to be borne by the assuror, which are not comprised in the policy of assurance. Mal. Lex Merc. 116. 117.

46. An assurance made is to be *understood always of the first voyage, unless* there were a *declaration of a second* voyage in the policy of assurance: and therefore assurors ought to be careful how they cause other men to assure for them in remote places, not to make them liable to two voyages for one assurance, nor to be subject to a second voyage when the first is performed. Mal. Lex Merc. 117.

47. If a merchant freights a ship with wool &c. which occasions a *forfeiture of a ship and lading*, being contrary to law; or if he lades contraband goods knowingly, and afterwards insures the same, if they are seised by the King's officers, the insurers are not compellable to bear the loss; tho' where any *goods* insured are *not contraband at the time of lading and insurance*, but become such by some posterior act or declaration, if they are then seised, the insurers are answerable. Gen. Treat. of Com. 76.

48. A merchant insured his goods to a port abroad, and there to be landed; the *factor, after arrival* of the ship, *sells the cargo aboard* without ever unlading the ship; and *the buyer* of the goods *contracts for the freight* of them *for some other port*, but *before the ship breaks ground, she is* by some accident *destroyed*; in this case the assured and buyer are left without remedy; for the property

perty of the merchandize being changed, and freight contracted de novo, the same doth *amount to as much as if the goods had been landed.* By the laws of Antwerp, the adventure is to be borne by the insurers 15 days after the ship's arrival in port. Gen. Treat. of Trade 76. 77. cites Molloy 243.

49. If a man *in a foreign country insures* a ship *from any place there to London*, and the ship is lost, the assurer, if he comes into England, shall answer by our law here; for the *promise is transitory*, and not fixed to the place where made: and so it was resolved, where a person abroad, in consideration of 10 l. had insured, that if the English merchant's ship did not come safe to London, he would pay 100 l. Afterwards the ship was robbed on the sea; and in an action brought for the 100 l. the merchant had judgment, tho' the subscription was out of the realm. Gen. Treat. of Trade 78. cites 37 H. 8. Mich. 31 Eliz.

50. Where *goods are redeemed from a pirate*, all the *insurers must pay contribution*, because the redemption is made for the safety of all; *so* it is *where goods* are wet, or *receive damage by any other accident*: and by the marine laws, if it be absolutely necessary to lighten a ship for her easy entrance into harbour, or a channel, two parts of the loss shall fall upon the goods, and the third part upon the ship, except the ship is of greater value than the lading, and the charge [or burden] of the goods be not the cause of her inability to enter, but some bad quality proceeding from the ship itself; or it is otherwise provided, that the goods shall be fully delivered at the port appointed for them. Gen. Treat. of Trade 80. 81. cites Lex Mercat. 109.

51. In order to the receiving and recovering of money insured, upon policies of insurance; when the persons insured have received advice of the loss of the ship or goods, they are to make application to the insurers, and *produce their vouchers, witnesses, or evidences, concerning the said loss*, declaring the manner and place, the cause, *with all circumstances* thereof, and all [413] such proof as by *letters and other means* they can attain unto; with which if the insurers are satisfied, they will pay the money without any scruple, deducting the premium; nor can they make any objection to it, unless they have some reasonable ground to found it upon, as *contrary intelligence* &c. in which case the parties, who have insured the sums, must wait a convenient time, according to the distance of the place where the ship is affirmed to be lost, 'till more certain advice can be obtained by the insurers about it; or if *nothing* can be *heard of the ship in any reasonable time*, then the insurers are obliged forthwith to pay the money. *But if after* that, it should happen that *the ship should arrive safe*, the insurers in such case shall have the money returned them. Gen. Treat. of Trade 78, 79.

52. And when it happens that some *part only of the goods are lost*, as in the case of *ejections in a storm*, or other such accidents; then the insurers make an average of it, and each man pay so much

much per cent. in proportion to the ſum for which he ſubſcribed. Gen. Treat. of Trade 78, 79.

53. If one *merchant hath* inſured the greateſt part of the adventure of a ſhip, and *advice* is received *of a loſs*, but *with hope of recovery of any part* thereof, whereby he would have the aſſiſtance of the inſurers, *he has a priviledge of making a renunciation* of the lading *to the aſſurers, and* to *come in* himſelf *in the nature of an inſurer for ſo much as* ſhall appear *he hath borne the adventure of beyond his part of the value inſured:* and if the merchant do not renounce, yet there is a power given in the policy of inſurance, for him to travel and endeavour a recovery of the adventure, after a misfortune hath happened, to which the aſſurers are to contribute, the ſame being a trouble for the eaſe of them; and they may appoint their ſervants or other perſons to join therein. Gen. Treat. of Trade 79, 80. cites Lex Mercat. 115.

54. A general *indebitatus aſſumpſit* will lie by an inſurer of a ſhip for the *premium* for which he inſured, tho' the conſideration of ſuch inſurance (viz. the hazard of loſs) is but a contingency. Per Cur. Carth. 338. in Caſe of Jackſon v. Colegrave.

2 Keb. 430. S. C. and there it is ſaid by Twiſden J. That it is *not uſual to regiſter the policies when they bring an action on the caſe, but only when they ſue before the commiſſioners*, which is the more dilatory.

55. In action upon the *Caſe* upon a policy of aſſurance plaintiff *declared upon a writing*, but did not ſay *in curia prolat.* It was urg'd for the defendant, that as his caſe is he cannot plead *non-aſſumpſit*, but a ſpecial plea grounded on the ſame writing, of which he had no counterpart, nor is it entered in the office of aſſurance, and ſince the plaintiff declared upon it, he moved this in order to get a view of it. All the Court agreed, that if plaintiff would ſtrike out of his declaration the words (per ſcriptum), the perpetual imparlance (which had been granted) ſhould be diſcharged. And at length the plaintiff agreed to give oyer. Sid. 386. Mich. 20 Car. 2. B. R. Suiſter v. Coel.

56. 11 *Geo.* 1. *cap.* 30. *ſ.* 43. enacts, That *in all actions of debt againſt either of the corporations called the* Royal-Exchange *Aſſurance* and *the* London Aſſurance, *upon any policies under the common ſeal for the aſſuring of any ſhip or merchandizes at ſea, or going to ſea, it ſhall be lawful for the ſaid corporations to* plea generally, *that they owe nothing to the plaintiff; and in all actions of covenant againſt either of the ſaid corporations upon any policy under the common ſeal for aſſuring any ſhip or merchandizes at ſea, or going to ſea, it ſhall be lawful for each of the corporations to plead generally, that they have not broke the covenant in ſuch policy contained; and if thereupon iſſue be joined, it ſhall be lawful for the jury to give ſuch part only of the ſum demanded, if it be an action of debt, or ſo much in damage, if it be an action of covenant, as it ſhall appear upon the evidence that the plaintiff ought in juſtice to have.*

[414] *S. 44. When any veſſel or merchandizes ſhall be inſured, a policy duly ſtamp'd ſhall be iſſued or made out within three days at fartheſt; and*

and the insurer neglecting to make out such policy shall forfeit 100 *l. to be recovered and divided as other penalties may be by the laws relating to the stamp duties; and all promissory notes for assurances of ships or merchandizes at sea, or going to sea, are declared to be void.*

[For more of Policy of Assurance in general, see Plea and Demurrer (S) pl. 7. and other proper Titles.]

Poor.

(A) *Statutes.*

1. 43 *Eliz. cap.* 2. *s.* 1. *BE it enacted by the authority of this present parliament, that the churchwardens of* * *every parish, and* † *four, three, or two* ‡ *substantial* ‖ *householders there, as shall be thought meet, having respect to the proportion and greatness of the same parish and parishes, to be nominated yearly in Easter week, or within one month after Easter, under the hand and seal of two or more Justices of the Peace in the same county, whereof one to be of the quorum, dwelling in or near the same parish or division where the same parish doth lie, shall be called overseers of the poor of the same parish: and they, or the greater part of them, shall take order from time to time, by and with the consent of two or more such Justices of Peace, as is aforesaid, for setting to work the children of all such whose parents shall not by the said churchwardens and overseers, or the greater part of them, be thought able to keep and maintain their children; and also for setting to work all such persons, married or unmarried, having no means to maintain them, and use no ordinary and daily trade of life to get their living by: and also to raise weekly, or otherwise, (by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines or saleable underwoods in the said parish, in such competent sum and sums of money as they shall think fit) a convenient stock of flax, hemp, wool, thread, iron, and other ware and stuff to set the poor on work: and also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such other among them, being poor, and not able to work, and also for the putting out of such children to be apprentices, to be gathered out of the same parish, according to the ability of the same*

* The Justices of Peace, by the general words of the statute, have power to name overseers in all parishes; and the Court was of opinion that it must *extend* as well to *extra-parochial places* as to all parishes in general, and that no subsequent words shall control the general words in the enacting part; and certainly all the poor-acts shall be construed to extend to such places as well as to other pa-

rishes, when they are within the same mischief, and

same parish; and to do and execute all other things, as well for the disposing of the said stock, as otherwise concerning the premisses, as to them shall seem convenient.

shall be subject to the controul of the Justices of Peace. Most of the forests in England are extra-parochial, and so is Christ-Church in Oxford, but they ought to maintain their own poor; therefore a peremptory mandamus was granted to the Justices of Peace to choose overseers in the town of Rufford, being an extra-parochial place. 8 Mod. 39. Pasch. 7 Geo. The King v. the Inhabitants of Rufford.

† Upon a motion to quash an indictment against B. for that he, with four others, being appointed overseers of the poor of such a parish, refused to take upon him that office &c. it was objected that the statute directs the nomination but of four, three or two with the churchwardens. And per Parker Ch. J. That is very odd [true] tho' in many places more are appointed than four; for the act says four, three or two shall be nominated of the inhabitants, at the discretion of the Justices (scil.) they may nominate four, three or two; it is not a limitation of the Justices power, but it is in the very authoritative part thereof. *Where more than four are added*, they are not punishable [415] by the act, and *they can be only* added *as assistants*. Per Powell, the question will be whether the words of the act will be any more than directory, or a limitation of their authority. In most of the parishes about London, there are more than four, wherefore he said we need not determine this point; but the indictment was quash'd for another fault. MS. Cases. Trin. 11 Ann. B. R. Anon.

‡ It was moved for a mandamus to J. H. and J. T. Justices of Peace in the county of Dorset &c. to nominate two substantial houlholders to be overseers of the poor of the parish of Charlstock in the county of Dorset upon this statute; and there was an affidavit, that at a meeting of the parish after Easter last, one John B. and Mary F. were elected overseers, and at a meeting of the Justices they approved of Mr. B. and refused the woman, as being an unfit person to serve as overseer; and the old overseers refusing to nominate any other, the Justices approved the said B. only. Per Powel, a *woman is not to be an overseer* of the poor; and there can be no custom in a parish to put her in, because of her being a housekeeper; because this is an officer created by act of parliament. Per Parker Ch. J. the nomination is to be by the Justices, and it seems the overseers are to continue but one year. The parish here was obstinate in not having another instead of the woman, and the Justices should have nominated one of the old ones, since they were so stiff; but (because the Justices had done well in refusing the woman) he directed that they should apply to the Justices to have another nominated; and if they refused, then to apply to the Court for a mandamus the next Term. MS. Cases. Pasch. 10 Ann. B. R. Anon.

‖ A *citizen of London that lived in the country in the summer*, was *chose overseer* of the poor of the parish: the Court seem'd to discountenance such choice of one that was resident there only for some part of the summer, and was actually an inhabitant of another parish in London. Carth. 161. Mich. 2 W. & M. B. R. The King v. Moor.

S. 2. *Which said churchwardens and overseers so to be nominated, or such of them as shall not be let by sickness, or other just excuse to be allowed by two such Justices of Peace, or more, as is aforesaid, shall meet together at the least once every month, in the church of the said parish, upon the Sunday in the afternoon, after divine service, there to consider of some good course to be taken, and of some meet order to be set down in the premisses,* (2) *and shall within four days after the end of their year, and after other overseers nominated, as aforesaid, make and yield up to such two* * *Justices of Peace as is aforesaid, a true and perfect account of all sums of money by them receiv'd, or rated and assessed, and not received, and also of such stock as shall be in their hands, or in the hands of any of the poor to work, and of all other things concerning their said office,* (3) *and such sum or sums of money as shall be in their hands, and shall pay and deliver over to the said churchwardens and overseers newly nominated and appointed, as aforesaid,* (4) *upon pain that every one of them absenting themselves without lawful cause, as aforesaid, from such monthly meeting for the purpose aforesaid, or being* † *negligent in their office, or in the execution of the orders aforesaid, being made by and with the assent of the said*

* The Justices' *authority* in stating this account, *cannot be delegated* to any other. MS. Cases. Pasch. 9 Ann. B. R. in Case of the Queen v. Turner & al.

ſaid Juſtices of Peace, or any two of them before mentioned, to forfeit for every ſuch default of abſence or negligence ‡ 20 *s.*

† If an overſeer does not provide for the poor, he is indictable; and if he relieves the poor when there is no neceſſity, it is a miſdemeanor. MS. Caſes. Paſch. 3 Ann. B. R. Tawney's Caſe.

‡ This penalty for not meeting in the church, ſhall never be inflicted on the overſeers of the poor of extra-parochial places, becauſe they have no church to meet in. Per Cur. 8 Mod. 40. Paſch. 7 Geo. in Caſe of the King v. the Inhabitants of Rutford.

If any of theſe officers be convicted of any of the penalties in this act, the other muſt levy it MS. Caſes. Trin. 11 Annæ B. R. Anon.

S. 3. And be it alſo enacted, that if the ſaid Juſtices of Peace do perceive, that the inhabitants of any pariſh are not able to levy among themſelves ſufficient ſums of money for the purpoſes aforeſaid, then the ſaid two Juſtices ſhall and may tax, rate and aſſeſs, as aforeſaid, any other of other pariſhes, or out of any pariſh within the hundred where the ſaid pariſh is, to pay ſuch ſum and ſums of money to the churchwardens and overſeers of the ſaid poor pariſh for the ſaid purpoſes, as the ſaid Juſtices ſhall think fit, according to the intent of this law. (2) And if the ſaid hundred ſhall not be thought to the ſaid Juſtice able and fit to relieve the ſaid ſeveral pariſhes not able to provide for themſelves, as aforeſaid; then the Juſtices of Peace at their general quarter ſeſſions, or the greater number of them, ſhall rate and aſſeſs, as aforeſaid, any other of other pariſhes, or out of any pariſh within the ſaid county for the purpoſes aforeſaid, as in their diſcretion ſhall ſeem fit.

See (I.) If ſeveral *inhabitants of A. have lands* and tenements *in* the pariſh of B. *and their tenants are ſo poor*, that they are not able to pay to the relief of the poor of B. the landlord's inhabiting in the pariſh of A.

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ſhall be no diſcharge to them, but *they ſhall pay for their lands* and tenements which they have *in* the pariſh of *B.* 2 Bulſt. 352. 29 July, 8 Car. Pariſhioners of St. Peter v. Pariſhioners of St. Helens.

Sir James Mountague Attorney General moved to quaſh an order of two Juſtices of the Peace for the county of the city of Norwich made upon this ſtatute; his exception was, that it does not appear that the pariſhes taxed are within the hundred; for it is only ſaid that they are within the *county of the city* of Norwich; and two Juſtices by the act, have not power to tax the county, but only the hundred, or the pariſhes within the hundred. To which it was anſwered, That if two Juſtices cannot relieve in this caſe, there can be no relief given; for it is well known there are no hundreds within cities, and the city and the county of the city are the ſame, and the power given to the Juſtices muſt ariſe upon a defect in the hundred, and where there is no hundred there can be no ſuch defect, and the ſeſſions could have made no order in this caſe. But, per Powel, this is not caſus omiſſus out of the ſtatute; and tho' the two Juſtices have no power, here being no hundred, yet the ſeſſions have a juriſdiction, and may tax the county of the city in part or at large; to which the reſt agreed, and (Holt abſente) quaſhed the order, being made by two Juſtices only. 11 Mod. 269. Trin. 8 Ann. B. R. Pariſh of St. Benedict v. Pariſh of St. Peter's in Norwich.

There are two ways by this ſtatute to make one *pariſh contributory* to the poor of another pariſh, viz. either the Juſtices may *tax particular perſons* in aid to that pariſh which cannot relieve it's own poor; or they may *aſſeſs the whole pariſh in a certain ſum*, and leave it to the churchwardens and overſeers to levy the ſame on particular perſons. Per Holt. 2 Salk. 481. Hill. 9 W. 3. B. R. Dimchurch v. Eaſtchurch.—Shaw's Pariſh Law 219. cites S. C.

Mandamus to the Juſtices to make a rate for the ſupport of the poor of the pariſh of St. Mary's &c. which was oppoſed, becauſe the pariſh-officers ought to make the rate, and the Juſtices are only to ſign it; to which it was anſwered, that this motion was grounded on this clauſe of the ſtatute, and thereupon a mandamus was granted, directed to the Juſtices; and as this is a matter of right, they ought to make a return. 2 Shaw's Pract. Juſt. 47. cites Hiſl. 11 Geo. 1. The King v. the Officers of St. Mary's in Marlborough.—Shaw's Pariſh Law 219. cites S. C.

S. 4. And that it ſhall be lawful, as well for the preſent as ſubſequent churchwardens and overſeers, or any of them, by warrant from any ſuch two Juſtices of the Peace, as is aforeſaid, to levy as well the ſaid ſums of money, and all arrearages, of every one that ſhall refuſe to contribute according as they ſhall be aſſeſſed, by diſtreſs and ſale of the

Vide (H)—Holt Ch. J. ſaid that a man could not be diſtrained by virtue of

a general warrant made before the rate, but there *ought to be a special warrant* on purpose; and he said that a distress could not be taken *for a quarter's rate before the quarter was ended*; but the Jury said the custom

the offender's goods, as the sums of money or stock which shall be behind upon any account to be made, as aforesaid, rendring to the parties the overplus: (2) *And in defect of such distress, it shall be lawful for any two Justices of the Peace to commit him or them to the common gaol of the county, there to remain without bail or mainprize, until payment of the said sum, arrearages and stock.* (3) *And the said Justices of Peace, or any one of them, to send to the house of correction, or common gaol, such as shall not imploy themselves to work, being appointed thereunto as aforesaid.* (4) *And also any such two Justices of Peace to* * *commit to the said prison every one of the said churchwardens and overseers which shall refuse to account, there to remain without bail or mainprize, until he have made a true accompt, and satisfied and paid so much as upon the said accompt shall be remaining in his hands.*

was otherwise. 2 Salk. 532. Trin. 5 Ann. Tracy v. Talbot.——6 Mod. 214. S. C. And says that Holt Ch. J. seemed not satisfied that they might distrain for a quarter's rate before the end of the quarter; but the Jury said the custom and usage was to do it, and that to avoid the mischief that would ensue, if the party should remove out of the parish before the quarter. To which Holt Ch. J. answered, if he *remove into another parish in the same county*, they might distrain by warrant from the Justices as well as in the same parish; but if he removed out of the county, he agreed the remedy failed. So he gave way to the usage in that point.

* If accounts be adjusted, and the *overseers refuse to pay the balance*, they cannot be committed immediately, but a *warrant* must issue *to distrain* them, and upon a return thereof there may be a *commitment*. MS. Cases. Pasch. 9 Ann. B. R. The Queen v. Turner & al.

The Justices *cannot commit* an overseer of the poor *for* bringing in *an account to which they object*, but they ought to hear it, and to strike out what is amiss in it, and balance the account. MS. Cases. At Devon Assises. Lent 1719. coram King Ch. J. Walrond's Case.

The defendant being an overseer, was committed by two Justices of Peace by a *warrant*, which recited, that he had appeared before them, and being demanded to give a just and true account of all such monies as he had received and paid, he had only *produced an account in gross* of his receipts and payments, and refused to give a particular account, or produce his books &c. And they believing this to be no account according to this statute, and the defendant refusing to give any other account, therefore they commit him to be detained until he shall make a true account. And upon a habeas corpus he was here discharg'd. Per tot. Cur. Because the Justices had no authority to commit in this manner by this statute, for that an account was confess'd to have been rendered &c. Show. 395. Pasch. 4 W. & M. B. R. The King v. Carrock.

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* See Apprentices.—An order of Justices of Peace, willing churchwardens to *pay a scrivener* 5*l.* due to him for *drawing of indentures for setting out poor children to trades* was quashed, as being a thing out of their power; but the way had been to order a parish-rate *for levying so much a week till a convenient sum were raised*; and in that case as soon as money was raised, an action would lie for the scrivener against the church-wardens. 12 Mod. 417. Mich. 12 W. 3. B. R. Anon.

S. 5. Enacts that churchwardens and overseers may bind poor children * *apprentices, and that they may by leave of the lord of the manor build houses on the waste for the poor to inhabit, but not to be afterwards used for the habitation of any other on the pains contained in the* 31 *Eliz.*

Vide (G)—Upon an appeal from a Poor Rate, the Justices refused to hear the appeal, because it was not made at the next quarter-sessions. But per Cur. The *party grieved may appeal at any* sessions. The Justices may

S. 6. Provided always, that if any person or persons shall find themselves griev'd with any sess or tax, or other act done by the said churchwardens or other persons, or by the said Justices of Peace; that then it shall be lawful for the Justices of Peace, at their general Quarter Sessions, or the greater number of them, to take such order therein, as to them shall be thought convenient; and the same to conclude and bind all the said parties.

may not have power to alter the rate at their diſcretion, but they ought not to refuſe to hear the appeal. MS. Caſes. Mich. 8 Ann. B. R. The Queen v. the Inhabitants of St. Giles.

T. P. and S. being overſeers of the poor, got their account allowed by their Juſtices. The pariſh appealed againſt it, and the Seſſions ſet aſide this account, and then directed a re-examination of the matter to the ſame two Juſtices, this order being removed. It was objected that here was a matter delegated by the Court, who were finally to determine the matter in queſtion. Per Parker Ch. J. The overſeers have four days time to paſs their accounts, and they may go before any two Juſtices for the doing it. Till the time is paſt there is no compulſion uſed, but if this time is ſlipt, the pariſh may go before any two Juſtices, and when theſe have entered upon the examination, no other Juſtices are afterwards to intermeddle; and when this matter comes to the ſeſſions, they are to take ſuch order therein as to them ſhall ſeem convenient, but need not finally determine. MS. Caſes. Hill. 10 Ann. B. R. Townſhend, Parſons and Smith's Caſe (overſeers of Whitechapple.)

S. 7. enacts, That the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent perſon, or other poor perſon not able to work, being of a ſufficient ability, ſhall at their charges relieve and maintain every ſuch poor perſon in that manner, and according to that rate, as by the Juſtices of Peace of that county where ſuch ſufficient perſons dwell, or the greater number of them, at their general Quarter Seſſions ſhall be aſſeſſed, (2) upon pain that every one of them ſhall forfeit 20s. for every month which they ſhall fail therein.

If a *man marries a grandmother, and has an eſtate with her* in marriage; for this eſtate *he ſhall be* charged to be *contributory towards* the relief and maintenance of the *grandchild* within the meaning of this ſtatute, but otherwiſe it ſhall be if he has not any eſtate or advancement by his marriage with her. Per Whitlock and Croke J. But per Croke J. he ſhall be charged with keeping the grandchild *during the life of the grandmother* his wife; and if ſhe dies, he ſhall *not be charged after her death. 2 Bulſt. 346. Hill. 7 Car. B. R. in Caſe of the City of Weſtminſter v. Gerrard——S. P. Juſt. Caſe Law 236.——S. P. Nelſ. Juſt. 542.——But if the *grandmother has no means*, and ſhe *marries with one that has* means, he ſhall not be charged with keeping the child. 2 Bulſt. 346. S. C.——So if the huſband becomes of ability after marriage, the grandmother having no means at the time of the marriage, he ſhall not be bound to keep and provide for the child. Per Croke J. clearly. Ibid.—— Dalt. Juſt. 226. cap. 73. cites S. C.——Ibid. 250. cap. 73. cites S. C.——Shaw's Pariſh Law 217. cites S. C.——*Contra per Holt Ch. J. That if the wife dies he muſt maintain the grandchildren, tho' the relation be determined. Comb. 321. Paſch. 7 W. 3. B. R. in Caſe of Walton v. Spark.——Poor's Settlements 160. pl. 210. cites S. C.——S. P. Juſt. Caſe Law 236. cites Black. 240——And Comb. 405. Hill. 9 W. 3. B. R. Holt Ch. J. ſaid, that in GERRARD'S CASE of Weſtminſter, who married the grandmother of a poor perſon, tho' ſhe died, and ſo the relation was determined, yet the ſtatute was conſtrued by equity, that he was a grandfather within the ſtatute. [But in the Caſe in 2 Bulſt. 346, it does not appear that the grandmother was dead, nor is there any reſolution, the Juſtices differing in their opinions.]

A *ſon in law* was obliged by an order *to maintain his wife's mother*, having an eſtate with her at the intermarriage. Per Cur. He is not within the words of the ſtatute, nor within the meaning of it; the *ſtatute extends to thoſe perſons only who ought by the law of nature to relieve their parents;* and ſome perſons were ſo hard-hearted as to refuſe; therefore this law was made to inforce them to do that which by the law of nature they were obliged to before. Poor's Settlements 91. pl. 123. The King v. Munday.——2 Shaw's Pract. Inſt. 57. S. P.

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S. 8. Mayors, &c. of Corporations, being Juſtices of Peace, ſhall have the ſame authority within their limits as Juſtices of the Peace of the county. And every Alderman of London ſhall do and execute ſo much as is appointed and allowed by this act to be done by one or two Juſtices of Peace of any county within this realm.

S. 9. And be it alſo enacted, That if it ſhall happen any pariſh to extend itſelf into more counties than one, or part to lie within the liberties of any city, town or place corporate, and part without, that then as well the Juſtices of Peace of every county, as alſo the head-officers of ſuch city, town, or place corporate, ſhall deal and intermeddle only in ſo much of the ſaid pariſh as lieth within their liberties, and not any farther. (2) And every of them reſpectively with-

The *pariſh of H. and a will called S. was time out of mind within the rectory of H. But there is a church in S. which*

from the time of H. 6. hath been uſed and reputed as a pariſh, and had all parochial rights, and churchwardens, and S. is diſtant two miles from H.

in their ſeveral limits, wards and juriſdictions, to execute the ordinances before-mentioned, concerning the nomination of overſeers, the conſent of binding apprentices, the giving warrant to levy taxations unpaid, the taking account of churchwardens and overſeers, and the committing to priſon ſuch as refuſe to account, or deny to pay the arrearages due upon their accounts; (3) and yet nevertheleſs, the ſaid churchwardens and overſeers, or the moſt part of them, of the ſaid pariſhes that do extend into ſuch ſeveral limits and juriſdictions, ſhall without dividing themſelves, duly execute their office and places within the ſaid pariſh, in all things to them belonging, and ſhall duly exhibit and make one account before the ſaid head-officer of the town or place corporate, and one other before the ſaid Juſtices of Peace, or any ſuch two of them, as is aforeſaid.

Richardſon Ch. J. held clearly, that this is a pariſh within 43 Eliz. and that the overſeers &c. might aſſeſs it to the relief of the poor; and the finding that from H. 6th's time till now it hath been uſed as a pariſh, does not exclude that it was not us'd ſo before. And this ſtatute being made for relief of the poor, to prevent their wandering, the intent of it was to confine the relief to pariſhes then in eſſe, and ſo uſed. And per tot. Cur. judgment for the plaintiff. Hutt. 93. Hilton v. Pawle——Litt. Rep. 73. S. C. adjudged. ——Neſſ. Juſt. 533. cites S. C.——Dalt. Juſt. 219. cap. 73. cites S. C.——Shaw's Pariſh Law 198. cites S. C.——Ibid. 207. cites S. C——Ibid. 208. S. C.

Cro. Car. 91. pl. 17. Mich. 3 Car. S. C. adjudged, that this is ſuch a pariſh as is chargeable for the relief of *Stoke-Goldingham*, and not for the poor of *Hinkley*; and tho' by the finding it ſhould not be intended to be a pariſh before H. 6th's time, yet being found that it was a church then, and that there were church-wardens there, it is a pariſh within the ſtatute, altho' it be but a *reputative pariſh*; for being in uſe ſo long before, and at the time of the ſtatute, the ſtatute appoints that the churchwardens, and three or four overſeers joined with them, ſhall &c. Now no churchwardens of H. are churchwardens of S. and ſo have nothing to do there; and the churchwardens of S only are to meddle with the church there, and conſequently with the poor of the pariſh.——S. P. As to *Tateridge* and *Hatfield*, where for 60 years then paſt, and at the time of making the ſtatute, and ever ſince, T. was commonly reputed a pariſh of itſelf, and the inhabitants there choſe conſtables, churchwardens, and overſeers of the poor, and made and levied their own rates to the poor, and repaired their own church, without contributing to that of H. And tho' it was alſo found that antiently the vill of T. was parcel of the pariſh of H. and never ſever'd by any legal act, and that the tithes of T. have been time out of mind paid to the parſon of H. who always uſed to find a curate at T. and that there is no parſon at T. yet T. ſhall be charg'd by itſelf, and for their own poor only. Cro. Car. 304. 395. Hill. 10 Car. B. R. Nichols v. Walker and Parker. ——Shaw's Pariſh Law 208. cites S. C.——Ibid. 217. cites S. C.——Pariſhes in reputation only are within the ſtatute, as other pariſhes are, if the uſage of ſuch pariſh to *chooſe overſeers* has been conſtant *without interruption*; but otherwiſe the overſeers and collectors of the mother church are only within the ſtatute; per Montague Ch. J. and Doderidge J. But Haughton J. contra as to reputative pariſhes being within the ſtatute. 2 Roll. R. 160. Paſch. 18 Jac. B. R. Weeden v. Walker.——als. Hemel-Hempſteed Pariſh, and Barington.——Dalt. Juſt. 249. cap. 73. cites S. C.

There were *two vills* in one pariſh, which had *us'd ſeverally to maintain their own poor, and now there being overſeers made of the whole pariſh they were rated together.* The queſtion was, Whether having been us'd time out of mind to pay ſeverally, they might now by the ſtatute of 43 Eliz. cap. 2. be rated together? Per Hale Ch. J. If there be *no chapel within the vill*, where the church does not ſtand, it is not ſufficient to make it a reputed pariſh within the ſtatute of 43 Eliz. Freem. Rep. 491. pl. 527. Trin. 1675. Skellington v. Norton.

The pariſh of St. Botolph without Aldgate *lies in* two counties, viz. *London and Middleſex*, and hath *one churchwarden and ſeveral overſeers*, and the *pariſh-rates are ſeveral*. And in regard that it was made appear that each part of the pariſh had diſtinct officers, and made diſtinct rates, and had uſed time out of mind to make *diſtinct accounts to the Juſtices of each county*, the Court looked upon each diviſion as a ſeveral pariſh, and ordered accordingly. Raym. 476. 477. Mich. 34 Car. 2. B. R. The pariſh of St. Botolph without Aldgate's Caſe——Poor's Settlement's 125. pl. 117. cites S. C.——Dalt. Juſt. 253. cap. 73. cites S. C.——Shaw's Pariſh Law 209.

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Upon a diſpute whether A. was a *vill in the pariſh of B. or a pariſh of itſelf*. To prove it a vill the *evidence* was, that there were but two churchwardens, two overſeers of the poor, and that marriages, burials, and all other parochial rites were done at B. and that the inhabitants of A. did contribute to the repairs of the church at B. And to prove that A. was a pariſh of itſelf, the evidence was, that in *the reign of E. 3. there was a publick chapple* there, and *divine ſervice* read in it at the time of making this ſtatute; that they had formerly *diſtinct conſtables*, and repaired their own highways in 1634, and then the difference between A. and B. was ſettled by a Judge of Aſſiſe,

that

that a rate was made in A. in 1654. But this was held not sufficient to make A. a parish in reputation at the time of the statute, without all other parochial rites, and therefore held to be a vill in the parish of B. 4 Mod. 158. Mich. 4 W. & M. B. R. Rudd v. Potter.———Shaw's Parish Law 208. cites S. C.

To make A. a reputed parish within 43 El it must have a *parochial chapel and chapel-warden*, and *sacraments, at the time the statute was made*; and because A. had but one chapel-warden, whose office was to collect the rates taxed upon A. and pay them to B. they were held part of the parish of B. and not a reputed parish within 43 Eliz.; and their having a distinct overseer, and maintaining their own poor, was not thought sufficient to make them a distinct parish. 2 Salk. 501. Mich. 4 W. & M. B. R. Rudd v. Morton.——This was the Case of BIGLESWADE AND STRATTON.

A chappel's having *sacramentals* only, makes it not independent of the parish, but it *must have other badges of sepultures &c.* Per Cur. 12 Mod. 504. Anon.

S. 10. *For* not appointing overseers *yearly, every Justice &c. of the division shall* forfeit 5l.

S. 11. *The penalties and forfeitures in this act shall be imployed to the use of the poor of the same parish, by distress and sale, or in default thereof the offender shall be committed to prison, there to remain without bail or mainprise, 'till the said forfeitures shall be satisfied and paid.*

S. 12. *And be it further enacted by the authority aforesaid, That the Justices of Peace of every county or place corporate, or the more part of them, in their general sessions to be holden next after the feast of Easter next, and so yearly as often as they shall think meet, shall rate every parish to such a weekly sum of money as they shall think convenient, (2) so as no parish be rated above the sum of 6d. nor under the sum of one half-penny, weekly to be paid, and so as the total sum of such taxation of the parishes in every county, amount not above the rate of 2d. for every parish within the said county. (3) Which sums so taxed shall be yearly assessed by the agreement of the parishioners within themselves, or in default thereof, by the churchwardens and petty constables of the same parish, or the more part of them, or in default of their agreement, by the order of such Justice or Justices of Peace as shall dwell in the same parish, or (if none be there dwelling) in the parishes next adjoining.*

S. 13. *And if any person shall refuse or neglect to pay any such portion of money so taxed, it shall be lawful for the said churchwardens and constables, or any of them, or in their default, for any Justice of Peace of the said limit, to levy the same by distress and sale of the goods of the party so refusing or neglecting, rendring to the party the overplus. (2) And in default of such distress, it shall be lawful to any Justice of that limit to commit such person to the said prison, there to abide without bail or mainprise till he have paid the same.*

Working-tools in a shop may be *distrained* for a poor rate. 2 Show. 126. Trin. 32 Car. 2. B. R. Edgcomb v. Sparks. Before this act, the Justices of Peace nor Constables had no power concerning poor. Sid. 292. Trin. 18 Car. 2. B. R. in Case of the King v. the Inhabitants of Ratcliff.

S. 18. *Provided always, That whereas the Island of Fowlness in the county of Essex, being environed with the sea, and having a chapel of ease for the inhabitants thereof, and yet the said island is no parish, but the lands in the same are situated within divers parishes far distant from the said island: (2) Be it therefore enacted by the authority aforesaid, that the said Justices of Peace shall nominate*

and appoint inhabitants within the ſaid iſland, to be overſeers for the poor people dwelling within the ſaid iſland, and that both they the ſaid Juſtices and the ſaid overſeers ſhall have the ſame power and authority to all intents, conſiderations and purpoſes, for the execution of the parts and articles of this act, and ſhall be ſubject to the ſame [420] *pains and forfeitures; and likewiſe, that the inhabitants and occupiers of lands there, ſhall be liable and chargeable to the ſame payments, charges, expences and orders, in ſuch manner and form as if the ſame iſland were a pariſh. (3) In conſideration whereof, neither the ſaid inhabitants, or occupiers of land within the ſaid iſland, ſhall not be compelled to contribute towards the relief of the poor of thoſe pariſhes wherein their houſes or lands, which they occupy within the ſaid iſland, are ſituated, for or by reaſon of their ſaid habitations or occupyings, other than for the relief of the poor people within the ſaid iſland; neither yet ſhall the other inhabitants of the pariſhes wherein ſuch houſes or lands are ſituated, be compelled by reaſon of their reſiancy or dwelling, to contribute to the relief of the poor inhabitants within the ſaid iſland.*

S. 19. *And be it further enacted, That if any action of treſpaſs, or other ſuit, ſhall happen to be accounted and brought againſt any perſon or perſons, for taking of any * diſtreſs, making of any ſale, or any other thing doing by authority of this preſent act, the defendant or defendants in any ſuch action or ſuit, ſhall and may either plead Not guilty, or otherwiſe make avowry, cognizance, or juſtification, for the taking of the ſaid diſtreſſes, making of ſale, or other thing doing by virtue of this act, alledging in ſuch avowry, cognizance, or juſtification, that the ſaid diſtreſs, ſale, treſpaſs, or other thing, whereof the plaintiff or plaintiffs complained, was done by authority of this act, and according to the tenor, purport and effect of this act, without any expreſſing or rehearſal of any other matter or circumſtance contained in this preſent act. (2) To which avowry, cognizance or juſtification, the plaintiff ſhall be admitted to reply, that the defendant did take the ſaid diſtreſs, made the ſaid ſale, or did any other act or treſpaſs ſuppoſed in his declaration of his own wrong, without any ſuch cauſe alledged by the ſaid defendant. (3) Whereupon the iſſue in every ſuch action ſhall be joined, to be tried by verdict of twelve men, and not otherwiſe, as is accuſtomed in other perſonal actions. (4) And upon the trial of that iſſue, the whole matter to be given on both parties in evidence, according to the very truth of the ſame. (5) And after ſuch iſſue tried for the defendant, or † nonſuit of the plaintiff after appearance, the ſame defendant to recover treble damages, by reaſon of his wrongful vexation in that behalf, with his coſts alſo in that part ſuſtained, and that to be aſſeſs'd by the ſame jury, or writ to enquire of the damages, as the ſame ſhall require.*

* It was affirm'd upon error in B. R. upon this ſtatute, that tho' the ſtatute expreſſes by name only (ſale and diſtreſs of goods) yet if the *plaintiff voluntarily delivers any goods* for what he is aſſeſs'd to the poor, and after brings treſpaſs thereof againſt the overſeers, this is within the ſtatute; for theſe words (ſale and diſtreſs) are put in the act only for examples; and the ſtatute ſhall be conſtrued largely, becauſe it tends to opus charitatis; and treſpaſs brought after ſuch voluntary delivery of money is a vexation which the ſtatute extends to ſuppreſs. Yelv. 176. Trin. 8 Jac. B. R. Okeley v. Salter &c.

† P. brought treſpaſs againſt certain perſons who pleaded Not guilty, and at the Niſi Prius (as appeared by the certificate of the Judge upon the back of the poſtea) the defendants juſtified as overſeers of the poor of the town of Ailſham, and ſhewed this ſpecial matter in evidence by this ſtatute; and after the jury was charged, and returned again, the plaintiff was nonſuited. And now the Court was moved to grant a writ of inquiry of damages for the treble damages which he ought

ought to recover againſt the plaintiff by this ſtatute; and upon oyer of the ſtatute, which was, that the damages ſhall be aſſeſs'd &c. Dod. ſaid, This is to be intended that it ſhall be tried by writ of inquiry of damages in ſuch caſes as it ought to be by the law, viz. upon diſcontinuance or demurrer; for the words (as the caſe requires) imply as much; and by the law, when a jury ought to have found a thing, and do not find it, this ſhall not be ſupplied by a writ of inquiry of damages; and this was ſo ruled in Banco, quod fuit conceſſum per Cur. that ſuch defect ſhall not be ſupplied by writ of inquiry of damages, becauſe then the party ſhall be ouſted of his attaint. But in the caſe at Bar, the writ of inquiry of damages was granted per Cur. inaſmuch as the plaintiff was non-ſuited, ſo that the jury could not aſſeſs the damages; and damages were found accordingly. Roll. R. 272. Mich. 13 Jac. B. R. Brampton v. . . . . .

S. 20. Provided always, that this act ſhall endure no longer than to the end of the next ſeſſions of parliament.

Continued until the end of the firſt ſeſſions of the next parliament. Continued indefinitely by 3 *Car.* 1. *cap.* 4. 16 *Car.* 1. *cap.* 4.

2. 13 & 14 *Car.* 2. *cap.* 12. *ſ.* 21. *Whereas the inhabitants of the County of Lancaſhire, Cheſhire, Derbyſhire, Yorkſhire, Northumberland, the Biſhoprick of Durham, Cumberland and Weſtmorland, and many other counties in England and Wales, by reaſon of the largeneſs of the pariſhes within the ſame, have not or cannot reap the benefit of the act of parliament made in the* 43 *year of the reign of the late Queen Elizabeth for relief of the poor: (2) Therefore be it enacted by the authority aforeſaid, that all and every poor, needy, impotent, and lame perſon and perſons within every townſhip or village, within the ſeveral counties aforeſaid, ſhall from and after the paſſing of this act, be maintained, kept, provided for, and ſet on work within the ſeveral and reſpective townſhip and village wherein he or they ſhall inhabit, or wherein he, ſhe, or they was or were lawfully ſettled according to the intent and meaning of this act; and that there ſhall be yearly choſen and appointed, according to the rules and directions in the ſaid act of* 43 *Eliz. mention'd, two or three † overſeers of the poor within every of the ſaid townſhips and villages, who ſhall from time to time do, perform and execute all and every the acts, powers and authorities for the neceſſary relief of the poor within the ſaid townſhip or village, and ſhall loſe, forfeit and ſuffer all ſuch pains and penalties for non-performance thereof, as is limited, mentioned and appointed in and by the ſaid in part recited act.*

In treſpaſs a ſpecial verdict found this ſtatute, and [421] that the pariſh of Kenilworth in the county of Warwick (not being any of the counties named in this ſtatute) is a large pariſh having two townſhips, but it is not found that it is ſo large that parochial diſtribution cannot be made; and the queſtion was, *if the county of Warwick,* not being named in the ſtatute, *ſhall be taken within the general words* (and divers other counties?) And Hopkins ſerjeant cited a caſe to be adjudged in C. B. two or three years ago, that the ſtatute did not extend to other counties than thoſe which are expreſly named; and to this Hale inclined, but the Court would ſee the ſaid precedent before they gave judgment; by which, adjornatur. 2 Lev. 142. Trin. 27 Car. 2. B. R. Skillington v. Norton —— But afterwards in Mich. Term it was adjudged, that the ſtatute did not extend to any other counties, but only thoſe that are named therein. Ibid. —— Freem. Rep. 401. pl. 527. Trin. 1675. S. C. by name of SKELLINGTON v. NORTON, where Hale Ch. J. ſaid, By the words it ſeems to be intended for all counties in England, becauſe the words are (or other counties;) but Serjeant Hopkins cited the judgment in C. B. in Caſe of WILSON AND BONNER, between CHIPPING-CAMPDEN AND BROAD-CAMPDEN in Glouceſterſhire, where the Judges held that this act extended to no counties but thoſe named. —— Ibid. 412. Mich. 1675. S. C. the Court gave judgment for the defendant, becauſe though it was found to be a large pariſh, yet it was not found to be ſo big that by reaſon of the largeneſs thereof they could not reap the benefit of the act of 43 Eliz. according to the ſtatute, and for that reaſon the Court gave judgment, and ſo did not poſitively rule that no other counties were within the act but thoſe named: but Hale did now ſtrongly incline that no other counties were within the act, and ſaid the inconvenience would be very great; for by that means the poor boroughs would be charged with poor, and the vills, where men of good eſtates lived, but perhaps no poor, would be at no charge at all. —— But 2 Salk. 486. pl. 44. in marg. there is a note, that in the

Caſe of the inhabitants of STOKELANE AND DOLTING, Hill. 11 Ann. B. R. it was adjudged by Parker Ch. J. and the whole Court, that by virtue of this act the Juſtices may exerciſe the powers given by 43 Eliz. and this act, in all extra-parochial places containing more houſes than one, ſo as to come under the denomination of a vill or townſhip.——And in the caſe of HINAN AND CHURCHAM pariſhes in Glouceſterſhire, Hill. 1738. Lee Ch. J. cited the ſaid Caſe of STOKELANE AND DOLTING, in which he ſays it was held, that this ſtatute *extended by equity to all* the *counties* in England, and that it was ſo held upon great deliberation.

* This ſtatute *relates only to* the maintenance of *poor and impotent* perſons, and *not to baſtards*, who are provided for by other ſtatutes. 1 Salk. 123. Hill. 5 Ann. B. R. in Caſe of the pariſh of Budworth v. the townſhip of Dumpley.

† The Court held, that this clauſe plainly *extends to towns and villages in extra-parochial places* as well as within pariſhes; for the law-makers had in view the inconvenience, that ſome towns and villages would not have the benefit of 43 Eliz. This ſtatute is of (towns &c. in counties) and not (in pariſhes) and towns and villages in extra-parochial places are plainly within the words, tho' not directly within the view of the act; and though there be not officers appointed in extra-parochial places, yet the Juſtices ought to do it upon complaint. MS. Caſes. Hill. 11 Ann.

Where the pariſh is not large and conſiſting of ſeveral townſhips, ſo as the 43 Eliz. may be of benefit to them, the Juſtices ought not to appoint particular overſeers according to this ſtatute. M. S. Caſes. Trin. 11 Ann. B. R. the Queen v. the Inhabitants of Dolting.

3. 9 *Geo.* 1. *cap.* 7. *ſ.* 1. *enacts, That no Juſtice of Peace ſhall order relief to any poor perſon dwelling in any pariſh till oath made of ſome reaſonable cauſe for it, and that he had apply'd to the pariſhioners at veſtry, or ſome publick meeting, or to two overſeers of the poor, and was refuſed, and till ſummons of two overſeers of the poor to ſhew cauſe.*

S. 2. *And any perſon ordered to be relieved ſhall be entered in the pariſh books, to be relieved ſo long as the cauſe for ſuch relief continues and no longer. And if any pariſh-officer, (except upon ſudden and emergent occaſions) ſhall charge to the pariſh account any monies given to any perſon not regiſtred he ſhall forfeit 5l. to be*
[422] *levied by diſtreſs and ſale by warrant of two Juſtices, to be applied to the uſe of the poor of the ſaid pariſh by direction of ſuch Juſtices.*

(B) *Orders* of Juſtices &c. concerning the Poor. Good or not.

2 Shaw's Pract. Juſt. 22 cites S. C.—Juſt. Caſe Law 244 cites S. C.—Shaw's Pariſh Law, 194. cites S. C.

EXception was taken to an order of the Juſtices made againſt the pariſh of Stretton, becauſe the Juſtices order'd them *to keep a woman, being poor, the cottage wherein ſhe liv'd being uncertain whether in this vill or another*; but the Court refus'd to quaſh it, tho' it were *not aver'd that ſhe was impotent*, becauſe in theſe caſes the Courts uſe a liberty and diſcretion. 2 Keb. 37 Paſch. 18 Car. 2. B. R. Kilbeck's Caſe.

2. An order of Juſtices of Peace *for the maintenance of a poor woman* was confirm'd, tho' it *appear'd that ſhe was able* of body *to work*, but the Juſtices of the Peace are judges of that. Vent. 69. Paſch. 22 Car. 2. B. R. Wiſe's Caſe.

Juſt. Caſe Law, 244. cites S. C.—2 Shaw's Pract. Juſt. 28. cites S. C.—Nelſ. Juſt. 550.

3. A poor *child was left in Chriſt-Church Hoſpital*; upon complaint of the wardens of the hoſpital 2 Juſtices made an *order on the overſeers* of the poor *of the pariſh* to receive and *maintain the child*; but this order was quaſh'd, becauſe it was *not ſaid, that the parents were unknown, or likely to become chargeable to the pariſh*: for tho' a child of 3 months old be helpleſs,

yet

yet the parents are bound to provide for it. As to the principal matter which was hinted, viz. that the hoſpital was bound to provide for poor children there expoſed, the Court thought there was nothing in that. 2 Salk. 485. Trin. 11 W. 3. B. R. Chriſt's Hoſpital Caſe. cites S. C. —Shaw's Pariſh Law 190. cites S. C.

4. An order of Juſtices was made for relieving a woman and 4 poor children *until further order*, but did *not ſet forth that ſhe was indigent*. It was quaſh'd for the laſt matter, and bad for the other, which ſhould have been during her poverty. 10 Mod. 220. Hill. 12 Ann. B. R. The Queen v. Mancheſter Inhabitants.

5. It was mov'd to quaſh an order of *Seſſions* which *order'd that the overſeers* of Monks-Riſborough ſhould *pay to one R. D. 2s. per week for his maintenance*. It was objected, 1ſt, that it is *not ſaid that they had any money in their hands*; 2dly, that it is not ſaid *that R. D. is a pariſhioner there*. Quaſh'd Niſi. Poors Settlements 12. pl. 17. The Queen v. the Inhabitants of Monks-Riſborough. It was objected, that the Juſtices could not make ſuch order for payment of a certain ſum weekly; the Court ſeemed to be of the ſame opinion, but ſaid they do it all over England; *& communis error facit jus*. Comb. 321. Paſch. 7 W. 3. B. R. in Caſe of Walton v. Spark.——Poors Settlements 159. pl. 210. cites S. C.

6. Two Juſtices made an order for the overſeers of the poor *to pay 2s. per week* to Elizabeth Reddiſh. It was objected that it is *not ſaid that ſhe is poor and impotent*; otherwiſe the ſtatute gives them no ſuch power. Per Cur. The 43 Eliz. does not give them power, unleſs they are *upon the Poor-Rate*. Let them ſhew cauſe. Poors Settlements 21. pl. 30. The Queen v. the Inhabitants of Mancheſter. Shaw's Pariſh Law 221. cites S. C.

7. An order *to continue the weekly payment of* 2s. to R. G. *and all the arrears till they find him a houſe*; quaſh'd; becauſe the overſeers have no power to find him a houſe, that muſt be done by the Lord of the manor, or by the Juſtices. Shaw's Pariſh Law 200.

(C) Orders as to *Children or Parents* being *rated*.

[423] See (A) pl. 1. ſ. 7.

1. IT was moved to diſcharge an *order* made *againſt a feme covert to keep a grand-child of hers*, becauſe a feme covert was not bound by ſuch an order. Roll Ch. J. anſwer'd, that the huſband is bound to keep his wife's grand-child by the ſtatute; but in regard that the huſband is not charged by the order, but the wife who is covert is only charged, therefore let the order be *quaſh'd*. Sty. 283. Trin. 1651. Cuſtodes v. Ginkes. S. P. 2 Shaw's Pract. Juſt. 27. cites Style 285. [but it ſhould be 283.]—Dalt. Juſt. 250. cap. 73. cites S. C.——

S. P. Shaw's Pariſh Law, 198. cites Style 251.——S. P. Juſt. Caſe Law 236. cites Black. 248.

2. An order of Seſſions was made, that the *defendant* ſhould *pay 2s. a week* towards the ſupport of his father *till the Court ſhould order the contrary*, which was held good, becauſe it was indefinite

indefinite and no ſet time limited, and if an eſtate happen'd to fall to him they might apply to the Juſtices; otherwiſe if a time was limited. 2 Salk. 534. Paſch. 5 Ann. B. R. Jenkins's Caſe.

3. An order that the *grandfather* ſhould *keep the grandchild, the father being* living, but *unable* to do it, *and alſo to pay ſo much money for the time paſt* while he was chargeable as well as for the time to come, was allowed good per Cur. MS. Caſes. Mich. 6 Ann. B. R. The Queen v. Joyce.

4. On *order* of 2 Juſtices to compel Daviſon *to allow* ſo much a week *for the maintenance of his wife and family*. It was moved to quaſh the order, for that the Juſtices have not juriſdiction in this caſe, it being properly alimony and belonging to the Spiritual Court. And (Holt being abſent) Powel ſaid, that the Juſtices have no juriſdiction in this caſe, but this is not alimony. If a man runs away from his family, he may be puniſhed as a rogue and a ſturdy beggar; but whilſt he continues reſident, they cannot charge him in this manner; and quaſh'd the order. 11 Mod. 268. Hill. 8 Ann. B. R. The Queen v. Daviſon.

Poor Settlements 32. pl. 52. Hill. 1713. S. C. —And adds, Suppoſe ſhe had had three huſbands, who ſhall contribute then? Sir Thomas Powis ſaid, the laſt huſband's father.

5. An order of Juſtices was made, that the *father-in-law* ſhould maintain *his ſon's widow*. But it not being ſet forth in the order, that the father *was of ſufficient ability*, in which caſe only the act enables the Juſtices &c. it was quaſh'd. 10 Mod. 221. Hill. 12 Ann. B. R. The Queen v. Dun, or Halifax Pariſh.

—A *father* was ordered to allow a maintenance *to the ſon's wife, he being beyond ſea*; and a father-in-law has been adjudged within the meaning of the act of 43 Eliz. c. 2. 2 Shaw's Pract. Juſt. 44. cites Style 283—Shaw's Pariſh Law 217. cites S. C. [but the book is miſcited.]— S. P. Dalt. Juſt. 226. cap. 73. ſays it was ſo done in the Caſe of one JOHN BALL, by order 2 Sept. 15 Jac. lib. Seſs. pa. Mid.

There was another exception to the order, which was, that this allowance was to be paid *until further order*, whereas it ſhould have been ſo long as the father continued able to allow, and the daughter poor and unable to work; but this exception was over-ruled. Ibid.

6. An order of Seſſions for the father to pay ſo much a week for maintenance of his *daughter* was quaſh'd, becauſe it was *not ſet forth that ſhe was unable to work*, without which the Juſtices have no juriſdiction. 10 Mod. 307. Paſch. 1 Geo. B. R. The King and Gully.

—Upon *complaint of* the overſeers, that B's *daughter was deſerted and impotent*, the *Juſtices adjudge* and award *the father to pay her ſo much per week*. It was objected that there is *no adjudication that ſhe was impotent*, only in the complaining part of the order; and the order was quaſhed. Poors Settlements 83. pl. 111. cites the King v. Litton.

An order was made at the Seſſions, that a man ſhould *maintain his daughter, and allow her* 1s. 8d. *a week* for her ſubſiſtence; the order was quaſhed, becauſe it did *not appear* by the ſame *that ſhe was unable to work*, or that ſhe *was ſick, aged, or impotent*, which the ſtatute requires. 2 Shaw's Pract. Juſt. 25. cites 13 W. 3. B. R. Mendoza's Caſe.——S. P. Juſt. Caſe Law 236. ——S. P. Dalt. Juſt. 256. cap. 73.——Shaw's Pariſh Law 196. cites S. C.

[424] 7. Juſtices at the quarter *ſeſſions, upon complaint of the overſeers, that Nicholas Tripping had left his wife, and that ſhe was become poor and impotent, and* become *chargeable to the pariſh, and that* Richard Tripping *her father-in-law was of ſufficient ability, did* (upon its being proved that Richard was of ability to relieve her)

order

order him to pay 2s. 6d. per week. The order was quaſh'd for want of an adjudication that ſhe was chargeable, and it was held, that an *adjudication that the perſon is become chargeable is as neceſſary in an order of the Quarter Seſſions*, as in an order of two Juſtices. MS. Caſes, Trin. 4 Geo. B. R. The King v. Tripping.

8. Upon complaint made to the Quarter Seſſions, that his ſon Valentine Ruth his wife and family were impotent and unable to maintain themſelves, this Court does *order* the ſaid Emery Ruth *to pay* them 4*s. per week.* It was objected, that it *does not appear that he was reſiant* and liv'd *in the county*, that the charge is perſonal, and the Juſtices had no power over him unleſs he liv'd in the county. They were order'd to ſhew cauſe. Note, an *affidavit was made that he liv'd in another county, but*, I think, *not read.* Poor's Settlements 99. pl. 134. cites the King v. Emery Ruth.

(D) Poor Rates. *By whom* made *and How.*

1. A Sſeſſments for the poor ought to be *made according to the viſible eſtate of the inhabitants there, both real and perſonal*, and no inhabitant there is to be tax'd to contribute to the relief of the poor in regard of any eſtate he hath elſewhere in any other town or place, but only in regard of the viſible eſtate he hath in the town where he dwells, and not for any other land which he hath in any other place or town; ſaid by Hutton and Croke J. to have been reſolv'd by all the Judges of England upon a reference made to them, and upon a conference by them had together. 2 Bulſ. 354. 9 Car. in Sir Anthony Earby's Caſe.

Dalt. Juſt. 219. cap. 73. cites S. C.—S. P. Dalt. Juſt. 243. cap. 73. —Ibid. 253. cap. 73. ——S. P. Juſt. Caſe Law 233. cites Black. 263.—S. P. 2 Shaw's Pract. Juſt. 46, 47.

cites 2 Bulſ. 154.—and Shaw's Pariſh Law 219. cites S. C. [but it is miſcited and ſhould be 354] ——The tax to be *in proportion to the yearly value*, and *not to the quantity of the land.* 2 Shaw's Pract. Juſt. 44.———S. P. Nelſ. Juſt. 533.——One who poſſeſſes lands lying in ſeveral pariſhes, ſhall be rated in every pariſh according to the annual value of the land lying in each pariſh. Dalt. Juſt. 254. cap. 73.

If a man *lives not within a pariſh*, he is to be *aſſeſſed according to his lands*; but *if he lives within the pariſh*, he is to be *rated as dwelling there*; per Parker Ch. J. MS. Caſes.

2. *Rent is no ſtanding rule* for making a poor rate; for circumſtances may differ, and there ought to be a regard *ad ſtatum & facultates.* Comb. 478. Paſch. 10 W. 3. B. R. The King v. Juſtices of Peace of the Precinct of Catherine Church Norwich.

Parker ſaid, that the Juſtices could not make a *ſtanding rate*; for

if it be juſt at the firſt, it may not be ſo after; quod fuit conceſſum per Holt Ch. J. for lands may be improved. By 43 Eliz. the rate muſt be equal, therefore it *ought to be continually altered as circumſtances alter.* 2 Salk. 526. Mich. 12 W. 3. B. R. in Caſe of the King v. the Inhabitants of Audly.———Shaw's Pariſh Law 219. S. P.

3. The *Seſſions*, upon *ſetting aſide a rate, may make a new one themſelves*, or order the church-wardens and overſeers to make a new one, they having it in their diſcretion to make a new rate at ſeſſions, *or remand it to the church-wardens &c.* to make a new

2 Salk. 534. S. C. and ſays, that the Juſtices may make a new one

themſelves, but they are not bound to do it, but *may order the ancient inhabitants to do it* a new one. 2 Salk. 483. Mich. 10 W. 3. B. R. The Pariſh of St. Leonard Shoreditch's Caſe.

——Poors Settlements 238. pl. 280. cites S. C. ——2 Shaw's Pract. Juſt. 45. cites S. C.——Ibid. 46. cites S. C.——Neſ. Juſt. 534. cites S. C.

[425] S. P. Juſt. Caſe Law 235. cites Black. 238.

4. The *churchwardens and overſeers* may make a rate *of themſelves*, per Cur. 2 Salk. 531. Hill. 2 Ann. B. R. in Tawney's Caſe.

——The overſeers of the poor are to make the rate which *is uſually approved by the inhabitants, and* to be *allowed by the Juſtices*. 2 Shaw's Pract. Juſt. 43.——S. P. Shaw's Pariſh Law 217. ——An *overſeer may make* as many *rates* as he will, but this ought to be done *by the conſent of the pariſhioners* at their general meetings, and the rate when made ought to be *confirmed by two Juſtices* of the Peace. MS. Caſes. Paſch. 3 Ann. Tawney's Caſe.

It is *not neceſſary that* the *pariſhioners ſhould conſent*; for the churchwardens, by the conſent of the * Juſtices, may make a rate without the conſent of the pariſh. Per Eyre J. MS. Caſes, Trin. 9 Ann. B. R. in Caſe of the Queen v. St. Michael's Cornhill.

* The order *need not ſet forth that the Juſtices allowing the* poors *rate were dwelling in or near the diviſion* or place where the pariſh does lie. MS. Caſes. Pariſh of Conbett v. St. Mary's Lincoln.

3 Salk. 260. S. C.—— Poors Settlements 235. pl. 279. cites S. C.—— 2 Shaw's Pract. Juſt. 46. cites S. C.—Ibid. 47. cites S. C.—Neſ. Juſt. 534. cites S. C.—Dalt. Juſt. 253, 254. cap. 73. cites S. C.—Shaw's Pariſh Law 218. cites S. C.—* S. P. Juſt. Caſe Law 235.

5. H. *took part of a houſe in* the pariſh of *D. on the third day of December*; he *was rated* as an inhabitant, *and* was *diſtrained* for a quarter's rate the Chriſtmas following; but the diſtreſs was taken *before Chriſtmas on a general warrant* made *for the whole year*; and in replevin it was rul'd upon evidence by Holt Ch. J. 1ſt, That if *two ſeveral houſes* are *inhabited by ſeveral families*, who make and have but *one common avenue* or entrance for both; yet in reſpect of their original, *both* houſes *are rateable ſeverally*; for they were at firſt ſeveral houſes; and *if one family goes, one houſe is vacant: but if one tenement* be *divided by a partition, and inhabited by different families*, viz. the owner in one, and a ſtranger in another, *theſe are* ſeveral tenements *ſeverally ratable* while they are thus ſeverally inhabited, *but if the ſtranger* and his family *go away it becomes one tenement*. 2dly, That H. could not be rated for the whole quarter, for *poor rates are to be aſſeſſed* * *monthly* by the ſtatute; and by this means a man cannot move in the middle of a quarter but he muſt be twice charg'd. 2 Salk. 532. Trin. 3 Ann. Tracy v. Talbot.

S. P. Neſ. Juſt. 533 — S. P. 2 Shaw's Pract. Juſt. 45.

6. When goods are rated, it ought to be according to the value of lands, viz. *Goods of the value of* 100*l.* ſhall be *rated* 5*l. per ann. as lands are*, and the perſon *muſt be charged only* in the place *where the goods are at the time* of the aſſeſſment; for if he has no goods where aſſeſſed is diſtrained he may have an action of treſpaſs &c. Dalt. Juſt. 253. cap. 73.

(E) Poor Rates. *Liable what.*

1. *ALL things* which are *real and bring in a yearly revenue* may be rated and tax'd to the poor. Shaw's Pariſh Law 221.

2. On

2. On a motion to confirm a tax laid by the Juſtices of Peace on a *toll of the corporation* of W. for a rate to the poor, Hales Ch. J. ſaid, that on a reference to him by both parties, he was of opinion that the toll was not exempted but chargeable, *tho' part of it were to maintain the Mayor*; and per Cur. a mandamus was granted to the Mayor and Juſtices to execute the order, Niſi. 3 Keb. 540. Mich. 27 Car. 2. B. R. The Corporation of Wickham v. the Mayor.

S. P. 2 Shaw's Pract. Juſt. 44. cites 3 Keb. 594. Shaw's Pariſh Law 217. cites S. C. [but it is miſcited, and ſhould be 3 Keb. 540.]——Dalt. Juſt. 218. cites S. C.——S. C. that this toll time out of mind had never been taxed to the poor; and the queſtion was, whether it could be now taxed by the ſtatute of 43 Eliz.? and the Court held that it might. Freem. Rep. 419. Mich. 1675. S. C. by name of the Caſe of the Poor of Wickham.

3. Note, It has been lately reſolved by the Court, that *ground rents* are liable to the poors rate. Comb. 62. Mich. 3 Jac. 2. B. R. Anon.

Shaw's Pariſh Law 217. cites S. C.——The overſeer of [426] Stoke Nayland in Suffolk made a rate, in which he charged the *quit-rent of ſeveral manors* within the pariſh, which rate the Juſtices refuſed to ſign, becauſe the quit-rents ought not to be taxed; whereupon the overſeer, upon application to B. R. obtained a rule to inforce the Juſtices to ſign it, which was ſtrongly oppoſed, becauſe no inſtance could be given that ever the quit rents were charged; but the Court ordered the rate to be ſigned, and a warrant to diſtrain, ſo that if any perſon thought himſelf aggrieved, he might replevy, and the matter in law be brought in queſtion. Carth. 14 Mich. 3. Jac. 2. B. R. Hull's Caſe.——Eyre J. ſaid, that a quit-rent is not taxable to the poor; for the tax ought to be laid upon the occupiers; but Holt ſaid it was otherwiſe ruled in the Caſe of one WILLIAMS of Suffolk. Comb. 264. Trin. 6 W. & M. B. R. Anon.

4. *Hoſpital lands* are chargeable to the poor as well as others; for no man, by appropriating his lands to an hoſpital, can diſcharge or exempt them from taxes to which they were ſubject before, and throw a greater burthen upon their neighbours; per Holt Ch. J. 2 Salk. 527. Paſch. 1 Ann. B. R. Anon.

Neſſ. Juſt. 534. cites S. C.—— Dalt. Juſt. 234. cap. 73. cites S. C.—Poor's Settlements 253. pl. 291, cites S. C.———Juſt. Caſe Law, 234. cites S. C.———2 Shaw's Pract. Juſt. 46. cites 2 Salk. 515.———Shaw's Pariſh Law 219. cites S. C. [but it ſhould be 527.]

5. The queſtion was, whether a *houſe converted into a conventicle, and uſed for no other purpoſes*, was ratable to the poors tax? The Court ſaid, they never knew it, and order'd them to ſhew cauſe; and after the order was quaſh'd. Poors Settlements 124. pl. 169. Hill. 1727. Anon.

S. P. Shaw's Pariſh Law, 219. cites Hill. 1 Geo. 2. B. R. Anon.

6. A *farmer* is not to be tax'd to the poor *for his neceſſary ſtock* according to the lands he holds; *but* if he has a *ſuperabundant ſtock*, i. e. more than the land requires, he ſhall be tax'd for that. Juſt. Caſe Law 233. cites Black. 263, 264.

7. Yet it is a quære ſtill if a farmer is to pay a rate or tax for *ſtock upon land*. Ibid.

It may be laid either on *lands or goods*; but a farmer being aſſeſſed for the land he occupies, ſhall not be aſſeſſed for his ſtock on that land neceſſary for manure, nor the profits for which he has been already taxed; but for other ſtock he is taxable. 2 Shaw's Pract. Juſt. 44.———Shaw's Pariſh Law 217. cites S. C.——Dalt. Juſt. 253. cap. 73. ſays, it was reſolved by three Judges againſt Holt Ch. J. that a farmer ſhall not be rated to the poor for his neceſſary ſtock, which he uſes on his farm, for that would be in effect to make the land *pay twice for one thing*, viz. for the *rent*, and alſo for the *ſtock*.———But a *farmer* ſhall be taxed *for his riches and ſtock* in caſe the ſtock is *more than is neceſſary* for the carrying on his farming and paying his rent, for then it is like a ſtock

a ſtock in trade, but for ſtock neceſſary for his farming he ſhall not be taxed. So for extraordinary ſtock he ſhall not be charged, if it be not more than is neceſſary; for the act ſays, *every inhabitant &c. and of land*, ſo that there may be an inhabitant that is not an occupier of land, and he *muſt be charged in reſpect of his perſonal eſtate and ability*; and ſo it is uſual to tax clothiers &c. Per three Juſtices againſt the Ch. J. MS. Caſes, the Queen v. the Inhabitants of Barking & Needham.——And adds, N. B. Thoſe farmers were never taxed before, nor were the tradeſmen ever before till within theſe two or three years, and the order above was for rating the farmers for the corn and hay which was in their barn and ſtable. Ibid.

A *clothier* &c. having an *eſtate in lands, and* a great *ſtock of wares*, may be taxed for both. 2 Shaw's Pract. Juſt. 44.——S. P. Neſſ. Juſt. 533.——Shaw's Pariſh Law 218. cites S. C.

8. A *ſhop-keeper* ſhall be charged to the poor's rates *for* the *goods &c. in his ſhop*. Juſt. Caſe Law 233. cites Black. 263, 264.

Stock in trade, and the houſe wherein the ſtock is kept, may be both rated towards the relief of the poor, and this ſhall not be a double tax; but if the land be taxed, the ſtock upon it cannot be taxed alſo, for this will be double. MSS. Caſes.

9. On a motion to quaſh a poor's rate made at the quarter-ſeſſions in Marleborough, becauſe it was *aſſeſſed for trade*, and the *corporation would not aſſeſs the toll of their market, or their own lands*, and they would not hear at their ſeſſions. Per Cur. It will be *inconvenient to quaſh poor rates*. But you may take a *mandamus to aſſeſs* you *according to law*, as in the Caſe of the TOWN OF CAMBRIDGE. MS. Caſes.

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See (A) pl. 1. f. 3.

(F) Poor Rates. Liable, *Who.*

S. P. Neſſ. Juſt. 533.—S. P. 2. Shaw's Pract. Juſt. 44.—S. P. Juſt. Caſe Law 233.——S. P. Dalt. Juſt. 219. cap. 73.

1. BY the words and meaning of the ſtatute 43 Eliz. 2. the *occupiers of the land* are to be aſſeſſed, and *not the leſſor* who receives the rents; the occupier of the land being by law only to pay the aſſeſſment, *unleſs* it be *ſpecially provided for* as to this payment between him and his leſſor; per Hutton and Croke J. who declared that it had been ſo reſolved by all the Judges of England. 2 Bulſ. 354. 9 Car. in Sir Anthony Earby's Caſe.——Shaw's Pariſh Law 219. cites 2 Bulſ. 154 [but it ſhould be 354.]

S. P. 2 Shaw's Pract. Juſt. 41. cites 2 Keb. 251.—S. P. Shaw's Pariſh Law 217. cites S. C. [but there is no ſuch point there].——S. P. Juſt. Caſe Law 233. cites Black. 260.—Every clergyman is to be rated *for his glebe and tithes* according to their yearly value ſo long as they are in his occupation; becauſe the *ſtatute charges every occupier of tithes* &c. and the clergy are contained under thoſe general words unleſs particularly exempted. Dalt. Juſt. 254. cap. 73.

2. *Parſons* ought to contribute to the poor; per Hales Ch. J. who ſaid it had been ſo agreed by all the Judges of England at Serjeant's-Inn, in the Parſon of PANCRASS's Caſe. 3 Keb. 255. Trin. 25 Car. 2. B. R. The King v. . . . . .

Shaw's Pariſh Law 221. cites S. C.

3. A *mandamus* was prayed *to the Mayor of Chicheſter to ſign a tax* made *on the palace &c. of the Biſhop* of Chicheſter, being *within the pariſh of Subdeanry*, and per Cur. it was granted; becauſe againſt this there can be no preſcription, and all the prebendaries that live in the ſame cloſe, which is a fourth part of the town, pay it. 3 Keb. 572. Hill. 27 Car. 2. B. R. The Pariſh of Subdeanry v. the Mayor of Chicheſter.

4. A

4. A *parſon* who *lets his tithes to the pariſhioners* may be taxed upon the poor rate; for the letting *is but an agreement* with the pariſhioners *to retain* the tithes, and the parſon here *has a modus for his tithes*; tho' it was objected that the pariſhioners were occupiers, and ſo the parſon not taxable. MS. Caſes, Paſch. 7 Ann. The Queen v. Bartlett.

5. Thoſe ought only to be contributory who were *livers there the year before*, and none elſe; per Powis J. Poor's Settlements 48. pl. 71. Mich. 12 Ann. in Caſe of the Inhabitants of Ware v. Petit Executor of Town.

6. *A.* ſeiſed of lands *demiſed* the ſame *to B.* reſerving the yearly rent of 10l. *A. covenanted* with B. that he ſhould quietly enjoy the land, and *to indemnify* him *againſt all charges* and taxes whatſoever to be impoſed upon the ſaid lands, *except tithes*. B. enter'd, and was poſſeſſed, and the church-wardens and overſeers of the pariſh where the land lay, and of which A. was inhabitant, made a poor rate, and B. by reaſon of the ſaid lands was charged with ſuch a ſum of the ſaid rate which he paid, and brought covenant againſt A. and aſſigned the breach, in that A. did not indemnify him againſt the ſaid poor rate &c. And after argument on both ſides the Court were unanimouſly agreed that the *poor rate was not within the covenant*, and therefore gave judgment for A. the defendant. Gibb. 297. to 299. Trin. 5 Geo. C. B. Caſe v. Stephens.

7. The *doctor agreed with ſeveral* of the *pariſhioners to take ſo much for his tithes, and made a leaſe to F.* The doctor was rated for the tithes to the pariſh levies, who appeal'd; and the matter being found ſpecially, the queſtion was, who ſhould be ſaid to be the occupier, the doctor's leſſee or the inhabitants? And per Cur. the *leſſee muſt be ſaid to be the occupier*, in regard there is no certain *time limited* for how long, but *only from year to year*; *and* per Eyre J. the letting of them *is in nature of a ſale*, and the party looked upon as a vendee: no manner of advantage is given to the inhabitants; for they give the full value for their tithes; *otherwiſe had it been a contract for years*. Poor's Settlements 104. pl. 140. The Inhabitants of Lambeth v. Faircloth leſſee of Dr. Ibbotſon.

8 Mod. 61. Mich. 8 Geo. 1722. S. C. by name of the KING v. FAIRCLOUGH and others, and reports it to this effect. So the rector of the [428] pariſh of C. by a verbal agreement let his tithes to F. and others, paying to him 2s. 6d. per acre for one year; and F. and the other farmers of the ſaid tithes let the ſame to the reſpective tenants of the lands, paying 3s. per acre for that year, excepting one tenant from whom they received tithes in kind, and paid to the rector 2s. 6d. per acre. Afterwards F. and the other farmers were charged by the church-wardens and overſeers of C. towards a poor rate upon the ſtatute 43 Eliz. cap. 2. as occupiers of the tithes, and upon an appeal to the Seſſions, they were diſcharged as to all excepting only 7s. which they were ordered to pay for the tithes of that tenant which they received in kind. And all this being removed into B. R. by certiorari, the queſtion was, who ſhould be accounted the occupiers of thoſe tithes, whether the farmers who paid the rent to the rector, or the tenants of the lands who paid their rent for the tithes to the farmers? After argument, the Court was of opinion, that the farmers ſhould be accounted the occupiers of thoſe tithes; it is true, it might be otherwiſe if an *underleaſe* had been made thereof, but this is a particular caſe, and it appears by the rate that the farmers have 6d. per acre profit; and if the rate is aſſeſſed on the profits of the tithes, it ought to be aſſeſſed on them, becauſe it does not appear to the Court, that the landholders had any profit; for they may have a hard bargain, therefore they ſhall rather be accounted buyers of thoſe tithes than occupiers; for where an agreement is made for tithes they ſhall paſs by way of bargain, otherwiſe they cannot paſs at all, becauſe they lie in grant, and therefore they cannot otherwiſe paſs than a deed; for a verbal agreement for them is good only for a year. The *money which the farmers receive* of the landholders for thoſe tithes *ſhall be accounted a modus*, and wherever there

is a modus, he who receives it ſhall be taken to be the occupier of the tithes. So where a man has a wood, or ſtanding corn, and ſells the ſame ſtanding, the ſeller ſhall pay tithes for that year. In this caſe, the rector who ſerves the cure for 2*s.* 6*d.* per acre ſhall not contribute to the poor's tax, but the farmers who have ſuch a benefit of 6*d.* per acre without any manner of conſideration for it by raiſing ſo much on the land-holders; therefore the Seſſions order was quaſhed, and the rate confirm'd.

See (A) pl. 1. f. 6.

(G) Rates. Good or not. And *ſet aſide* in what Caſes.

1. THERE are *four adjacent towns within the pariſh of Banbury*, and there is an *overſeer within each town, and* an overſeer *alſo within the borough*; they *all join in one account*, and there is but *one rate* made *for all the pariſh, but* the *overſeers of each particular town collect and pay the money within ſuch town*; one who is *tenant* of lands *in one of theſe towns lives in the borough*, and *is aſſeſſed by the overſeer of the borough for the lands within the town, and paid to the overſeer of the borough*; and the like is done in the other towns; ſo that the overſeer of the borough had a ſurpluſage for the poor within the borough, and the overſeers of the towns wanted money for the relief of the poor within the towns, tho' the poor within the towns were leſs than thoſe within the borough; and upon this the Juſtices ordered, that there ſhould be a *diſtribution* made; and this order with others being removed, it was moved to be quaſhed by North and Levinz, but confirmed; and tho' the ſtatute of 14 Car. 2. was cited, and this caſe urged to be within that ſtatute, it was not agreed to be within that ſtatute. Skin. 258. Mich. 2 Jac. 2. B. R. The Caſe of the Borough of Banbury and the adjacent Towns.

2. Altho' a poor's rate be *really made at the Seſſions on an appeal*, yet if it *does not appear by the order itſelf*, as by recital of the former order &c. the later order ſhall be quaſhed, and the *Court refuſed to ſupply this defect* in the order *by affidavits*. Comb. 133, 134. Trin. 1 W. & M. B. R. Anon.

3. The church-wardens and overſeers, and ſome of the inhabitants of this pariſh made a *poor's rate*, which was *confirmed by two Juſtices*, in which ſeveral were not taxed for their *perſonal eſtates* (which was erroneous), but the whole lay on the real eſtates of the pariſh; on which ſeveral of the inhabitants appeal'd to the *Seſſions*, and they *ordered that the ſaid rate ſhould be annulled*, and a new one made; accordingly the church-wardens made a new rate both on the real and perſonal
[429] eſtates, which rate was confirmed by two Juſtices. But in the new rate there was a great inequality, the *real eſtates* being *rated in proportion ten times more than the perſonal*; for which ſeveral of the inhabitants appeal'd again to the Seſſions, where another order was made to diſcharge the ſaid rate. And now theſe two orders of Seſſions being removed by certiorari into B. R. it was moved to quaſh them; becauſe the Seſſions can only relieve particular perſons grieved by the rate, and cannot

cannot ſet aſide *the whole rate.* Sed per tot. Cur. Sure the Juſtices at ſeſſions, upon an appeal by particular perſons grieved, may, if they ſee reaſon, ſet aſide the whole rate. The Juſtices have a large power, and in both theſe caſes, either on the firſt rate where the perſonal eſtates were not charged, or upon the ſecond where they are unequally charged, it is impoſſible for them to give relief without ſetting aſide the whole rate, which therefore they may legally do, being impowered by the act to take order herein *according to their diſcretion*; by virtue of which, as they may ſet aſide the whole rate, ſo they may make a new rate themſelves, or order the overſeers &c. and church-wardens to make a new one, as was done in this caſe; wherefore thoſe two orders were confirmed. 12 Mod. 212. Mich. 10 W. 3. B. R. The King v. the Inhabitants of St. Leonard Shoreditch.

4. If a poor rate be *made for a whole year*, it cannot be *confirmed* in part, but muſt be for the whole or no part. 8 Mod. 10. Mich. 7 Geo. Biſhopſgate Church-wardens v. Beecher.

5. If the *rate be illegal*, the * *Juſtices may refuſe to ſign it*, but *as* to *the ſums or parties aſſeſſed* they have nothing to do with it, *the remedy is by appeal*; and tho' the Aldermen of Dorcheſter refuſed to ſign a rate becauſe of inequality, yet the Court granted a mandamus, and after a return a peremptory mandamus, and then an attachment, in order that the parties grieved might appeal. Cited per Cur. MS. Caſes. Mich. 8 Geo. B. R. in Caſe of the King v. Beecher.

* And they may return it for cauſe upon a mandamus directed to them to ſign it. MS. Caſes. Hill. 4 Geo. B. R. in Caſe of the Inhabitants of Boſton v. the Inhabitants of Horncaſtle in Lincolnſhire.

6. A *rate* that is *of itſelf good*, may be *quaſh'd*, *where it ſays it ſhall be a ſtanding rate*; per Earl. Poor's Settlements 23. pl. 33. in Caſe of Shagforth v. Northbovey in Devon.

Parker ſaid he *never knew a poor's rate quaſh'd.* If the rate is *not good*, it *is a mere nullity*, and you are not bound to obey it. Poor's Settlements 48. pl. 41. in Caſe of the pariſh of Ringmere v. Petworth in Suſſex.——Shaw's Pariſh Law 221. S. P.

7. To quaſh a poors rate the *parties aggrieved appealed* to the Seſſions; the *Seſſions made an order to levy* the money on account of the rate *according to the land-tax*; it was mov'd to quaſh it, becauſe perſons that do not pay to the land-tax, yet contribute to the poors rate, as perſons who have a conſiderable ſum of money. *Quaſh'd*, per Cur. Poors Settlements 73. pl. 96. The Pariſh of Camberwell's Caſe.

S. P. Shaw's Pariſh Law 221.

(H) Remedies for recovering of Rates.

See (A) pl. 1. f. 4.

1. IT was ſaid, that a *warrant to diſtrain* for a poors rate ought *not to be granted before demand* made; for *the firſt* ought to be *only a confirmation of the aſſeſſment* for the poor, and afterwards *upon refuſal &c. a new warrant is to be made for diſtreſs &c.* and Holt ſaid *that ſtrictly* it was ſo, *but* the practice having

having been in the caſe of taxes to grant ſuch a conditional warrant to diſtrain, *communis error facit jus.* Comb. 342. Trin. 7 W. 3. B. R. in Caſe of Eaſt India Company v. Skinner & al.

* 2. If the poor rates are unreceived, and the *overſeers lay out a ſum of their own*, they *are remedileſs* if they do not raiſe it before they are *put out of their office.* Juſt. Caſe Law 235. cites Black. 237. 238.

3. The churchwardens and overſeers of the poor, *by warrant from* any *two Juſtices* of the Peace *(Quor. 1.) may levy* the tax *by diſtreſs and ſale of goods* where any perſon refuſes payment of the ſum he is aſſeſſed. And if there be no diſtreſs whereby the ſame may be levied, he ſhall be *committed to the common gaol* there to remain *till payment.* 2 Shaw's Pract. Juſt. 42.

Dalt. Juſt. 255. cap. 23. cites S. C.—Neſſ. Juſt. 534. cites S. C.

4. A *mandamus* was mov'd for, and a rule obtain'd *for an Alderman to ſhew cauſe why he refus'd* to grant *his warrant to diſtrain for* a tax for relief of the poor; who at another day ſhew'd that the churchwardens had made *a tax for the whole year*, when they ſhould have made only a quarterly tax, and thereupon a rule was made that he ſhould grant his warrant to diſtrain *quarterly.* 8 Mod. 10. Mich. 7 Geo. 1721. Biſhopſgate Churchwardens v. Alderman Beecher.

Set (A) pl. 1. 1. 3.

(I) Rates of *Pariſhes in Aid.*

2 Shaw's Pract. Juſt. 46. cites S. C.—Shaw's Pariſh Law 219. cites S. C.——Such order muſt begin with two Juſtices, and if it be an original order of ſeſſions it is not good. 5 Mod. 397. Paſch. 10 W. 3. Anon.

1. AN order of Seſſions was returned upon ſtat. 43 *Eliz.* for rating the pariſhes adjacent &c. for relief of a poor pariſh. Exception was taken, that by the ſtatute this ought to have been done by the *two next Juſtices*, whereas this order was *made at ſeſſions.* And by the Solicitor General, if it be made by all the Juſtices &c. then it is by two, and they ſhall be ſuppoſed to be at the general ſeſſions. And per Wythens, you have not purſued the ſtatute, and do hereby prevent the appeal. Adjournatur, and it was afterwards at another day quaſhed for that reaſon. Comb. 25. Trin. 2. Jac. 2. B. R. The King v. Grieſly.

2. A pariſh in Colcheſter being ſurcharged with poor, the Juſtices made an order that *two other pariſhes* in Colcheſter ſhould pay to the relief of the poor within this pariſh, viz. the *one 5s. per week, and the other* 8*s.* per week, *and that the overſeers ſhould collect it*; and the order being removed by certiorari, Alibone mov'd to quaſh it, becauſe not purſuant to the direction of 43 *Eliz.* which *ſays (others of other pariſhes)* ſo that it ought to be *aſſeſſed by the Juſtices upon particular perſons*, and not generally, (and ſo it may be done, and it has been admitted it might be done this Term before; and alſo a caſe remembred in Pemberton's time, when it was ſo ruled). But the Court ſeemed to be of opinion that it was well enough, and according

to the right courſe; and that the Juſtices are only to aſſeſs the *quantum*, and then the rate is to be made by the overſeers of the poor of the pariſh, and ſuch was the opinion of the Court. Skin. 258. Mich. 2 Jac. 2. B. R. St. Rumbald's Pariſh Caſe.

3. It was moved to quaſh an *order* made *by two Juſtices, that the inhabitants of L. G.* ſhould *pay a yearly ſum to Whetſtone:* 1ſt, becauſe it was *not ſaid quorum unus*; but that exception was diſallow'd.: 2dly, for that it was *only ſaid that Whetſtone was at great charge* in maintaining the poor, *but not that they were unable.* Note, Upon an appeal the Juſtices made an order at the ſeſſions, wherein it is *ſaid they were oppreſſed*, which implies inability. Comb. 241. Hill. 5 W. & M. B. R. The King v. the Inhabitants of Little Glen in the county of Leiceſter. Shaw's Pariſh Law 216. cites S. C.

4. Upon an order for contribution to the relief of a poor pariſh it was ruled that the Juſtices may *either charge particular perſons or the whole pariſh*, and they to levy it; but here a †*ſum in groſs* was *laid for a whole year*, which (it was objected) was unreaſonable; for their ability may change; nevertheleſs the order was confirmed. Comb. 309. Mich. 6 W. & M. B. R. The King v. Knightly Inhabitants. Poors Settlements 153. pl. 203. cites S. C.—S.P. [431] 2 Shaw's Pract. Juſt. 43. cites 2 Bulſ. 352—Juſt. Caſe Law 234. cites S. C.—Shaw's Pariſh Law 216. cites S. C. [but I ſee no ſuch point there]—It was reſolved that the Juſtices might impoſe the charge upon any of the inhabitants of the neighbouring pariſh, and were not obliged to put a general tax upon the whole pariſh, the words of the *ſtatute being (any other of any other pariſh)* Vent. 350. Mich. 32 Car. 2. B. R. Anon. ——Dalt. Juſt. 253. cap. 73. cites S. C ——S. P. cited by Holt recorder, to be ſo ruled in the Caſe of a Pariſh in Cambridge, Mich. 32 Car. 2. B. R. after having been diverſe times argued by Pemberton and Pollexfen, and it was allowed to be ſo by the Court. Skin. 259. Mich. 2 Jac. 2. B. R. in Caſe of the Borough of Banbury, and the adjacent towns.———The Juſtices may tax any other perſons within the hundred to pay ſuch ſums of money as they ſhall think fit. Dalt. Juſt. 225. cap. 73.

† Upon a motion to quaſh an order for charging ſeveral pariſhes to contribute to the relief of the poor of another pariſh, it was ſaid by the Court, that ſuch a contribution may be *by a groſs ſum yearly*. Comb. 242. Hill. 5 W. & M. B. R. Anon.———Poors Settlements, 152. pl. 202. cites S. C.——Shaw's Pariſh Law 216. cites S. C.

5. Holt Ch. J. ſaid, that poſſibly a *place extra-parochial* may be tax'd *in aid of a pariſh; but a pariſh ſhall not* be tax'd in *aid of that*. 2 Salk. 486. Hill. 11 W. 3. B. R. in Caſe of the Precinct of Bridewell v. the Pariſh of Clerkenwell. When inhabitants of an *extraparochial place* are *tax'd towards the relief of the poor of an adjoining pariſh*, the tax *muſt be by poll*, every particular inhabitant by himſelf; *but* where it is laid *upon a hundred it is otherwiſe*; becauſe there are officers who may proportion what every body is to pay. MS. Caſes. The Queen v. the Inhabitants of Clarendon Park and the Hundred of Cudworth.———But at another day the Court held that the reaſon was, becauſe the pariſhes were taxable by themſelves at the common law, and that in the ſaid caſe the inhabitants of an *extraparochial place may be taxed in general*, and that they may proportion the particulars upon every inhabitant, or the tax at firſt may be laid upon every perſon by himſelf, but the *Juſtices cannot appoint* two *perſons* to do this, *and that the money ſhall be levied on ſuch and ſuch*; and being thus appointed, the order was quaſhed. Ibid.

6. *In a city* where one pariſh is not able to relieve their poor, the *next pariſh being able is to aid them by a weekly allowance*, but when the cauſe ceaſes ſuch allowance is to ceaſe alſo. Juſt. Caſe Law 234. cites Black. 260, 262.

7. In caſe a pariſh is not able to maintain its own poor, two Juſtices may tax any other pariſh within the hundred towards S. P. Nelſ. Juſt. 533.

their relief, and if the *hundred* be *not of ability* to relieve their pariſhes, the Juſtices in their *ſeſſions may tax any other* pariſh or *pariſhes within the county*. 2 Shaw's Pract. Juſt. 42.

2 Shaw's Pract. Juſt. 28. cites S. C.—Shaw's Pariſh Law 199. cites S. C.——* *It muſt appear that the pariſh* which prays in aid of another *was not able* to pay ſufficient ſums, *and* there *muſt be an aſſertion or an adjudication that it appeared ſo to them.* MS. Caſes, Conbett v. St. Mary's Lincoln.

8. An order was made *by the Juſtices of the borough, for the pariſh of* St. Peter's *to pay to the officers of St. Mary's* the ſum of 20s. *weekly, until we the ſaid Juſtices ſhall ſee fit to order to the contrary*. It was objected, 1ſt, That it does *not appear that the pariſh of St. Mary's is* * *overburthened with poor*; but over-rul'd; for the order follows the words of the ſtatute. 2dly, It is ſaid, that they are Juſtices of the town and borough, and it *appears upon the order that the pariſh of St. Mary's is within the borough, but not within the town and borough*. But per Cur. they are Juſtices of both. 3dly, The order is, until we ſhall ſee fit to order the contrary, where the act never gave the Juſtices ſuch an authority, and it is in effect making a perpetual order; for if one of the Juſtices die or be remov'd, no other Juſtice can alter it till they the ſaid Juſtices ſhall ſee fit to alter. And it was quaſh'd per Cur. for the laſt objection. Poors Settlements 121. pl. 165. Paſch. 12 Geo. 1. The Inhabitants of St. Peter's and St. Mary's in the Borough of Marleborough.

[For more of Poor in general, ſee Apprentices, Baſtardy, Overſeers, Removal, Seſſions, Settlements, and other proper Titles.]

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Portions.

See (B).

(A) *Raiſed. How.* By Sale or Mortgage &c.

1. PORtion *charged by virtue of a power* [was decreed] to be raiſed by ſale or mortgage and not by perception of profits. MS. Tab. cites February 28th, 1701, or 1707. Kelly v. Ld. Bellew.

In this Caſe *no expreſs time was limited when the* 8000*l. portions were payable*, but then a further

2. A *term of* 99 *years* was by marriage ſettlement created, and veſted in truſtees *for making proviſion for younger children*, whereby in caſe of both ſons and daughters, the daughters were to have 1000l. each, at the age of 21 or marriage; and and if no ſon and but one daughter, ſhe to have 5000l. but if more daughters, then 8000l. between them, to be raiſed out of the *rents, iſſues and profits as ſoon as conveniently could be*. The

father died without iſſue male, leaving 3 daughters; and on a bill brought by the 3 daughters, it was urged that the 8000l. ſhould be raiſed by mortgage or ſale, becauſe here was *a time limited for payment, viz. on the death of the father without iſſue male*; for that then ſays the deed the portions ſhall be raiſed as * *ſoon as conveniently they may*, which is in judgment of law preſently; and of the ſame opinion was the Ld. C. Parker, and ſo decreed it. Paſch. 4 Geo. 1. 10 Mod. 401. Aſhton v. . . . . truſt was declared of the term for raiſing 1000l. a-piece for daughters, payable at 21 or marriage, in caſe of there being no

ſon; and the term was not made without impeachment of waſt. It was ſaid by the counſel for the plaintiff, and ſo ruled by the Court, that the *daughters were purchaſors of their portions by their mother's marriage and portion*, but the limitation to the defendant, who was brother to the grantor, was voluntary; that the meaning of the word *(portion) is a proviſion for marriage*, but the leiſurely way of raiſing money by yearly profits would not anſwer ſuch end; that the words *(profits of lands)* eſpecially when *to pay portions* or debts, *imply any profits which the land would yield, either by ſelling or mortgaging*; that though the words *(yearly profits)* might make a difference, yet the word (yearly) was here omitted. Wms's Rep. 415. &c. Paſch. 1718. Trafford v. Aſhton.

* *But* where the term was for raiſing portions for daughters by rents and profits, or by ſale or mortgage, and *to be paid at the daughters age of* 18 *or marriage, provided that no maintenance ſhould commence till death of the father, but at the quarter day after; and provided, if all the daughters die between* 18 *or marriage, then the term to be void*; and a *power with conſent of truſtees to revoke the uſes*. The mother died leaving no ſon, and but only one daughter, who married J. S. Lord Macclesfield thought that the portion (being 3000l.) remained yet ſubject to a contingency, and therefore not to be raiſed till this contingency is out of the caſe, which cannot be done during the father's life; and the words of the clauſe for paying the portion being [tho' they are not taken into the ſtate of the caſe in the report] viz. *That the ſame ſhall be paid at the daughters age of* 18 *or marriage, or as ſoon after as conveniently may be*, his Lordſhip inferred, that it was not to be raiſed till it could be done with conveniency, and ſaid, that in his opinion it cannot conveniently be raiſed by ſelling a reverſion, which will incommode the family to that degree as to ruin the eſtate, and ſo declared that he thought it could not be conveniently raiſed till the father's death. Hill. 1722. 2 Wms's Rep. 93. to 102. Rereſby v. Newland.—Affirmed in the Houſe of Lords. Ibid.

3. A. purſuant to marriage articles ſettled lands on himſelf for life, remainder to his wife for life, remainder to the firſt &c. ſons &c. *remainder to truſtees for* 120 *years for raiſing* 1500*l. for daughters portions*, viz. *out of the rents and profits of the premiſſes, as well by leaſes for one, two, or three lives*, or *any number of years determinable thereon*, or *for* 21 *years abſolutely at the old rent*. They had only one child, viz. a daughter named M. [It ſeems that the wife was dead tho' not mentioned] A. having reſerved to himſelf the reverſion in fee, ſettled the ſame expectant on his own death without iſſue male, and ſubject to the 120 years term, *to truſtees, for* 10 *years*, remainder *to B.* his nephew *for life*, remainder *to his firſt &c. ſon in tail male*, remainder *to C.* grandſon of A. and ſon of M. *in tail male*, remainder *to A. in fee*. The 10 *years term was, that if M.* and her huſband *would releaſe the* 1500*l.* then *the truſtees ſhould raiſe* 1900*l.* viz. 1500*l. to be veſted in land for the benefit of M.* and her huſband, and the *other* 400*l. be to paid to the huſband of M.* A. died without iſſue male, leaving C. his executor, M.'s portion not being paid; B. enter'd and enjoy'd for 4 years, the portion ſtill unpaid. The ſurviving truſtee died, and M. having adminiſtred to him, ſhe and her huſband, and B. aſſign'd the term of 120 years to J. S. who advanced the 1500l. *B. died without iſſue male after* 7 *years poſſeſſion but left no aſſets*. The queſtion was, whether the money could be raiſed by mortgage, or any other way by the words of the truſt, Chan. Prec. 583. S. C.—MS. Tab. cites February 5, 1723. S. C. That the truſtees raiſed the whole money by *mortgage of all the term*; that the mortgage was ſet aſide, and decreed [433] to account for the rents and profits, there being an expreſs proviſion that the monies ſhould be raiſed by rents and profits; beſides the power to make leaſes for

truſt, than by annual profits or leaſing? Ld. C. Macclesfield ſaid, he thought it material to know the yearly value of the premiſſes, and that he took it to be a rule, that *where a truſt of a term for raiſing portions directs a particular method, it implies a negative* that they ſhall not be raiſed any other way; and when it is as here to raiſe by leaſing &c. it ſhall not be any other way; and that it is conſiderable that even by leaſing it could not be raiſed but by reſerving the old rent; that the *natural meaning of raiſing a portion by rents, iſſues and profits is* by the * *yearly profits*; but *to prevent an inconvenience*, the word (profits) *has in ſome particular inſtances been extended to any profits* which the land will yield, but not where reſtrained by ſubſequent words. And his Lordſhip obſerved, that at the time of making this ſettlement, (viz.) in 1657, he thought the word (profits) was not extended to ſignify profits to be made by ſale or mortgage. Paſch. 1722. 2 Wms's Rep. 13 to 21. Ivy v. Gilbert & al.

21 years, ſhews that they could not mortgage for the whole term In ſome caſes, where it is *doubtful*, the whole term may be aſſigned, but here it is apparent. — The Reporter ſays, that this decree was afterwards affirmed in the Houſe of Lords, though thought a very hard caſe.

2 Wms's Rep. 21.——S. C. cited by the Maſter of the Rolls. Hill. 1731. and concluded, that there was not one ſingle precedent where a ſale had been decreed of a truſt-term for a portion appointed to be raiſed by rents and profits, and no time limited for payment 2 Wms's Rep. 604, 605. in Caſe of Evelyn v. Evelyn.

Truſtees being to pay the daughters portions out of the rents and profits, it was objected that they had not power to ſell; to which the Court replied, that the truſtees were *not* to pay the portions *out of the annual rents and profits, but out of the rents and profits*, and thoſe portions were to be paid *at prefixed days*, which the annual profits would not do; and therefore conceived the truſtees might ſell for that purpoſe within the intention of the truſt. Chan. Caſes 176. Trin. 22 Car. 2. Backhouſe v. Middleton.

4. When *no time* is *limited for payment* of portions, and the *claimants are of very tender years, tho' the right* to the portions *veſted* in ſuch infant daughters, yet they are to be raiſed by rents and profits; per the Maſter of the Rolls. 2 Wms's Rep. 603. Hill. 1731. in Caſe of Evelyn v Evelyn.

S. C. cited by the Maſter of the Rolls. Hill. 1731. 2 Wms's Rep. 604. In Caſe of Evelyn v. Evelyn.

5. *As* where lands were limited to the huſband for life, remainder to the wife for life, remainder to the firſt &c. ſon in tail male, remainder to J. S. in fee; *provided* that *if no iſſue male, but a daughter be living at the huſband's death*, then the *truſtees ſhould ſtand ſeiſed of the premiſſes*, to the intent *that ſuch daughter ſhould receive* 10000 *l. out of the rents, revenues and profits* thereof, *and* 100 *l. a year for maintenance*, and this 10000 l to be for her portion, without appointing any time for payment. There was no ſon, and but one daughter, who died unmarried at 17. The 10000 l. was decreed to go to her executors, and to be raiſed out of the profits. Trin. 1688. 2 Vern. 72. Ld. Rivers v. Ld. Derby.

S. C. argued. Gibb. 131.

6. By ſettlement of the manor of W.—A. was tenant for life, remainder to his firſt &c. ſon in tail male, with a *power to A. to charge the ſame with* 6000 *l. by leaſe mortgage or otherwiſe*, without reſtriction, and with a *power to every one of the ſons when in poſſeſſion to limit a jointure of* 100 *l. a year for every* 1000 *l. and to make leaſes ſans waſt (but without prejudice to any jointure to be made) for raiſing daughters portions not to exceed their mother's fortune, and the leaſes not to take effect until failure of iſſue male of ſuch ſon making ſuch leaſe, with power to any in poſſeſſion to leaſe for* 21 *years at the moſt improved rent.* A. by another ſettlement of

other

other lands made the day following limited the ſame *to the ſame uſes*, * *with this difference* only, viz. that as to the ſon's power of leaſing for raiſing daughters portions, theſe words were added (*ſo as ſuch leaſe or leaſes ſhould ceaſe and determine upon the raiſing of ſuch portions* and coſts and charges for raiſing of the ſame). A. died, and upon the marriage of B. the eldeſt ſon, he by virtue of the power limited a term of 500 *years* to truſtees *to commence from and after failure of iſſue male of the ſaid B. and by and out of the rents, iſſues and profits, or by ſale, mortgage, or leaſe, or otherwiſe, as ſoon as conveniently might be after his deceaſe, raiſe* 8000 *l.* (ſo much being his wife's fortune) *for daughters portions*; *proviſo that the term ſhall not prejudice the jointure, and* that *immediately after the raiſing the term ſhall ceaſe.*—B. died leaving 3 daughters but no ſon, who at about 4 years of age brought their bill againſt the remainder-man in tail for a preſent ſale of the 500 years term. —It was agreed by Ld. C. King, Ld. Ch. J. Raymond, and the Maſter of the Rolls, that the 8000 l. ſhould be raiſed out of the rents, iſſues, and profits of the 500 years term, and not by ſale or mortgage; and that no more than 8000 l. ſhould be raiſed in the whole, and the profits to be accounted from the death of B. The Maſter of the Rolls took notice of the different limitations in the two ſeveral ſettlements, and that thereby it was plain, that a ſale was not intended by B. and that it was not poſſible that the term could ceaſe upon raiſing the portions in any other ſenſe or way than by raiſing them out of the growing profits. And Ld. Ch. J. Raymond relied much on the *intention* of the maker of the ſettlement, which appeared *to be plainly to preſerve the eſtate in the male line*, and ſo thought it would be extreme hard to decree what would be the deſtruction of the eſtate againſt the intention of the party. Hill. 1731. 2 Wms's Rep. 591. 598. to 605. Evelyn v. Evelyn.

(B) *At what Time* to be raiſed or paid.

See (A).

1. BY marriage ſettlement, a term is limited to raiſe 5000 l. if but one daughter, *to be paid at* 21 *or marriage, which ſhould firſt happen after the deceaſe of the father and mother, or within ſix months after either of thoſe days or times.* There was only one daughter, and the father dy'd. Daughter comes to 21; decreed the 5000 l. to be raiſed, tho' the mother was living. 2 Vern. 458. Hill. 1703. Gerard v. Gerard.

S. C. cited Wms's Rep. 451. Arg. — S. C. cited 2 Vern. 658. Trin. 1710. and 2 Ch. R. 200. 203. — S. C. cited 2 Vern. 641. in Caſe of Corbet v. Maydwell.—and ibid. 655. in Caſe of Hickman v. Anderſon, where this is ſaid to be a ſtrain.—S. C. and it being inſiſted, that the portion ought not to be raiſed till after the deceaſe of the mother, becauſe this *term did not take effect in poſſeſſion till after her death, and it is appointed to be raiſed out of the rents and profits &c.* and if it might be raiſed in the life of the mother, it might ſo have been in the life of the father; but it was anſwered, and ſo held by the Court, that it could not be pretended to be raiſed in the father's life, becauſe *the term*, which was the fund to raiſe it, *veſted in contingency till after the death of the father, it being to veſt on his dying without iſſue male, and leaving iſſue female*; *but where a term did veſt, though* it was *in reverſion after the deceaſe of the father, yet* the money *being payable at a certain time*, as at 21 or marriage, there it had been decreed to *be raiſed even in the father's life-time*; and that ſo it was in the LORD TRACY'S CASE, and alſo a Caſe of * HELIARD v. JONES, where it was ſo reſolved in an appeal to

the Houſe of Lords. And though the firſt clauſe for payment of the portion, had it ſtood ſingle, had been pretty plain, that it could not have been paid till after the deceaſe of the father and mother, yet *by the ſubſequent words* it ſeems to be *intended, that it ſhould have been paid in their life-time, upon marriage*, in caſe ſuch marriage had been *with conſent*. And ſo the intent appearing upon the whole deed, and *being for a portion*, it was ordered to be raiſed by ſale in caſe the heir at law did not pay it. 2 Freem. Rep. 271. pl. 340. Gerard v. Gerard.

* A ſettlement was made *to huſband for life, remainder to the wife for life*, remainder *to the firſt and other ſons in tail male* ſucceſſively, *remainder to truſtees for* 200 *years*; and the term was declared to be upon truſt, *that the truſtees, after the death of the huſband and wife, ſhould out of the rents and profits raiſe and pay* 4000*l. for younger children, at* their age of 21 *years*, unleſs the perſon in remainder ſhould raiſe and pay the ſame; and the term was decreed to be ſold, and the portions raiſed in the life-time of the father and mother. Mich. 1 W. & M. Abr. Equ. Caſes 337. pl. 2. Heliar v. Jones.—S. C. cited Wms's Rep. 451. Arg.—2 Jo. 201. GREAVES v. MATTISON, S. P. and the introductive words were, In caſe the ſaid father ſhould die without iſſue male, then the truſ-

[435] tees ſhould out of the rents and profits raiſe 500*l.* and 200*l.* per annum for maintenance in the interim. The wife died, leaving one daughter; and per three Juſtices againſt one, the portion was to be raiſed immediately, though the father was living, the daughter being married.

S. C. cited 2 Vern. 641. 653. in Caſe of Corbet v. Maidwell. ——S. C. cited 3 Ch. R. 201.—S. C. cited per Cowper C. 3 Ch. Rep. 203. who ſaid, if the Caſe of GREAVES and MATTISON, or of STANIFORTH and STANIFORTH, had been *res integra*, he ſhould not have gone ſo great a length. ——Approved by Ld. C. Parker. Wms's Rep. 452.

2. Lands limited on marriage to huſband and wife for their lives, remainder to the heirs male of their bodies, and if no iſſue male of their bodies, and one or more daughters, then to truſtees for 500 *years from the deceaſe of the ſurvivor, in truſt to raiſe by ſale or mortgage* 1000*l.* for daughters portions, but *no time for payment*. The father died leaving one daughter and no ſon of that marriage; per Maſter of the Rolls, The term aroſe on the deceaſe of the father without iſſue male, tho' not to take effect in point of profits till after the deceaſe of the mother; but the portion is veſted in the daughter, tho' the mother is living. And decreed to raiſe it by a ſale with a reaſonable *maintenance* in the mean time not exceeding the intereſt of the portion from the death of the father, or at leaſt from the time the portion might have been raiſed by a ſale. 2 Vern. 460. Hill. 1703. Staniforth & al. v. Staniforth.

3 Chan. Rep. 190. to 206. S. C. accordingly. —2 Vern. 640. and 641. S. C. accordingly. —— Abr. Equ. Caſes 337. pl. 5. S. C.—* S. P. tho' it be a term in remainder, and not in poſſeſſion; per Cowper C. and ſays, that in the Caſe of ‡ HELIARD v. JONES,

3. A. upon his marriage ſettled lands to the uſe of himſelf for life, remainder to truſtees for 500 years, remainder to the heirs-male of his body by his intended wife, and if he ſhould happen to die without iſſue-male of his body by his wife, and there ſhould be one or more daughters of their two bodies, which ſhould be unmarried, or not provided for at the time of his death, ſuch daughter (if but one) ſhould have 2000*l. and* 30*l. per annum*, iſſuing *out of the profits 'till the portion ſhould become due*; the portion to be payable *at the age of* 18, *or* day of *marriage*, and a power for the truſtees *to raiſe it by ſale or mortgage of the term, or perception of profits*. The *wife died leaving* but *one daughter* of this marriage, *and no ſon*, and the *daughter being above* 21 *married to the plaintiff*. The queſtion was, whether the truſtees could raiſe her portion in the life of her father? And on great conſideration it was held by the Ld. Chancellor, that tho' a term is limited in remainder to commence after the death of the father, yet if the *truſt* is to *raiſe a portion payable at* the age of 18, *or* day of *marriage*, without queſtion the *daughter ſhall* * *not wait the death of her father*, but at the age of 18 or marriage may compel

compel a ſale of the term. But in the principal Caſe, the daughter, who is the ſubject of this proviſion, muſt be a daughter unmarried or unprovided for at the time of the father's death, which is a contingency not yet happened; that this Caſe was too ſtrong for the Court to attempt to get over, and to do it would create great confuſion, and it would be to no purpoſe for any one to make deeds, if the argument of convenience or inconvenience ſhould prevail to over-rule them; and therefore diſmiſſed the bill. 1 Salk. 159, 160. Trin. 9 Annæ. Corbet & Ux v. Maidwell.

the queſtion only was, when intereſt was to commence of a portion payable at 18 or marriage, and no contingency, and there no doubt intereſt was payable, tho' the father was living. 2 Vern. 656. 658. in S. C.——‡ S. C. cited by the name of HEYTER v. JONES. November 14. 10 W. 3. and affirmed in the Houſe of Lords. 3 Chan. Rep. 196.

Where the *term and portion are both to ariſe on a contingency*, as in the Caſe of STANFORTH v. STANFORTH, there, becauſe a *total failure of iſſue male* between the parties is all that is contingent in the Caſe (for it is certain that all fleſh muſt die), the portion ſhall be raiſed in the life-time of the father or mother at the day of payment, which was 18 or day of marriage, in regard the term muſt certainly veſt, and can never be defeated by leaving of iſſue male; per Cowper C. 1710. 3 Ch. Rep. 204. in Caſe of Corbet v. Maidwell.

4. A. made a ſettlement to the uſe of himſelf for life, remainder to the uſe of his firſt ſon in tail male, *remainder to truſtees for 40 years*, remainder to A. in fee. The term is declared to be in truſt, that *if A. ſhould die without iſſue male* of his body, then the truſtees ſhould *raiſe 5000 l. for daughters portions, payable at 21 or marriage*, with a proviſion for maintenance in the mean time. The wife died, leaving two daughters and no iſſue male; and reſolved per 3 J. that the right to the portion was veſted by the mother's death without iſſue male in the life of the father; for otherwiſe the father might live ſo long that the portions might be of little ſervice. 2 Jo. 201. Greaves v. Mattiſon.—cited 1 Salk. 160. Trin. 9 Ann. in Canc. in the Caſe of Corbett v. Maidwell.—In which caſe it is reſolved accordingly, and further alſo, that if the truſt of a term for raiſing daughters portions be limited to take effect *in caſe the father die without iſſue male by his wife*, and the wife dies without iſſue male, leaving a daughter, in ſuch caſe the term is ſaleable in the life of the father. Ibid. 159.

Where the term is veſted, and the portion contingent, as in [436] the Caſe of GREAVES v. MATTISON, there the *failure of iſſue male* ſhall tantamount the deceaſe of the father without iſſue male of the body of his wife, and the portion be raiſed even in his life-time, becauſe *payable at a day certain*, and eſpecially being directed by deed to be raiſed by ſale thereof; per Cowper C. but he ſays they are conceſſions made by him, becauſe he finds it has gone current ſo of late, but he thinks it of hard digeſtion. 3 Ch. Rep. 204. 1710. in Caſe of Corbet v. Maidwell.

5. Lands were ſettled on *A. for life*, remainder *to ſuch woman as A. ſhould marry*, remainder *to firſt &c. ſon of A. in tail male*, remainder *to B.* with a *power for A. to charge 2000 l. for younger children*; A. died, leaving only daughters, and by will charged the premiſſes with 2000 l. payable at 21 or marriage. The daughters brought their bill to raiſe the 2000 l. out of the reverſionary eſtate, and to have intereſt in the mean time for their * maintenance. Ld. Harcourt, as to the bill praying to charge the remainder only with this 2000 l. portion, held, that the *power, and charge* made purſuant thereto, *did affect the wife's eſtate*

* See (C) S. C.

for life as well as the remainder, and that it was like a power of leasing which over-reaches all the estates; for which reason it is usual to insert a proviso in such power of charging, that it shall not prejudice the jointure or other precedent estates. Wms's Rep. 244 to 246. Hill. 1713. Beale v. Beale.

6. In a marriage settlement a power was lodg'd in trustees to raise 3000 l. for a daughter, *to be paid her at the age of 21 or day of marriage, which should first happen, when A. and his wife should die without issue male*, and *in the mean time* 100 *l. per ann. to be* paid her *for her maintenance*. Resolved per Ld. Chancellor Cowper, upon the authority of the Duke of SOUTHAMPTON's CASE, that the words, *when A. and his wife should die without issue male*, amounted to a condition precedent, and that the time of raising the portion did not commence when one of them should be dead without issue male, and so the other be tenant in tail, after possibility of issue extinct; but when both of them should be dead without issue male. Resolved, that the *mean time*, in which the 100 l. per ann. was payable for a maintenance, must necessarily relate to the intermediate time between the raising the money and her attaining the age of 21 or day of marriage. 10 Mod. 314. Pasch. 10 Mod. 314. Pasch. 1 Geo. 1. Champney v. Champney.

10 Mod. 433. S. C. —— The words *[commencement of the term]* must be intended commencement *in possession*; per Ld. C. Parker. Wms's Rep. 452. S. C. —— Where by marriage-settlement a *term* was limited *in*

7. Marriage settlement limited the estate to the baron for life, remainder to the wife for life, remainder to the first &c. sons, remainder to trustees for 500 *years in trust, that after the commencement of the term, they should raise* 4000 *l.* by rents or profits, sale or mortgage, *for younger children, payable at* 21 *or marriage*, first happening, remainder to the heirs of the baron. The baron dies leaving only one daughter; it was insisted that it was not to be raised till after the commencement of the term, and the term does not properly commence till it comes in possession, but was a vested remainder on the making the settlement, and was no contingent remainder; and decreed accordingly, that the portion was not payable till after the decease of the jointress, and would not carry interest in the mean time. 2 Vern. 760. Trin. 1718. Butler v. Duncomb.

trustees to raise portions either out of the rents or profits, or by mortgage and sale, but the provision for maintenance was not to take place till after the death of the jointress, the portions were not to be raised in her life-time. Abr. Equ. Cases 340. pl. 7. —— S. C. cited by Ld. C. Talbot, who said, that in this case the maintenance must precede the portion, and consequently the portion must wait the jointress's death; for if what was to precede must have waited, that which was to come after must do so likewise. Sel. Chan. Cases in Ld. Talbot's time. 32, 33. Pasch. 1734. in Case of Hebblethwaite v. Cartwright.

The Master of the Rolls decreed it to be raised by sale, unless the son should pray it to be done by mortgage; and

8. A. seised of *White Acre in possession and Black Acre in reversion expectant on the death of J. S.* devised *White Acre to his wife for life, and the reversion of both after* the respective deaths of his wife and J. S. *to his son B. on condition to pay M. his daughter* 1000 *l. within* 12 *months after the death of W. R.* and on default that *M. may enter* into White Acre and take the profits till paid. *W. R. died, living the wife and J. S.* After the 12 months from W. R.'s

W. R's death, M. and her husband brought a bill for the portion, and the Master of the Rolls decreed it to be raised *by sale of the reversions*, with interest from the 12 months after the death of W. R. and said, that the clause of entry was only intended in case the estate for life fell in the mean time, so that she might thereby enter, but not to delay the payment of the portion till that time. Ch. Prec. 500. Mich. 1718. Bacon v. Clerk.

this decree was appealed from to the Ld. C. Parker, who affirmed the same. Wms's Rep. 478. Mich. 1718. Bacon v. Clerk.

9. A. on the marriage of B. his son settled 900 l. per ann. on *himself for life*, remainder *to his son for life*, remainder to trustees for 500 *years, to raise portions* of 10,000 l. a-piece if 2 daughters, payable at 21 *or marriage, with maintenance* in the mean time, *to begin at such of the feasts as should first happen after the death of him and his son or either of them*, and the same to be raised *out of the rents and profits*. B. has issue a son and a daughter, and dies. Ld. Chancellor thought it hard to decree a mortgage or sale of such reversionary interest, and that in well drawn settlements, it was restrain'd to the commencing of the term in possession; but as this was only for raising maintenance, he ordered it to a Master to inquire the value of the estate, and then to come back to the Court for further directions. Mich. 1718. Ch. Prec. 503. Lady Pierpoint v. Ld. Cheney.

This settlement was made by a private act of parliament, and the 20,000 l. was expressly mentioned to be raised out of the rents, issues, and profits, *or by sale or mortgage*; Lord C. Parker said, that tho' he did admit that he must take the act as he found it, viz. the first quarter-day after the death of A. or B. the maintenance money is to be raised by profits, mortgage, or sale, yet that this Court, which is the guardian of the infant, must consider the good of the infant, which the not raising the maintenance in the present case may be; and said, that as Lord Cowper had declared, that in such case he would not go beyond the established precedents, as taking it that the Court had already gone too far, so he should observe the same rule, not having been able to find one single precedent for *mortgaging a reversion for maintenance*, and that it was less reasonable in the present case, because A. had offered in Court to maintain the daughter. Wms's Rep. 488. Mich. 1718. S. C.

10. A. in consideration of marriage and portion with M. settled lands to the use of *himself for life*, remainder *to M. for life*, remainder *to the first &c. son in tail male*, remainder *to trustees for 500 years without waste, to raise 6000 l. for daughters portions by sale or mortgage, or by rents, issues or profits, to be paid at their age or ages of 21 or marriage if after 14*. M. died leaving 4 daughters, but no son. The eldest daughter after 14 married the plaintiff. The daughters had other provisions left them by a grandmother. Ld. C. Macclesfield was very averse to the decreeing a sale or mortgage of this reversionary term, but at length (animo reluctante) decreed a sale or mortgage of a 4th part (subject to a power reserved to the father of making a jointure of 150 l. on a 2d wife) for raising 1500 l. and interest from the marriage; saying that tho' this was a matter of trust, yet since *all the contingencies had happened, and it did not evidently appear but that the parties intended that the portions should be raised out of the reversionary term*, he did not look upon it to be within the discretion of the Court, any more than in the option of the trustees, to raise the money or not, but that it was a thing not to be encouraged. And as to the matter of the other provisions left by the grandmother,

S. C. cited by the Master of the Rolls, Mich. 1728. saying, that nothing appearing in the trust of the term shewing it to be the intent of the parties that the portion should not be raised out of the reversionary term, the portion was decreed (tho' reluctante Curia) [438] to be raised in the sa-

ther's life-time. 2 Wms's Rep. 486. in

mother, he thought it not material. Trin. 1721. Wms's Rep. 707 to 710. Sandys v. Sandys.

Caſe of Brome v. Berkley.—*So* where there were the like limitations for payment of 2500l. at 21 or marriage, and that the truſtees ſhould *alſo raiſe and pay* 100*l. by half-yearly payments* for her maintenance and education, until her portion ſhould be due, *the firſt payment of the maintenance to be made at ſuch of the ſaid half-yearly feaſts as ſhould next happen after the ſaid eſtate ſo limited* to the truſtees as aforeſaid *ſhould take effect in poſſeſſion*. A. died leaving no ſon, and but only one daughter, who being 21, brought a bill in her mother's life-time for raiſing the portions with intereſt; but it was decreed by Ld. C. King, aſſiſted by the Maſter of the Rolls, that it ſhall not be raiſed in the mother's life-time; for the maintenance is not to be paid till the truſt eſtate comes into poſſeſſion, and the maintenance muſt be intended to precede the payment of the portion, and ſo the bill was diſmiſſed. Mich. 1728. 2 Wms's 484. Brome v. Berkley.—This decree was affirmed on appeal to the Lords in March following. Ibid. 488.

11. Where a portion is to be raiſed *by annual profits or fines, if no time be appointed*, the portion is due when the profits can raiſe it. Paſch. 1722. 2 Wms's Rep. 20. in Caſe of Ivy v. Gilbert & al.

Caſes in Chan. in Ld. Talbot's time 122. his Lordſhip ſaid, that in caſes where the portion is to be raiſed out of the *reverſionary term after the tenant for life's death, and to be paid at twenty-one or marriage*, and the child marries, and then dies, it would be hard to decree it to merge; that in BUTLER AND DUNCOMB's Caſe, 2 Vern. 760. a ſum was borrowed by direction of the Court, to aſſiſt the huſband in his trade,

12. A ſettlement was made for want of iſſue-male, to raiſe portions for daughters, to be paid at *twenty-one or marriage, which ſhould firſt happen*, by and *out of the rents and profits, or by mortgage or ſale, as the truſtees ſhould think fit; and in the mean time to raiſe* 100*l. per ann. for the maintenance of each* of them. The *father died*, and *one of the daughters married the plaintiff*, who brought this bill to have the portion raiſed, but was diſmiſs'd, becauſe the portion being to be raiſed out of the rents and profits, or by mortgage or ſale, plainly ſhewed that it was not to be raiſed till ſuch time as the truſtees might make uſe of the election given them by the ſettlement to raiſe it either out of the rents and profits, or by mortgage or ſale; but during the life of the mother, who had it in jointure, they could not raiſe out of the rents and profits; therefore neither by mortgage or ſale, which were all inſerted in one and the ſame clauſe, and a *diſcretionary power lodged in the truſtees to uſe either the one way or the other, and till they had the election of uſing either of thoſe ways, they had no power at all*; beſides that the *maintenance* being to *precede* the raiſing of the portions, if there was no maintenance to be raiſed in the mother's life-time, the portions were not to be raiſed in her life-time, as they were not to take place till after the maintenances. And my Lord Chancellor and the Maſter of the Rolls both ſaid, that the Caſes on this head had gone too far already, and mangled all eſtates, and that they would never decree portions to be raiſed in the father's life-time, where it could poſſibly bear any other conſtruction. And this decree was affirm'd in the Houſe of Lords. Abr. Equ. Caſes 340. Mich. 1728. Brown v. Barkley.

the term not being yet come into poſſeſſion; that in this Caſe of BROOME v. BERKLEY, the Lord Trevor delivered his opinion in the Houſe of Lords, that in all ſuch caſes as this, where the *portion is contingent, and the child marries, and* then *dies, the repreſentative ſhall have it*. Indeed in caſes where the *child dies ſo young that the portion could never be wanted*, the Court will not decree it to be raiſed, becauſe there is no occaſion for it, as in Caſe of BREWEN v. BREWEN, and in that of TOURNAY v. TOURNAY; but that there is *no precedent where the Court has dealt ſo hardly*

hardly with a child who dies after marriage, as to take away what was intended for its proviſion. And that a *future intereſt* is an intereſt, tho' not ſo good as an intereſt in poſſeſſion, and it is and may be a conſideration of marriage; that tho' ſuch an intereſt does not abſolutely veſt, yet it is carrying it too far to ſay it does not veſt at all, or ſo as that it may not be tranſmiſſible.

13. Where a particular *certain time is limited for the payment* of a portion, it may imply a power of ſale. Per the Maſter of the Rolls. Hill. 1731. 2 Wms's Rep. 601. in Caſe of Evelyn v. Evelyn.

14. A. on marriage with M. ſettled his eſtate to the uſe of *himſelf for life*; remainder *to his firſt &c. ſons in tail malé*; remainder *to truſtees for* 1000 *years*; remainder *to B. his brother &c.* The truſt of the term was declared to be that *in caſe of* [439] *no iſſue-male of the bodies of A. and M.* which ſhould live to twenty-one, or be married, and have iſſue, *and that there be one or more daughter or daughters*, then *ſuch daughter, if but one, ſhould have* 4000 *l. and if two or more* 5000 *l. between them, at twenty-one or marriage, which ſhould firſt happen.* And *if one only*, then *ſhe to have* 100 *l. a year for maintenance*; and *if two or more*, then *the like ſum of* 100 *l. to be paid half-yearly in equal ſhares till their reſpective portions ſhould be raiſed and paid*; and *in caſe of non-payment of the portions*, then *the truſtees, their executors &c. out of the rents or profits, or by mortgage or ſale of the premiſſes, or any part thereof during the term, to raiſe and pay the ſeveral portions before limited. Provided if A. ſhould in his life-time prefer them in marriage with portions equivalent, or that the remainderman after A.'s death ſhould do the like, or that no daughter ſhould live to twenty-one or be married, then the term to ceaſe.* M. died living A. leaving no ſon, but three daughters, who are all * unmarried. The queſtion was, if the portions were to be rais'd in A.'s life-time? Lord Chancellor ſaid, that the raiſing or not raiſing muſt, according to the different decrees as to this point, depend upon the particular penning of the truſt. That in this caſe all the contingencies precedent to the raiſing the portions have happened, as that of not having iſſue-male (by reaſon of the wife's death without ſuch iſſue, which in this Court is deemed a total failure of male between them), and alſo the daughter's marrying, or attaining the age of twenty-one &c. That A.'s death is made no part of the condition; and tho' the raiſing it out of the rents and profits cannot be done during A.'s life, and that the mortgage or ſale is to be during the term, which is not to commence in poſſeſſion till A.'s death, yet they † may be raiſed in A.'s life-time, it being no-where ſaid that the portions ſhould not be raiſed till after ſuch time as the term ſhould take effect in poſſeſſion: that indeed had there been no expreſs authority given to the truſtees to ſell or mortgage, there might have been ſome difficulty, but now they may do either; and that the proviſo to make the term void, in caſe A. in his life-time ſhould prefer the daughters in marriage with portions equivalent, will not control ſuch power of the truſtees. And ſo decreed the portions to be raiſed, with intereſt from

* So the Caſe is ſtated, fol. 32. but by what is ſaid by Lord Chancellor, fol. 33. it appears that they were all married and 21.

† S. P. 1 Salk. 159. Trin. 9 Annæ, in Canc. in Caſe of Corbet & Ux. v. Maidwell.

from M.'s death, at which time they firſt veſted. Sel. Chan. Caſes in Lord Talbot's time. 31. Paſch. 1734. Hebblethwaite v. Cartwright.

See (I) Rolt v. Rolt.

(C) *How much* to be raiſed and paid. *And Maintenance, in what Caſes.*

1. A. Made a leaſe in truſt with reference to his will, and thereby *deviſed* to ſeveral of his daughters 500 *l. a-piece to be paid at* 21 *years or marriage, and if any or all died before, then to others.* The daughters had no other portion, nor no maintenance; and direction was prayed by the truſtees, whether they might allow the daughters *maintenance?* The Lord Keeper ſaid, No; becauſe of the deviſe over; elſe it might have been done. Chan. Caſes 249. Hill. 26 and 27 Car 2. Leech v. Leech.

So marriage ſettlement was in truſt, that if the huſband ſhould die without iſſue male, then the truſtees ſhou'd *raiſe* 5000 *l. if but one daughter, but if more,* then 6000 *l.* to be equally divided, and to be paid at marriage or 21, and 200 l. per ann. for maintenance in the mean time. The mother died, leaving two daughters; *one died living the father, and before* 21 *or marriage*; the other daughter married, but unknown to the father; and then the father died. Per three Juſtices againſt Jones J. the daughter ſhall have 6000 l. For 1ſt. The intereſt veſted in the two daughters, on the death of the mother. And 2dly, The truſtees after the mother's death, and living the father, might ſell their intereſt in the term, to take effect after the father's death, and on the contingency of marriage, or living to 21. 2 Jo. 201. Greaves v. Mattiſon.—3 Ch. R. 198. S. C. cited.——Skin. 38. S. C.

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2. A. was to give, *if one daughter* 10000 *l.* if *two* daughters 12000 *l.* if *three* daughters 20000 *l.* He had three daughters, *and one dy'd*; and the queſtion was, if the two daughters ſhall have 12000 l. a-piece or 20000 l.? and decreed they ſhould have 20000 l. per the Ch. J. Skin. 39. Paſch. 34 Car. 2. B. R. cites it as Stowell's Caſe.

3. By marriage articles the wife was to have 500 l. per ann. jointure, or 5000 l. in money. She elected the 5000 l. and it was decreed; and ſhe had a *ſequeſtration* of defendant's lands, and a writ of aſſiſtance to put her in poſſeſſion, and a *decree* againſt defendant, then an infant, *for maintenance for his younger brothers and ſiſters*; and this was to be paid out of the ſequeſtred eſtate. On appeal the Lords reverſed this decree, as to the maintenance, which had been paid to the wife, and which ſhe had applied for the children's maintenance. North K. on the account coming back, allowed the principal ſums for maintenance towards ſinking the 5000 l. but would not let them be applied at the time they were paid, but in one intire ſum at the end of the account, and ſo ſtruck off all the intereſt for above ſixteen years, which came to more than the principal, ſaying it was a hard caſe, and that damages were in the power of the Court. Vern. 160. Paſch. 1683. Dacres v. Chute.

4. Where an *infant recovers by decree* of the Court, the Court may, with the approbation of the infant's relations, allot him a maintenance, tho' no proviſion in the truſt be for that purpoſe,

and this is founded on natural equity. 2 Vern. 236. Trin. 1691. Englefield v. Englefield.

5. A *term was raiſed* by a power in a marriage ſettlement for proviſion of *portions* for younger children, *to be paid at ſuch time as the truſtees* in their diſcretion *ſhould appoint for their better maintenance* and preferment. The children are to have maintenances out of the truſt eſtate, and money employed for placing out a child ſhall alſo be allowed. Ch. Prec. 213. Hill. 1702. Warr v. Warr.

6. By a marriage ſettlement after the common limitations to the firſt and other ſons, a term was limited to truſtees for 300 years *in truſt, on failure of iſſue male, to raiſe* with all convenient ſpeed 3000 *l.* for daughters portions, *to be paid at* 18, *or marriage*. The mother dies; then the father dies, leaving no ſon but two daughters, and *by will gave them* 500 *l. a-piece payable at the ſame time* as their original portions, and deviſed the eſtate to B. a nephew. They were under 18 at their father's death. Ld. Harcourt held that the *father ſurviving his wife, the daughters ſhould have intereſt or maintenance (call it which they would) from the father's death, and referred it to a Maſter to ſee what maintenance was reaſonable, and decreed the original portions to be raiſed, and intereſt to be paid at 5 l. per cent. only, being charged upon land. Ch. Prec. 367. Paſch. 1713. Greenhil v. Waldoe.

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7. If there be *one or more ſons, and but one daughter, ſuch daughter to have* 500 *l.* and *to every other younger daughter* 200 *l. a-piece* in a deed of ſettlement; there *being three daughters*, the eldeſt ſhall have but 200 l. the eſtate being ſmall, and not able to bear a greater charge. Mſs Tab. tit. Portions, cites April 26, 1721. Chamberlain and White.

(D) How much to be raiſed or paid. *Accumulative.*

[441] See Accumulative.

1. A Deed is made for raiſing portions for daughters; afterwards *a new proviſion* is made *by a ſecond deed, and a will* to which the deed refers. The prior deed is barred by the ſecond deed. 2 Ch. R. 8. 20 Car. 2. Every v. Gold.

2. On marriage of T. with M. a ſettlement was made, by which a *term of* 99 *years* was created *for daughters portions*, and for

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1. A Deed is made for raiſing portions for daughters; afterwards *a new proviſion* is made *by a ſecond deed, and a will* to which the deed refers. The prior deed is barred by the ſecond deed. 2 Ch. R. 8. 20 Car. 2. Every v. Gold.

2. On marriage of T. with M. a ſettlement was made, by which a *term of* 99 *years* was created *for daughters portions*, and for

for want of iſſue male of the marriage, the remainder *in tail* was limited over *to a diſtant relation*. The deed declared the uſes as follows, viz. If T. die without iſſue male, or having ſuch iſſue male by M. if ſuch iſſue ſhould die in minority, or unmarried, the truſtees ſhould out of the premiſſes raiſe and levy 2000 *l.* for the portion and portions of ſuch daughter and daughters, together *with a competent yearly maintenance* for every ſuch daughter and daughters, *not exceeding* 20 *l. per ann. and the* 2000 *l. to be paid at* 21 *years or marriage, which ſhould firſt happen; proviſo if* the ſaid T. B. in his life-time, or any to whom the immediate remainder &c. ſhould appertain, *ſhould within twelve months next after the death of the ſaid T. B. without iſſue male by the ſaid M.* either *pay or ſecure the ſame, and the ſaid maintenance to the liking of the ſaid truſtees*, then *the ſaid term to ceaſe*. T. died, having a ſon [and E. a daughter]; the ſon died without iſſue, E. his ſiſter then living, and many years after, *but died at* 19. M. the mother took adminiſtration to E. and the bill was to have the 2000 l. and the 20 l. for ſo many years as E. lived; for G. in remainder had entered and received the profits, but not paid the 20 l. nor maintained E. The Lord Keeper decreed for the plaintiff as to the maintenance, notwithſtanding that her *grandfather* J. *had by this will given the ſaid E.* 2000 *l.* ſo as ſhe needed not maintenance; but as to the 2000 l. diſmiſſed the bill. 2 Chan. Caſes 166. Trin. 36 Car. 2. in Canc. Bond & Ux. adminiſtratrix of Elizabeth, daughter of Mary, the former wife of Thomas Brown.

3. By a marriage ſettlement, a *term for years* expectant on failure of iſſue of M. *is raiſed for ſecuring* 3000 *l.* for daughters not preferred in the life of the father, payable *at* 18, *or marriage;* there are a ſon and two daughters; the father in his life, *by ſale of lands raiſed* 1800 *l. for his daughters*, which by another deed was *payable at* 21, *or marriage*; he left alſo a ſon of a former marriage; the younger ſon died an infant. Decreed the 1800 l. to be taken in part of the 3000 l. 2 Vern. 255. Jeſſon v. Jeſſon.

4. A. upon marriage *ſettled his eſtate*, ſubject to portions for younger children, and afterwards *purchaſes another eſtate, and ſubjects it to like portions*. It was decreed to be only a double ſecurity, and not a double charge; cited by Mr. Vernon. G. Equ. R. 66. as the Caſe of Juſſon v. Juſſon.

5. Marriage ſettlement on A. for life, remainder to the firſt ſon &c. in tail male, remainder to truſtees for 500 *years, to raiſe* 5000 *l. for daughters portions, payable at* 18, or marriage, remainder to A. in fee. After the marriage A. ſettles *other lands*, and a like term is created for *raiſing the like ſum for daughters* on like failure of iſſue male *payable at ſixteen*, or marriage. A. dies and leaves a daughter his heir at law, who after eighteen dies unmarry'd; the truſt of the term is not merg'd in the fee, but the portion ſhall go to the daughter's executors, and is diſpoſable by her will; but there ſhall be but one five thouſand pounds raiſed, but

S. C. cited G. Equ. R. 65. 66. Arg. A. ſettled an eſtate, and charged it with 5000 *l. for grand-daughters* on failure of iſſue-male of B. his ſon, *payable within* a

but to take by which of the two ſettlements ſhe thought moſt to her advantage. Per Somers C. and after affirmed in Dom. Proc. 2 Vern. 348. Thomas v. Keymiſh.

year after marriage, or at 21, which ſhould firſt happen.

B. on his marriage ſettled the whole eſtate (including what was charged with the 5000 l.) and on failure of iſſue-male to raiſe 8000*l.* *for daughters, payable* * *at* 18, *if then married, or when married after.* B. had only one child M. a daughter, grand-daughter of A. and *deviſed all his lands to C.* a kinſman in tail-male chargeable with legacies, *and deviſed to M. his daughter for her portion* 8000*l.* viz. 4000*l.* *to be paid at* 18, *and* 4000*l.* *at* 21, *or in a year after marriage, and alſo gave her* 200*l.* *a year for her life.* Tho' it was urg'd that theſe ſums were payable at different times, and ſome leſs beneficial than others; and that therefore all theſe portions, or at leaſt the 5000 l. given by A. the grandfather, and the 8000 l. given by B. the father, ſhall be paid to her. But Lord Harcourt decreed that ſhe ſhould only have one portion, and not two, but that ſhe may when of age elect which ſhe ſhall think the moſt for her advantage. Wms's Rep. 147. Trin. 1711. Copley v. Copley.

6. By marriage ſettlement a *term* was to commence after the death of the ſurvivor, *to raiſe* 3000 *l. in twelve months for daughters portions.* There was only one daughter, and the father by will *deviſes the truſt-lands* to make good the wife's jointure, and *to raiſe* 3000 *l. for his daughter's portion.* Per Curiam, The will ſhall be taken as relative to the ſettlement, and as a better ſecurity of the firſt 3000 l. and not as a deviſe of another 3000 l. 2 Vern. 439. Bruen v. Bruen.

Chan. Prec. 195. S. C. —Freem. Rep. 254. S. C.

7. On the marriage of A. with M. a *term of* 500 *years was limited to truſtees* to raiſe portions for daughters in caſe of no iſſue-male by the marriage *payable at* 18, *with maintenance at the rate of* 40 *l. a year to each daughter, from the death of their father and grandfather by the mother's ſide, until their portions ſhould become payable.* A. died, leaving two daughters, one of eight and the other of nine years old; ſome time after the grandfather died. The father by his will had made another proviſion for the daughters, and lands alſo deſcended from him. But Lord C. Macclesfield held this not material, as long as by the ſettlement there was no other proviſion except this maintenance money, until the portions ſhould become payable, and any matter ſubſequent to the ſettlement ought not in juſtice to vary the conſtruction thereof. 2 Wms's Rep. 179. Trin. 1723. Ravenhill v. Danſey.

8. *A proviſion was made by a marriage ſettlement for daughters portions, and after a further proviſion was made of a further ſum amounting to half of the firſt ſum,* and this is made by the father's will by virtue of a power in the marriage ſettlement: the *leſs ſum was certain, the greater was on a contingency which happened after the leſs was to be received.* It was inſiſted that in caſe of double portions there is no inſtance where the ſecond proviſion is leſs than the firſt, that ever it was held a ſatisfaction. And Tracy J. who ſat in the Lord Chancellor's abſence, held accordingly; and obſerved, that in all the Caſes cited, the ſecond ſum was more, or at leaſt equal to the firſt proviſion; and ſo decreed both ſums to be raiſed, and that the greater ſum be raiſed with intereſt and coſts from the time the contingency happened, which was the death of the brother within age and without iſſue-male. Caſes in Chan. in Ld. King's time. 32. Trin. 11 Geo. 1. 1725. Savile v. Savile.

9. An

9. An objection arising from double portions *holds only where both portions come from one and the same perſon.* Barn. Chan. Rep. 156. Trin. 1740. Per Lord Chancellor, in Caſe of Sir Robert Walpole v. L. Conway.

(D. 2) *Maintenance, or Intereſt,* payable *in what Caſes, and from what Time.*

Where portions are to be raiſed *out of the rents and profits,* no intereſt is to be allowed till the whole is * paid.

[443]

1. A TERM *of* 40 *years* was limited for raiſing 2000 l. *either by profits or ſale of the term;* the *truſtee takes poſſeſſion, and ſwears he made no intereſt of the profits.* Lord Somers decreed that no intereſt ſhould be paid for the 2000 l. becauſe the truſtee was admitted into poſſeſſion. But this decree was reverſed, becauſe the truſtee had power to have raiſed it immediately, and the eſtate was ſufficient. MS. Tab. tit. Intereſt, cites 26 Jan. 1702. Lord Roſeberry v. Taylor.

March 13. 1725. Bagnal v. Bagnal. —* In another MS. it is (raiſed.)

Where portions are limited by deed to be raiſed *as ſoon as conveniently they may be,* they are due in judgment of law preſently, and carry intereſt from that time. Paſch. 4 Geo. 1. 10 Mod. 402. in Caſe of Aſhton v. ....

2. A. by marriage ſettlement limited lands *to himſelf for life*; remainder *to M. his wife for life;* remainder *to truſtees for* 99 *years;* remainder *to his firſt &c. ſon*; remainder *to the firſt &c. ſon of B. his brother.* The 99 *years term was,* that *if there ſhould be no iſſue-male* of the ſaid marriage, but there ſhould be one or more daughters, *the truſtees ſhould raiſe* 8000 l. *for the daughters to be paid as ſoon as conveniently could be,* but limited no expreſs time when payable. But then a further truſt of the term was declared, *that if there ſhould be a ſon and a daughter, or daughters, the truſtees ſhould as ſoon as poſſible raiſe* 1000 *l. a piece for the daughters payable at* 21 *or marriage.* A. and M. both died, leaving three daughters, but no ſon, the daughters being 21. On a bill brought by the daughters, it was inſiſted by the counſel for the plaintiffs, that the portions being payable preſently on A's death (the daughters being then 21), they conſequently would carry intereſt, and the rather ſince they were to *ariſe out of land which yielded rents and profits,* and ſo [as it ſeems] it was ruled by the Court; and Lord C. Parker farther obſerved, that *the truſt alſo was, that if there were a ſon and a daughter, or daughters, by the marriage, the ſon was to pay intereſt to his ſiſters* for their portions *from their age of* 21 *or marriage;* and he ſaid it could not be imagined that A. would be kinder to his nephew, in excuſing him from paying intereſt, than to his own ſon, if he had one, who was bound to pay intereſt; and decreed the portions to be raiſed by ſale or mortgage, as ſhould be agreed by the Maſter and the parties, with *intereſt from A.'s death,* and *coſts.* Wms's Rep. 415 to 420. Paſch. 1718. Trafford v. Aſhton.

3. Where a *portion* is *to be raiſed by annual profits* &c. if *no time be appointed,* the portion is due when the profits can raiſe it, and it carries no intereſt in the mean time. Paſch. 1722. 2 Wms's Rep. 20. in Caſe of Ivy v. Gilbert.

4. A

4. A term of 500 *years* was limited to truſtees *to raiſe portions for daughters, in caſe of no iſſue-male* by the marriage, *by ſale, mortgage or profits*, and alſo *with maintenance at the rate of* 40 *l. a year to each daughter, from the death of their father and mother's father, until their portions ſhould become payable, to be raiſed by rents and profits.* The father died, leaving two daughters, the one about eight, and the other about nine years old. Afterwards the mother's father died, and then the term commenced in poſſeſſion. Lord C. Macclesfield declared it to be againſt his opinion to raiſe a portion or maintenance by ſelling a reverſionary term under colour of the word Profits; but ſaid that here the truſt term was come into poſſeſſion, and comparing it to a rent granted out of a reverſion to commence preſently, in which caſe tho' the reverſion falls not into poſſeſſion until many years after, yet when it does fall, it ſhall anſwer all arrears; and ſo directed the *arrears of the maintenance money* from the time the ſame became payable by the ſettlement, to be raiſed out of this term. 2 Wms's Rep. 179. Trin. 1723. Ravenhill v. Danſey.

5. A particular *certain time* being limited *for payment* of a portion, it carries intereſt from that time. Per the Maſter of the Rolls. Hill. 1731. 2 Wms's Rep. 601. in Caſe of Evelyn v. Evelyn.

(E) *Who is intitled* by the Limitation, *and how.* [444]

1. A Widower ſettles lands to raiſe 100 l. per ann. to his eldeſt ſon, and 100 *l. a-piece for his younger children, to be paid according to their ſeigniority;* and afterwards he marries again, and has children by his ſecond wife: it was decreed, that the children by this ſecond wife were equally intitled with the children of the firſt to have the benefit of this proviſion for younger children; and that in caſe there ſhould happen a deficiency, the eldeſt ſhould not have more, and the younger leſs, but they ſhould be all paid in average. 1 Vern. 334. 335. Mich. 1685. Brathwaite v. Brathwaite.

2. Five hundred pounds was ſettled in truſt to pay the intereſt to the wife for life, and after her death to pay the principal and intereſt *to ſuch daughters as ſhall be begotten* on the body of the wife, ſhare and ſhare alike; but if the huſband die without any daughters, then the money to be paid to the wife. There was a daughter at the time of the ſettlement, who was living at the huſband's death, and no other daughter was born afterwards. Per Parker C. the daughter tho' born before the ſettlement is intitled by the words. 10 Mod. 398. Paſch. 4 Geo. 1. Slingſby v. . . . . .

See (B) pl. 8.

(F) *Liable. What is.*

1. WHERE a *term* was limited for 99 years *to raiſe* portions, and that term *happened to commence at the ſame time with a former* eſtate for 99 years, ſo that the latter term proves void, Finch C. decreed the money ſhould be charged on the firſt 99 years; for the limitor intended the raiſing it, and had power to charge the firſt term with theſe portions, as well as the other charged thereon, and ſaid he regarded only the *party's intent to raiſe the money* tho' he pitched not on proper means. Chan. Caſes 290. Mich. 28 Car. 2. Biſco v. Earl of Banbury.

2. A *term for raiſing* 10000 l. for a portion *was ſo ſhort, that the ordinary profits* of the land *would not raiſe half the ſum*; but there was a *coal-mine* open at the father's death, which the Court ordered to be wrought, and the truſtees to make drains &c. in any other lands of the heir as need required, and to be done orderly, and ſo to raiſe the money. And per Ld. Hutchins. where the uſual profits will not raiſe the money appointed within the time, this Court may *order timber to be felled* off the land to make it up. Ch. Prec. 27. Trin. 1691. Offley v. Offley.

See (I) Rolt v. Rolt.

(G) *Veſted. In what Caſes.*

Note; This bill was diſmiſs'd in 1685, and the diſmiſſion affirm'd in the Houſe of Lords.—North K. diſtinguiſh'd between a

1. BY a term limited in a ſettlement, portions were to be paid *at* 21, *or days of marriage*. The baron dies, leaving two daughters and a ſon; *one daughter dies before* 21, *and unmarried*; the mother, as adminiſtrator, brought a bill for the portion. But Lord North thought it a hard demand, being to be raiſed out of the real eſtate, tho' had it been out of the perſonal eſtate, ſhe muſt have had it. Vern. 204. Mich. 1683. *Pawlet v. Pawlet.

portion given by a *will*, or which is rather a legacy, and where it ſtands only upon a *deed*. That in the laſt caſe it is to be raiſed for the benefit of the adminiſtrator, but not in the caſe of a will, tho' it be deviſed payable out of land. Vern. 323. S. C. Paſch. 1685.—* S. C. cited. Arg. 2 Wms's Rep. 277.—Ch. Prec. 195. Paſch. 1702. Brewin v. Brewin. S. P.——Ibid. 318. Mich. 1711.——A portion was given *by will*, to be raiſed out of the rents and profits of lands, and made payable at 21 or marriage; the daughter dies an infant, and unmarried. The portion ſhall not be raiſed. 2 Vern. 92. Per Maſter of Rolls. Smith v. Smith.—— But *if no time had been limited for payment, it had been otherwiſe*. Ibid. cites Lord Rivers v. Lord Derby.—2 Vern. 72. Tr. 1688. S. C.——Thus lands ſettled on marriage charg'd *to raiſe* 10000 *l. for daughters portions out of the rents and profits*, and 100 l. per annum for maintenance for ſuch as ſhall be living at the father's death, till the payment of the 10000 l. portions, but *no time limited for the payment*. The huſband dies, and leaves A. his only daughter, who lives to 17, and by her will diſpoſes of the 10000 l. It was decreed that this is an intereſt veſted in the daughter, and well diſpoſed of by the will ——S. C. cited Hill. 1697. 2 Vern. 352. in Caſe of THOMAS v. KEYMISH? and ſays this decree was affirm'd in parliament.—— Ch. Prec. 140. Hill. 1700. S. P. decreed per Lord Somers, aſſiſted per Maſter of the Rolls, and afterwards per Lord Wright, and affirmed in Dom. Proc. Yate v. Fettyplace.—— S. C. 2 Vern. 416.—— Lord Commiſſioner Jekyl cited S. C. and that it ſhould ſink for the benefit of a hæres factus, as well as of a hæres natus; for the former is ſubſtituted in the place of the latter, and the true *reaſon is*, that the legacy being *given as a portion*, when the child dies before the portion is payable, there is no occaſion for it; and equity will not countenance the loading of an heir for the benefit of an adminiſtrator. 2 Wms's Rep. 277.

Pakh.

Paſch. 1725. in Caſe of Jennings v. Looks.——*So, tho' not mentioned to be given as a portion,* if the fact appears to be ſo. Ibid.

2. A. by will deviſed *lands to be ſold for payment of portions* to his younger children. One of the children dies after the portion becomes payable, but before the land ſold. Per North K. the adminiſtrator of the child that is dead is intitled to the money. Vern. 276. Mich. 1684. Bartholomew v. Meredith als. Moorehead.

3. A. by will charges his lands with 6000*l. for the child his wife was privement enſeint of, if it proved a daughter;* with clauſe of re-entry for non-payment. A daughter is *born, and died:* this ſhall not go to the adminiſtrator. 2 Vern. 208. Hill. 1690. Norfolk v. Gifford.

4. By marriage ſettlement, lands were limited to the baron for life, remainder to the wife for life, *remainder to firſt &c. ſons,* remainder *to truſtees for* 500 *years to raiſe after the commencement of the term* 4000*l. for younger children, payable at* 21, *or marriage,* remainder to the heirs of the father of the baron. The baron died, leaving a daughter his only child, and his wife living. Tho' the Court held, that the money was not to be raiſed till the term ſhould commence, yet his Lordſhip agreed that the words which ordered the payment at 21 or marriage ſhould have their effect, viz. that they ſhould veſt a right in the daughter to this portion when ſhe attained 21 (as ſhe then had), and *having attained that age, the portion, in caſe of her death, ſhould go to her executors or adminiſtrators as a veſted intereſt;* per Ld. Parker. 10 Mod. 433. Trin. 1718. Butler v. Duncomb.

5. By marriage articles a term was created for raiſing 3000*l.* portion for a daughter in default of iſſue male, *payable at* 18 *or marriage,* to be raiſed by rents and profits, or by ſale or mortgage, *provided that if the father dies without leaving a daughter,* or his wife enſeint of a daughter, *then the portion is not to be raiſed.* The wife died, leaving a daughter her only child, now married. The Ld. C. Macclesfield taking notice of this proviſo [which the book in ſtating the caſe ſays nothing of] ſaid, that ſtill there may be no daughter *living at the father's death.* So that there is a contingency ſtill ſubſiſting, which prevents the portion from becoming due. 2 Wms's Rep. 93. 100. Hill. 1722. Reresby v. Newland.

And in the ſame caſe there was a *proviſo that the father with conſent of the truſtees might revoke all the uſes,* which his Lordſhip held to be ſtill a ſubſiſting power, and conſequently ſuſpends and prevents the portion from being as yet payable, becauſe the father with conſent of the truſtees may yet revoke, and ſo he may at any time before the portion is paid: and to ſay that the right to this portion is veſted in the daughter, is no objection; for if the term falls, as by ſuch revocation it muſt do, all the truſts thereof muſt fall alſo, and conſequently the truſt for raiſing the portion. 2 Wms's Rep. 93. 101. Hill. 1722. Reresby v. Newland.——This decree was afterwards affirmed in the Houſe of Lords. Ibid.

6. A *term* of 500 years was created by marriage ſettlement, *to raiſe* 5000*l. for daughters payable at* 21 *or marriage, provided if any* of the daughters *ſhould be* 21, *or married in the life of the father, then her portion to be paid at the end of one year after the father's death;* and it was alſo *provided, that if any of the ſaid* [446]

daughters ſhould die before her or their portions become payable, and before 21 *or marriage, her or their ſhare to go to the ſurviving daughters or daughter.* There were iſſue one ſon and three daughters, C. D. and E.—C. married, and had a portion greater than her ſhare of the 5000l. D. attained 21, married, and died in the father's life-time without iſſue. Her huſband adminiſtered, and then the father died. It was inſiſted by the Sollicitor General Talbot, that E. could not be intitled to D.'s ſhare, becauſe D. attained to 21, and was married; whereas to intitle E. the ſurvivor, D. muſt have died under 21, or before marriage. And that D.'s ſhare could not ſink into the land, becauſe ſuch conſtruction is to prefer the heir to the adminiſtrator of the deceaſed daughter, where ſuch daughter died before 21, or marriage, ſo that a portion was not wanting to advance her, whereas in the preſent caſe D. was both married and 21. And of this opinion was the Ld. C. King, who obſerved, that *equity had ſtrained ſometimes to help a daughter married in her father's life-time, but never to deprive a married daughter* thereof. And that the laſt [firſt] proviſo was without any negative words, that ſhe ſhould not be paid her portion till then; but the meaning was, that then in all events, even tho' the grandfather of ſuch daughter, who had part of the eſtate compriſed in the 500 years term limited to him for life, had been living, the reverſion ſhould have been ſold notwithſtanding, for raiſing this portion. And his Lordſhip decreed the third part of the 5000l. to the huſband of D. with intereſt from the end of the year after the father's death, to be raiſed by ſale of a third part of this term. 2 Wms's Rep. 513. Hill. 1728. Petfield's Caſe.

(H) *Merged by Conjunction of Eſtate.*

She *within age deviſed the portion.* But the Maſter of the Rolls *reliev'd againſt the merger,* and decreed the portion to go according to the will of the daughter. 2 Vern. 90. Mich. 1688. Powel v. Morgan.

1. A Term raiſed for the portion of a daughter was extinguiſh'd by the *inheritance deſcending* on the daughter. 2 Vern. 208. Hill. 1690. cited in the Caſe of NORFOLK v. GIFFORD, as the Caſe of Powel v. Morgan.

S. C. cited G. Equ. R. 65, 66. Paſch. 7 Annæ Arg.

2. Marriage ſettlement of lands on A. for life, remainder to firſt &c. ſon in tail male, remainder to truſtees for 500 *years to raiſe* 5000*l. for daughters*, payable at 18 or marriage, remainder to A. in fee. A. dies, leaving *one daughter his heir at law*, who lives beyond 18, and then dies unmarried. The Ld. Chancellor thought, that as the term in law was not merged, ſo neither was the truſt determined or extinguiſhed in equity, and ſhall go to defendant (who was the daughter's mother, and to whom the daughter by a *will nuncupative* mentioned that ſhe deviſed all that was in her power to deviſe) who had adminiſtration with the

he will annexed. Affirmed in Dom. Proc. 2 Vern. 348. Hill. 1697. Thomas v. Keymiſh.

3. Whether a portion of 2000l. ſecured by a *term in truſt* ſhall extinguiſh in the land by a *deviſe of the lands to the daughter in tail?* See 2 Vern. 457. Hill. 1703. Lawrence v. Blatchford. It was inſiſted it could not be extinguiſhed, becauſe *nothing deſcended*, or came to her *in poſſeſſion*, only a reverſion expectant on a 60 years term deviſed to truſtees for payment of debts and legacies, remainder in tail to the daughter, who was heir at law. Whereas in the Caſe of THOMAS v. KEYMISH, the fee-ſimple in preſent poſſeſſion was given to the daughter, and yet that was held no extinguiſhment. Ibid.

(I) Merged, or lapſed for the Benefit of the Heir. [447]

1. A. Made a *ſettlement to raiſe portions* of 4000l. for two daughters to be paid at the day of marriage or age, and reſerved a power to order it otherwiſe by his will; and by his will made about the ſame time, he gives the ſame ſum payable as directed by the ſaid ſettlement. One dies, her portion ſhall not go to her adminiſtrator, but the heir ſhall take the profits, and a *difference* is taken between *a truſt and a legacy*; for that a truſt is expounded according to the intent of the party, and a legacy is govern'd by the rules of the common law. 2 Chan. Rep. 288. Pawlet v. Pawlet. Vern. 204. S. C. but no decree.—Afterwards the bill by the adminiſtrator was diſmiſſed 1685. and the diſmiſſion affirmed in Dom. Proc. in marg. ibid. 205. 321. S. C.——And North K. makes the difference between a *portion* by a ſettlement, and a *legacy*, and tho' here was both *deed and will*, yet the diſpoſition was by the deed. Ibid.—If a ſettlement be made, and lands charged with ſuch ſums of money as a will ſhall declare, in ſuch caſe the will will be but *declarative*, and *not operative*. Cited 2 Vent. 367. as decreed by Ld. North, in the Caſe of Bond v. Richardſon.

2. A. a widower ſettles lands to raiſe 100l. a year for his eldeſt ſon, and 100l. a piece for his younger children; many of the younger children died in the life-time of their father; it was decreed that the adminiſtrators of the children ſo dead ſhould have no benefit of this proviſion, but the ſame ſhould ceaſe. But in caſe any of the *daughters* had been *married in the life of the father*, and died; the huſbands as adminiſtrators ſhould have their portions. And Ld. Chancellor took a difference between a portion and proviſion, and a legacy payable at 21 &c. Vern. 335. Mich. 1685. Braithwaite v. Braithwaite.

3. A. ſeiſed of the manor of P. made a *mortgage to J. S. for* 1000 *years for ſecuring* 6000*l.* and then *ſettled the ſame on himſelf for life, and afterwards on B. his ſon in tail, remainder over, remainder to himſelf in fee*, ſubject to the mortgage, *and by will deviſed other lands for payment of his debts, provided that upon paying of the ſaid mortgage, the ſame ſhould be kept on foot to make good his daughter's portion*, and thereby deviſed 3000l. to be paid to her at 21, or marriage, if ſhe marry with conſent of her mother and truſtees, otherwiſe but a 1000l. and died, leaving a daughter E. who *died at ſix years old*. The queſtion was, if the 3000l. was ſunk for the benefit of the heir, or ſhould go to the adminiſtrator of the daughter? Ld. Keeper Wright, aſſiſted by the Maſter of the Rolls, diſmiſſed the bill of the adminiſtrator S. C. 2 Vern. 416. but there it is ſtated that *the deviſe for payment of debts and legacies was of ſome leaſehold and perſonal eſtate*. And it was endeavour'd to diſtinguiſh this from the Caſe of

PAWLETT v. PAWLET, 1ſt. Becauſe that was by deed, and this by will.

for having the portion raiſed, and this diſmiſſion was affirmed in the Houſe of Lords. Chan. Prec. 140. pl. 122. Hill. 1700. Yate v. Fettiplace.

2d. Becauſe there it was to be raiſed out of land only, whereas here the perſonal eſtate is liable as well as the land, and has been applied in part to pay off the mortgage that was on the land; but the Court held it to be within the reaſon of that Caſe.—2 Freem. Rep. 243. S. C. but ſtates nothing of the deviſe being of perſonal eſtate, but reſts it wholly upon other lands, and the keeping on foot the mortgaged term of 1000 years; and that it was held, that tho' the mortgage leaſe out of which it is to be raiſed be but a term for years, yet it is *not a term in groſs, but* a term *attendant upon the inheritance after the debts paid*, and the truſts performed; but if it had been a term in groſs, it had been a chattel and a perſonal eſtate, but it is not ſo here. And Ld. Keeper Wright ſaid, it was a condition precedent, and all one as if he had ſaid, If my daughter marry with conſent of my wife, I give her 3000*l.*—S. C. 12 Mod. 276. Hill. 11 W. 3. 1698. but ſtates it only (as to this point of its being merged) as charged upon land, and ſays, that it was decreed by Ld. Somers, and that he held, that in all caſes where a man charges a *ſum certain*, to be paid as here *out of the real eſtate*, there, if the perſon dies, the money ſhall be ſunk for the benefit of the heir. *But* if a man deviſes a *perſonal legacy*, *or* a ſum to be paid *out of a term for years*, and the legatee dies before the age &c. the executors or adminiſtrators of the legatee ſhall have the money; becauſe it was *debitum in præſenti*, tho' *ſolvendum in futuro*.—S. P. and Caſe cited Arg. 2 Wms's Rep. (610.) 611.) and per Ld. C. King (612.) and his Lordſhip ſaid, that there is not the leaſt difference between a ſum of money charged by will on land payable to an infant at 21, and where ſuch charge ariſes by deed. Trin. 1731. in Caſe of Duke of Chandos v. Talbot.

[448] 4. The *reaſon* why a legacy or portion charged on land ſhall ſink into the eſtate for the benefit of the heir, where the party dies before it becomes payable, and not to do ſo when it is charged upon the perſonal eſtate, *is becauſe the heir is more favour'd at law and in equity than an executor or adminiſtrator*; and becauſe the heir is looked upon to be the ſtay and ſupport of the family, whereas an executor is ſometimes a mere ſtranger to it; per Ld. K. Wright. 2 Freem. Rep. 244. Hill. 1700. in Caſe of Yate v. Fettiplace.

S. C. cited Arg. ſays, the 500*l.* was to be raiſed out of the rents and profits *as ſoon as might be*; ſo that whatever was raiſed before M. came to 21, was then to be ſeparated from the land,

5. A. having only one ſon B. and one daughter M. *deviſed* 500*l.* *portion to M. to be paid by his executor at* 21, *out of his perſonal eſtate, and rents and profits of his lands*, and *if not raiſed by that time*, then *his executor ſhould ſtand ſeiſed, and receive and take the rents, iſſues, and profits of his lands until the* 500*l.* *ſhould be raiſed*, and *after payment deviſed the lands to his ſon*. M. at 18 married J. S. the plaintiff; ſhe died before 21, leaving iſſue a daughter; J. S. as adminiſtrator to M. brought a bill to have the 500*l.* raiſed out of the land; and the Ld. Keeper decreed accordingly, altho' the incumbrances were ſo great that the whole inheritance would produce little more than the 500*l.* 2 Vern. 424. Paſch. 1701. Jackſon v. Farrand.

and remain as money in the executor's hands, and conſequently could never merge for the benefit of the heir when once ſeparated from the land. And tho' (as it appear'd from the decretal order, which was produced in Court) debts came in ſo faſt that the 500*l.* could not be raiſed ſo ſoon as expected, yet the intent was the ſame, that it ſhould be raiſed for her; and that it was decreed probably upon that or ſome other circumſtance not mentioned in the book. Caſes in Chan. in Ld. Talbot's time 120. And Ibid. 122. Ld. Chancellor cited S. C. and ſaid, that *the marriage* of the daughter *might be the cauſe of that decree*, the 500*l.* being intended as a portion, altho' no expreſs proviſion was made that it ſhould be paid upon the daughter's marriage. Trin. 1735. in Caſe of the King v. Withers.

Chan. Prec. 195. S. C.—2 Freem. Rep. 254.

6. By marriage ſettlement a term was to commence after the deceaſe of the ſurvivor, to raiſe 3000*l.* *in* 12 *months for daughters portions*. There being only one daughter, the father by will *deviſes*

vises the truſt lands to make good the wife's jointure, and *to raiſe* 3000*l. for his daughter's portion*; this being a portion to be raiſed out of the land, it ſhall not be raiſed for the adminiſtrator of the daughter, who died at five years old, before ſhe had occaſion of a portion, but ſhall merge in the land for the benefit of the heir. 2 Vern. 439. Paſch. 1702. Bruen v. Bruen.

S.C.—Abr. Eq. Caſes 267. (D). pl. 2. S. C. and adds a nota, The daughter died within the 12 months, tho' it does not appear in 2 Vern. 430.——[Neither do I obſerve in the S. P. mentioned, either in Chan. Prec. or 2 Freem. Rep.]—S. C. cited by Ld. Chancellor Talbot, and alſo the Caſe of TOURNEY v. TOURNEY, who ſaid, that indeed in ſuch caſes, where the *child dies ſo young, that the portion could never be wanted*, the Court will not decree it to be raiſed, becauſe there is no occaſion for it; but ſaid, that there is *no precedent where the Court has dealt ſo hardly with a child who died after marriage*, as to take away that which was intended for its proviſion. Caſes in Chan. in Ld. Talbot's time 123. in Caſe of King v. Withers.

7. Upon a marriage *ſettlement*, a term was raiſed for providing portions for younger children, *to be paid* * *at ſuch time as the truſtees ſhould appoint* in their diſcretion *for their better ſupport* and maintenance. One of the younger children was put to a ſea captain, and died at 17, the truſtees having made no appointment for payment of his portion. The Maſter of the Rolls decreed that what had not been raiſed of his portion for putting him out and for maintenance ſhould ſink into the inheritance. Ch. Prec. 213. Hill. 1702. Warr v. Warr.

* *To be paid in a year's time after the father's death, with intereſt at* 5*l. per cent. from his death* till paid There were three children; *one died within a year after the father's death*; per Ld Cowper. The portion, tho' raiſable preſently, was not demandable preſently, and therefore ſhall ſink into the inheritance for the benefit of the heir. Ch. Prec. 290. Hill. 1709. Tournay v. Tournay.

8. Where a child's portion is to *be raiſed out of a truſt eſtate, created by a voluntary family ſettlement with a power of revocation*, and the *child dies unmarried and inteſtate before his father*, equity will never raiſe the portion, but it muſt ſink in the eſtate. MSS. Tab. tit. Portions, cites 1702. Warburton v. Warburton.

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9. Where portions are provided for daughters by a ſettlement, the father cannot by his will annex any *condition to the payment* of them, or deviſe them over in caſe of the death of any of them before their portions become payable, for he had only the power of appointing, and in caſe of death of either, the portion would *extinguiſh in the land* for the benefit of the heir. 2 Vern. 452. Mich. 1703. Alſton v. Alſton.

10. A term is limited after the death of father and mother, to raiſe portions for daughters if no ſons, *payable at* 18 *or marriage, provided ſuch daughters ſurvive their father*; if either die in the life-time of their father, her portion is not to be raiſed. 2 Vern. 655. Trin. 1710. Hickman v. Anderſon,

The truſt of a *term* was declared that *if A. the h ſhould die without heir male by M. and leaving a daughter &c.* then *ſuch daughter to have* 1000*l.* at 21 or marriage; *proviſo if A. ſhould not have any daughter by M. living at his death*, then *the term to ceaſe*. A. and M. *had iſſue E. a daughter who attained* 21 and married the plaintiff. M. died, leaving no iſſue but E. and afterwards *E. died living A. leaving iſſue* by the plaintiff. Then A. died, and the plaintiff as adminiſtrator to E. brought a bill for the portion. But Ld. C. Cowper held him not intitled, for the term never aroſe, it being to commence on a *condition precedent*, viz. If A. ſhould die without heir male leaving a daughter, which he did not, and cannot be intended of having had a daughter: and that the proviſo determines the term itſelf, by not having a daughter living at his death; and if it be determined at law by the *expreſs proviſion of the parties*, he ſaid it would be ſtrange for Chancery to revive

revive it, and that perhaps the intention might be that in ſuch caſe it ſhould not be raiſed. Wms's Rep. 401. Hill. 1717. Wingrave v. Palgrave.

11. *Part of lands charged* with 400l. portion *are deviſed to the party* to whom the portion is payable; although the lands deviſed are worth more than the portion, yet it is no extinguiſhment of the charge. MS. Tab. tit. Portions, cites Feb. 28. 1725. Ruſhout v. Ruſhout.

12. A. the teſtator being poſſeſſed of a conſiderable real and perſonal eſtate, deviſed it thus, viz. *I give and bequeath unto my daughter M. at her age of* 21, *or* day of *marriage*, which ſhall firſt happen, *the ſum of* 2500*l.* *And* my will and meaning is, That *if my ſon C.* ſhould *die without iſſue male* of his body then *living, or which may afterwards be born*, that *then my ſaid daughter ſhould have* and receive, *at her age of* 21, *or* day of *marriage*, which ſhall firſt happen, *the further ſum of* 3500*l.* over and above the ſaid ſum of 2500l.; *but in caſe* the contingency of *my ſaid ſon's dying may not happen before the ſaid age of my daughter, or* her day of *marriage*, that *then* ſhe ſhall receive and be paid *the ſum of* 3500*l. whenever it might after happen.* Then he *deviſes his real eſtate to his ſon in tail, and for want of ſuch iſſue, remainder to his brother in fee;* then goes on thus: *And my will* and meaning *is, that the lands* and premiſſes *hereby deviſed ſhall be liable to, and chargeable with the payment of the ſaid ſum of* 3500*l. whenever it ſhall become due* and payable; *and directs, that in caſe of failure of iſſue of his ſon, his daughter, her heirs, or aſſigns, ſhould join in a ſurrender of ſome copyhold lands to the uſe of his brother, otherwiſe the legacy of* 3500*l. to be void.* The *daughter marries, having attained* her age of 21, *and dies in her brother's life-time*, leaving the *plaintiff her huſband*, who *took out adminiſtration to her*, and then her *brother dies without iſſue male.* The queſtion was, whether the legacy of 3500l. ſhould be raiſed out of the land, the *perſonal eſtate* being *deficient?* and whether it was ſuch an intereſt in her as ſhould go to the plaintiff her adminiſtrator? Ld. C. Talbot obſerved, that three things were, by the will, neceſſary to happen to intitle M. to this legacy of 3500l. viz. the death of C. without iſſue male, marriage, or attaining her age of 21; and that all three had happened; and though it is to be raiſed out of land, it remains money ſtill; and though ſhe has not lived to receive it, yet the contingency having happened, it muſt go to her huſband, who is her repreſentative, and who may well be thought to have married in contemplation of this additional
[450] fortune of 3500l. though depending upon a contingency; and decreed it to the huſband accordingly. And, 16 March 1735, the decree was affirmed in the Houſe of Lords. Caſes in Chan. in Ld. Talbot's time, 117. Trin. 1735. King v. Withers.

13. Mr. Baynton being ſeiſed in fee of a conſiderable eſtate, and having no children, by indenture January 19, 1715, covenanted to ſuffer a *recovery* of all his lands, *to* the uſe of *himſelf for life*, then to his wife for life, then to the iſſue of their bodies; *and for want of ſuch iſſue*, in truſt *for his ſiſter Anne* Rolt,

for

for her ſole and ſeparate uſe during life; and *after her death*, if Edward Rolt her huſband ſhould ſurvive her, to permit him to receive the clear yearly ſum of 1000l. during life, and afterwards *to Edward Rolt* (eldeſt ſon of Edward and Anne) *for life*, with remainder to his firſt and other ſons, with like *remainder to* Thomas, and all *the other ſons of* Edward and *Anne*. Then comes this proviſo: *Provided* alſo, *that* it ſhall and may be lawful to and for the ſaid *Anne* Rolt, *with the conſent of* the ſaid *Edward* Rolt *her huſband*, and for the ſaid Edward Rolt, her ſurviving, from time to time, by ſale, mortgage, or otherwiſe charging the premiſſes, *to raiſe* and ſecure ſuch ſums of *money not exceeding in the whole the ſum of* 12000*l. as* the ſaid *Anne*, notwithſtanding her coverture, *ſhall* with the conſent in writing of her ſaid huſband, *think fit*, and for the ſaid Edward Rolt her ſurviving, as he ſhall think fit, *for the maintenance and portion of any of the children of them the ſaid Edward and Anne, born or to be born; and if* the ſaid *Edward and Anne* his wife, *or the ſurvivor* of them, *ſhall not appoint in what proportion ſuch their children ſhall be provided for, then* all the parties to theſe preſents are agreed that 2000l. a-piece ſhall be raiſed and payable *to each* ſuch *younger ſons, and* 3000*l. a-piece for the daughters* of the ſaid Edward and Anne, and if there ſhall be but one daughter, then 6000l. for ſuch only daughter, *at their ages of* 21 years *with intereſt* for the ſaid ſeveral ſums after the rate *of* 5*l. per cent. for their* ſeveral and reſpective *maintenances, until their reſpective portions ſhall become payable;* and ſuch maintenance *to begin from the time* that ſhall be *appointed by the ſaid Edward and Anne his wife, or the ſurvivor* of them; *and in caſe no ſuch appointment, then from the death of the ſurvivor of them the ſaid Edward and Anne* his wife; then comes a proviſion, that if any of the younger children die before their reſpective ſhares become payable, then the ſhare of ſuch child ſo dying ſhall be equally divided amongſt the ſurviving children. Mr. Baynton died ſoon after without iſſue, and then, in the year 1722, *Mr. Rolt died, leaving iſſue* by his wife *four younger ſons, and two daughters, Elizabeth, and Anna Maria*, which *laſt died an infant* ſoon after her father's death; and in the year 1734 *the mother died, having never charged the lands with the* 12000*l. or any other ſum* for the children's proviſion, nor giving any direction in what manner or proportion they ſhould be provided for, ſome of the children having attained their age of 21 in her life-time. Ld. C. Talbot held, that tho' by the firſt clauſe 12000l. only was to be raiſed, yet that the ſecond clauſe is ſubſidiary to the firſt; and that in caſe the firſt does not take effect, then the ſecond was to prevail, whereby he made a certain direct charge of 3000l. for each daughter, and 2000l. for each younger ſon, without any proviſion (as there was in the firſt clauſe) that the whole ſhould not amount to more than 12000l. That by the firſt clauſe ſuch children only can be conſidered as intitled to any ſhare under the power of appointment as were living at the ſurvivor's death; but no appointment having been made, it ſtands upon the ſe-

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cond clauſe, which is a direct charge upon the land of 2000l. for each ſon, and 3000l. for each daughter; and his Lordſhip was alſo of opinion, that tho' the payments were to be at 21, yet *no certain intereſt veſted in any of the children until the ſurvivor's death*; and tho' ſome of them attained their ages of 21 in their mother's life-time, yet all being contingent until the ſurvivor's death, *no intereſt can be due but from the time of the happening of the*
[451] *contingency*; and ſo decreed the whole 14000l. to be raiſed, and intereſt from the mother's death only. Caſes in Chan. in Ld. Talbot's time. 189. Hill. 1735. Rolt v. Rolt.

14. The rule of portions ſinking in the land where the party dies *before the term out of which they are to ariſe comes into poſſeſſion*, has not always held without exception, as appears from BUTLER and DUNCOMB's Caſe. 2 Vern. 760. where the words were from and after the commencement of the term, and therefore the portion not payable during the life of the father and mother, the term not being yet commenced; but yet the Court enabled the huſband and wife to raiſe money upon the intereſt by way of mortgage; which was to conſider it in ſome ſort as already veſted; ſo in that of BROOME v. BERKELY, Abr. Equ. Caſes 340. notwithſtanding the portions were decreed not to be raiſed immediately, yet they were conſidered as tranſmiſſible intereſts; the ſame in KING AND WITHERS's in the Houſe of Peers. In all theſe caſes the limitation was, that the portions ſhould be paid them at ſuch a time, as upon marriage, or at ſuch an age; and the intent of the parties was plain, that upon either of theſe contingencies happening, the child ſhould be intitled to the portion, although it was contingent, ſince a contingent intereſt is tranſmiſſible; and a future proviſion may well be looked upon as a conſideration for marriage; per Ld. C. Talbot. Caſes in Chan. in Ld. Talbot's time, 194, 195. Paſch. 1736. in Caſe of Bradley v. Powel.

15. A. was tenant for life, remainder in tail to B the eldeſt ſon. They reſettle the eſtate *to the uſe of A. for life* as to part, then *to truſtees for* 200 *years to raiſe* 1100*l. to be paid to C. the ſecond ſon within ſix years after A.'s death, or as ſoon after as the ſame could be* raiſed, *and in the mean time intereſt from A.'s death for and towards his maintenance until the portion be paid him*, remainder *to B. the eldeſt*, &c. *C. died indebted* at 45 years of age, leaving no aſſets; and two years after him *A. died*, from whom an eſtate of 700l. a year came to B. Ld. C. Talbot thought this 1100l. muſt be conſidered as a portion, as it moved from the father, and was intended by him as a proviſion for his child; the *term and truſt are not to ariſe until the father's death, but no particular time is limited for payment of the* 1100*l.* but barely within 6 years after A.'s death, and not made payable to him, his executors, and adminiſtrators &c. but barely to him, with a proviſion, that from A.'s death 5l. per cent. ſhall be raiſed for and towards his maintenance, which looks like an intent to poſtpone the veſting till A.'s death, ſince *the 5l. per cent. for and towards his maintenance can never be raiſed to that purpoſe when he died in A.'s life-*

time;

time; for this neceſſarily ſuppoſes him living at A.'s death, and where the intereſt is contingent, as here it is, it is moſt reaſonable to conſider the principal as contingent likewiſe; and ſhould the conſtruction be otherwiſe, the term can never ceaſe, it being to endure for and towards his maintenance until the portion be paid, which it can never be ſince he died in A.'s life-time; and thought the whole contingent, principal as well as intereſt, and that the portion muſt merge; and ſo diſmiſſed the bill. Caſes in Chan. in Ld. Talbot's time. 193. Paſch. 9 Geo. 2. Bradley v. Powell.

16. Where land is charged for payment of portions, and the legatee dies before the time of payment, it is true in general that the legacy ſhall not be raiſed, but ſink for the benefit of the eſtate; but where *portions are directed* by the will (as in the principal caſe it was,) *to be raiſed and paid within two years after the teſtator's death, and a daughter ſurvives theſe two years and then dies*, it is otherwiſe. By Mr. Juſtice Parker, who ſate for the Lord Chancellor. Barn. Chan. Rep. 89. Paſch. 1740. Webb v. Webb.

(K) Lapſed. In reſpect of the *Settlement not being made.* [452]

1. A. On the marriage of E. his daughter in law with J. S. entered into articles, in which it was recited, That *whereas A. was to pay J. S. 1000l. for the marriage portion of E. his wife. J. S. covenanted to ſettle certain lands &c.* It fell out, that the ſhare of the perſonal eſtate (out of which the 1000l. was ſuppoſed to ariſe, and of which A. was poſſeſſed as being the eſtate of his wife's former huſband, and out of which his wife and E. her daughter were both intitled to their diſtributive ſhares) amounted only to 320l. for E.'s ſhare. Upon a bill by J. S. for payment of the 1000l. it was decreed accordingly, tho' it was objected that *E. lived but ſix months, and* that *J. S. was not able to have made the ſettlement agreed upon*, and that ſhe had very hard uſage from J. S. the time ſhe lived with him. 2 Freem. Rep. 57. Trin. 1680. Graves v. White.

The marriage portion was *agreed to be paid to ſuch perſon as he ſhould appoint in the ſpace of ſix months, and be in conſideration thereof was to ſettle certain lands*; the marriage was had; the *wife died, and the ſix months elapſed, and no perſon appointed to receive the money*, yet the portion was decreed to the huſband without examining his capacity to make a ſettlement according to the agreement; cited by the Ld. Chancellor. 2 Freem. Rep. 58. pl. 64. Trin. 1680. as then lately decreed in Ld. Delaware's Caſe.

2. A. intermarried with M. without her father's conſent; afterwards the fathers of A. and M. entered into articles, by which *M.'s father agreed to pay 1000l. into truſtees hands, to be laid out in lands to be ſettled on A. for life*, and then *to M. for life*, with *remainder to the iſſue of their two bodies.* Before this agreement was executed *M. died without iſſue*; the Court decreed payment of the 1000l. to A. it being M.'s portion, and it appearing that *a ſettlement was made upon A. by his father in purſuance*

ſuance of the ſaid articles. 2 Freem. Rep. 200. Trin. 1694. Harvey v. Chamberlaine.

(L) *Favour'd.*

Sid. 102. S. C.

1. A Settlement was made in conſideration of marriage and 1000l. to the uſe of *baron for life*, remainder to the *ſon* in the uſual manner *in tail*, and *if he die without iſſue male* then to the uſe of the *daughters for* 500 *years to raiſe* 1500*l. for their portions.* The baron died, and *leaves a ſon and a daughter*, and after the *ſon dies without iſſue.* The daughter brought ejectment, and judgment was given for her, notwithſtanding it was inſiſted, that this term was on a condition precedent which did not happen, and alſo that the term was void in its creation. And held that this was ſuch a dying without iſſue male within the intent of the ſettlement as that the term ſhall ariſe. Lev. 35. Goodin v. Clerk.

A. made a leaſe on the marriage of B. his ſon with M. for proviſion of

2. Where a deed is for proviſion of daughters portions, and the *deed is uncertainly worded*, conſtruction ſhall be made upon the whole deed to make the intent appear that the daughters ſhall be provided for in ſome caſe.

portions for daughters of the marriage, *to commence on death of B. without iſſue male, or from the time that B. ſhall be dead before the daughter or daughters ſhall reſpectively attain to* 16 *years* of age *without iſſue male of his body by M.* which ſhall firſt happen, he leaving a daughter or daughters by M. or ſhe being enſient of a daughter, *for* 200 *years thence next enſuing*; B. had *iſſue C. a ſon, and J. a daughter*, at which time J. was under 16; afterwards *C. died, J. being upwards of* 16. The Court ſeemed to think that the leaſe ſhould ariſe upon the firſt words (viz.) on death of B. without iſſue male, though it is not within the laſt part of the diſjunctive. 3 Lev. 99. Paſch. 35 Car. 2. C. B. Watts v. Guybon.

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As where A. ſurrenders copyhold lands to B. his brother,

3. *And* may be *carried beyond the words* of the deed, in caſe where the whole reſidue of eſtate real and perſonal was given away to a brother.

and J. S. to the uſe of his brother B. and his heirs, on condition to pay to M. the only child of A. *when ſhe comes to the age of* 21, 200l. *provided if his daughter died without heirs of her body*, then B the brother to have the 200l. A. died, M. being but two years old; M. at 18 marry'd the plaintiff, had iſſue, and died at 20 years and an half; the iſſue died an infant; decreed for the plaintiff. 2 Chan. Caſes 94. Paſch. 34 Car. 2. Row v. Tillier.

4. *Money placed out* upon bonds by a father *in the name of a child* ſhall be look'd upon to be toward a proviſion for ſuch child. MS. Tab. tit. Portions, cites February 14th, 1706. Parker v. Lamb.

5. Lands by marriage ſettlement are limited *to the ſons in tail male*, remainder *to A. the huſband in fee, provided if* A. and his wife, or either of them *die without iſſue male living* at the time of his or her death, leaving only one daughter unmarried, the truſtees to ſtand ſeiſed till they have raiſed 1500l. for ſuch daughter, and if more daughters unmarried at the death of A. and his wife, or either of them, and no iſſue male living begotten between them, then 3000l. for ſuch daughters. *A. dies leaving daughters,*

daughters, and his wife *enſeint of a ſon* which is afterwards born. Queſtion was, whether upon the wording of this proviſo, the poſthumous ſon ſhould defeat the daughters of their portions? It was agreed, that there being no proviſion for the poſthumous ſon, and the father dying before the ſon born, the *ſon could not take by the ſettlement;* for the remainder muſt immediately veſt when the particular eſtate determined. And it was inſiſted, that as the proviſo was worded, a conſtruction could not be made, that the daughters were to have portions upon failure of iſſue male, and whilſt iſſue male no portions to ariſe; for that the proviſo is ſpecial and operates both ways, viz. If a ſon living at the deceaſe of A. or, his wife firſt dying; tho' there ſhould afterwards be a failure of iſſue male, no portions could ariſe to the daughters. So e converſo, if no ſon living at the deceaſe of A. or his wife, the portions ſhould ariſe, although a ſon ſhould be after born. Per Ld. Keeper, Generally and moſt commonly it is the intent of the parties, that the daughters are not to have portions provided by the ſettlement if there be a ſon. So when no proviſion is made for a poſthumous ſon, although it is the intent of the parties that the ſon ſhould have it, yet *until the late* * *ſtatute ſuch poſthumons ſon could not take;* ſo that what might be the *intent of the parties cannot be the rule.* And if in this caſe *the daughters* (upon the wording of the ſettlement, and as it were *by accident* not being directly intended by the parties) *become intituled to a reaſonable proviſion* and portion, he thought *equity would not take it away;* but would be further informed as to the value of the eſtate, and whether the other daughters had received their portions. 2 Vern. 578. Hill. 1706. Palmer v. Cracroft & al. * 10 & 11 W. 3. 16.

6. A. ſeiſed of lands in fee conveyed to J. S. and his heirs, to the uſe of *himſelf and to his wife R. for life*, remainder the 1ſt, 2d, 3d, 4th, 5th, &c. *ſons in tail*; and for default of ſuch iſſue, and *in caſe* the ſaid *A. ſhould die*, or be dead *without iſſue male of his body of the ſaid R.* to be born, *or in ventre* ſa mere at the time of his death, *and ſhall leave one or more daughters* of his body on the body of the ſaid R. begotten or in ventre ſa mere at the time, then to the uſe and behoof of the ſaid *J. S.* and his executors *for* 500 *years, to raiſe portions for his ſaid daughters.* The huſband *dies, leaving iſſue male and daughters* at the time of his death, *which iſſue male ſoon after died without iſſue male, living the daughters;* the wife dies; the queſtion was, if this term ſhould riſe up again for the benefit of the daughters? The opinion and judgment of the Court was, that it ſhould not, it being a *condition precedent*, and not a remainder upon the determination of [454] the eſtate tail. This judgment was reverſed in the Houſe of Lords, upon the reaſoning that Mr. Raymond urged, viz. that the *time of his death related only to the ventre ſa mere*; and then it was no more than an uſual limitation; for the wife was not enſeint. Vid. 11 Mod. 88. and Holt's Rep. 623, 624. Andrews v. Stroud.

7. Father upon his ſon's marriage *ſettles lands, which he covenants*

nants to be 800*l. per ann.* and *reſerved* power to himſelf *to charge* 1200*l. for his younger children.* He *charges the eſtate with* 600*l. only* and dies. The ſon objected to the payment of 600 l. becauſe the *value of the lands was defective, being only* 600l. [a year,] which ought to be made 800l. [a year] before the charge ſhould take effect. But decreed that the money was well charged, the father having only charged a moiety of the 1200l and in caſe there were a deficiency he ought to ſue for ſatisfaction out of his father's eſtate for the breach of covenant. MS. Tab. tit. Power. Jan. * 12th, 1712. Ormſbey v. Dodwell.

* In another MS. it is 20th. 1702.

8. *What is* expreſsly *paid* towards a portion ſhall be firſt *applied to diſcharge the intereſt* of ſuch portions. MS. Tab. tit. Portions. February 17th, 1724. Lord Kingſland v. Lady Tyrconnel.

[For more of Portions, ſee Charge, Deviſe, Marriage, Powers, and other proper Titles.]

Poſſeſſion.

(A) *Who* ſhall be ſaid in Poſſeſſion *of Land, or Things Real.*

He cannot be diſſeiſed of a rent ſervice in groſs, rent-charge, or rent-ſeck by attornment or payment of the rent to a ſtranger, but at his election; but if the diſſeiſee bring an aſſiſe againſt a pernor, then he admits himſelf out of poſſeſſion. Co. Litt. 323. b.—No one who has right to ſuch things as are *inviſible and incorporeal*, as rents &c. can be put out of poſſeſſion thereof, but only at his own election by a *fiction of law*, in order to enable him to recover damages againſt the wrongful diſturber; for ſuch things being *mere creatures of the law*, and depending entirely upon the conſtruction thereof, *are always in poſſeſſion of thoſe whom the law adjudges to have a right to ſuch poſſeſſion.* Hawk. Pl. C. 151. cap. 64. ſ. 45.

1. OF *rent and common* a man is in poſſeſſion and out at his will upon diſturbance made, be it appendant or in groſs; and ſeiſin of parcel of the rent is good to have aſſiſe of the whole rent. Br. Aſſiſe, pl. 131. cites 8 Aſſ. 4.

Br. Seiſin, pl. 24. cites S. C. per Knivet.—See Deſcent

2. If *baſtard and mulier enter* after the death of the anceſtor, the poſſeſſion ſhall be adjudged in the mulier. Br. Entre-Cong. pl. 67. cites 30 Aſſ. 51.

3. If one be ſeiſed of lands, and another who has no right does enter into the land and continues poſſeſſion, yet does he gain nothing

nothing thereby, but the poſſeſſion does always *continue in him that has the right*. Bridgm. 57. cites Litt. Warranty 158. and 3 E. 4. 2. and Pl. Com. 233.—Unleſs where there is an actual diſſeiſin. See. Mo. 694. Partridge v. Turk.

4. When *two men come upon lands* and tenements *together to claim* the ſaid lands and tenements, *and one of them claimeth by one title and the other by another title*, the law does adjudge the poſſeſſion in him who has rightful title to the poſſeſſion. Perk. ſ. 218.

For if a *diſſeiſor dies ſeiſed* of the ſame land in fee, *and the heir of the diſſeiſor* [455]

and the diſſeiſee come upon the ſame land together to claim the ſame land, the law will adjudge the poſſeſſion of the land in the heir of the diſſeiſor, and not in the diſſeiſee; yet the diſſeiſee habet majus *jus ad rem, viz. in jure* to have the land, than the heir of the diſſeiſee has; but the heir of the diſſeiſor has *majus jus in re, viz. in poſſeſſione* to have the land than the diſſeiſee has. Perk. ſ. 218.

5. Poſſeſſion is *ſuppoſed to continue* if it be not avoided. Arg. Hard. 46. in Caſe of Jones v. Clerk.—Cites Pl. C. 193.

6. When a man *may enter* or claim, the law adjudges him not in poſſeſſion *till entry* or claim. Co. Litt. 218. a.—1 Rep. 94. b. (g.) in Shelly's Caſe.—2 Rep. 53. b. (e.) in Chomley's Caſe.

7. By bargain and ſale for money for 3 years the *bargainee before entry* has eſtate for years divided from the reverſion, and a reverſion in the vendor. Jo. 9. Mich. 18 Jac. C. B. Mitton v. Lutwich.

8. *Patronage* by grant for years is in the grantee, but by grant of 1, 2, or 3 avoidances, the patronage is not ſevered, but is ſtill in the grantor; per Jones J. Arg. Jo. 19. Hill. 20 Jac. C. B. in Caſe of Standen v. the Univerſity of Oxon.

9. After a *judgment of recovery*, the law judges not *tenant for years* in poſſeſſion of theſe lands till he has *claimed* them; per Archer J. Arg. Cart. 59. Paſch. 18 Car. 2. in Caſe of Geary v. Bearcroft.

10. If a man bargains and ſells lands, preſently the *bargainee* has actual poſſeſſion. He may ſurrender, aſſign, attorn, releaſe; yet he cannot on this poſſeſſion *bring treſpaſs*, and ſo he has no actual poſſeſſion; per Bridgman Ch. J. Arg. Cart. 66. Paſch. 18 Car. 2.

11. Tenant *at will and he in reverſion* are in poſſeſſion of a houſe, he in reverſion is *houſekeeper*, yet the poſſeſſion ſhall be adjudged to be in tenant at will. Sid. 385. Mich. 20 Car. 2. B. R. Kinnoul v. Whitchcot.

12. A *bare entry* on another *without an expulſion*, makes ſuch a ſeiſin only that the law will adjudge him in poſſeſſion that has the right, and ſo are the words *intravit & fuit inde ſeiſit. prout lex poſtulat*, to be underſtood in ſpecial verdicts, but it will not work a diſſeiſin or abatement without actual expulſion. 1 Salk. 246. per Holt Ch. J. Trin. 3 Annæ B. R. Anon.

(B) *Who* ſhall be ſaid in Poſſeſſion *of Goods.*

1. OF a heriot which is *tranſitory*, the law adjudges *poſſeſſion without ſeiſure*; as of the body of a ward. Br. Hariots, pl. 9. cites 13 E. 3. and Fitzh. Preſcription 29.

S. C. cited 11 Mod. 12. in Caſe of Cowper v. Baſingſtoke Hundred.

2. If a *highwayman* come up to a carrier and *lead the horſe out of one hundred into another*, this is a robbery in the firſt hundred; for the carrier was robbed upon the firſt taking. But if the *carrier had led the horſe himſelf*, then it ſhould be adjudged to be in his own poſſeſſion, and no robbery till he came into the ſecond hundred. And if a man has money, and the malefactors take him in one hundred, and carry him into another, and there riſle him, this is a robbery in the ſecond hundred only; for he is always in poſſeſſion. Per tot. Cur. and adjudged accordingly. Goldſb. 86. pl. 11. Paſch. 30 Eliz. Anon.

3. A man's *pocket was picked* in the King's Bench, and the thief was taken in the manner, but *a key faſtened to the purſe ſtuck in the pocket*, and two Juſtices againſt two, that the man was ſtill in poſſeſſion of his purſe, and ſo no robbery. Goldſb. 86. pl. 11. Anon.

4. In caſe of *bailment* the *proprietor* is *to ſome purpoſes* in poſſeſſion, and to ſome purpoſes out of poſſeſſion. Vent. 261. in Caſe of Batmore v. Greeves.

[456] (C) Of *One.* In what Caſes it ſhall be *of Another.*

1. THE poſſeſſion *of one executor* is the poſſeſſion of the other. Arg. 3 Le. 209. cites 16 H. 7. 4.

2. The poſſeſſion of the *termor* in the ſame tenancy is the poſſeſſion *of the recoveror*. Br. Aſſiſe, pl. 1. cites 27 H. 8. 7.

3. A. has *cuſtodiam parci*, and the *inheritance is granted to B.* The poſſeſſion of A. is the *poſſeſſion of B.* and if A. refuſe B.'s entrance, he may break the doors and juſtify. Mo. 786. Mich. 4 Jac. Lady Ruſſel v. Lord Nottingham.

S. P. Yelv. ——165. Mich. 7 Jac. Freeſton v. Shellito.

4. Poſſeſſion *of the leſſee is* the poſſeſſion *of the leſſor.* 2 Brownl. 298. Hill. 7 Jac. C. B. Mors v. Webb.

—Tho' the poſſeſſion of the *leſſee* is the poſſeſſion of the leſſor by operation of law, yet *to make an occupant* there muſt be *actual poſſeſſion*, and not a poſſeſſion by inference, diſcourſe or argument in law, but ſuch an occupation as the lay gents may take notice of. Per Archer J. Cart. 58. Paſch. 18 Car. 2. in Caſe of Geary v. Bearcroft, cites Raſt. Ent. 690. that in an action of waſt, the queſtion was, whether ſuch an one did occupare the lands; and the pleading is, that he did occupy the lands and take the profits, and ſo there they are ſynonimous. And after judgment was given accordingly by three J. againſt Bridgman Ch. J. and that judgment affirm'd per three J. in B. R.—2 Lev. 202. S. C.—Sid. 346.

See Robbery.

5. The poſſeſſion *of the ſervant* in the maſter's preſence is the poſſeſſion *of the maſter.* Carth. 147. Bird v. the Hundred of Oſſulſton.—Cited there in Caſe of Aſhcomb v. the Hundred of Elthorn.—

Elthorn.—3 Mod. 287. S. P. in Caſe of Aſhcomb v. Elthorn.—D. 161. Lord North's Caſe.——3 Mod. 323.—Ow. 131. Hall v. Wood.

6. *Deviſe* was of *knight-ſervice-land to wife for life*, which was void for a third part, and it was *enjoyed between her and the heir* during her life. The poſſeſſion was held joint, and that the poſſeſſion of one was the poſſeſſion of the other; and that tho' tenants in common have ſeveral freeholds, and joint-tenants but one, yet it is to be underſtood that tenants in common have ſeveral freeholds, but undivided, and joint-tenants have one undivided freehold. Per Holt. Ch. J. 12 Mod. 302. Mich. 11 W. 3. in Caſe of Fiſher v. Wiggs, cites Mo. 868. Small v. Dee.

7. Poſſeſſion *of one joint-tenant* is the poſſeſſion of the other. 6 Mod. 44. Mich. 2 Annæ B. R. Ford v. Lord Grey.

The entry of one veſts the poſſeſſion in both.

Le. 147. Hed v. Challoner.—Per Manwood J. 264. pl. 354. Anon.——So the poſſeſſion of an indenture of leaſe by one jointenant, is the poſſeſſion of both; and the proving the delivery of it to the one is good evidence of the poſſeſſion of it by the other. 2 Le. 220. Anon.

8. The poſſeſſion of a *truſtee* is the poſſeſſion *of ceſty que truſt.* G. Equ. 235. temp. Geo. 1. Wan v. Lake.

And the poſſeſſion of *one ceſty que truſt* is the poſſeſſion *of all*; as the poſſeſſion of *one tenant in common* is the poſſeſſion *of the reſt.* G. Equ. R. 235.

(D) *What will* * *give or make* a Poſſeſſion. *And what* will *put a Man* † *out of Poſſeſſion.*

* See Gift—Preſentment (R. b.) pl. 1. (T. b.) pl. 1.

† See Preſentment (K. b.)

1. *OF a thing tranſitory*, a man ſhall be in poſſeſſion *without entry or* * *ſeiſure.* Br. Treſpaſs, pl. 169. cites 14 H. 8. 23.

As where *tenant in chivalry died his heir within age*, the Lord ſhould have *raviſhment of ward without ſeiſure*, but *not ejectment* of ward of the land. Br. Treſpaſs, pl. 169. cites 14 H. 8. 23.—* S. P. Br. Chattels, pl. 21. cites 2 H. 4. 19.

2. If the King be intitled by office *to the land to which N. hath* [457] *title* and right, he *cannot enter upon the King*; for by office the King is in poſſeſſion, and N. is out of poſſeſſion, and if the King grants it over, he *cannot enter upon the patentee, the office being in force*; *but* he who hath a *rent-charge or common* extra terram illam is not out of poſſeſſion, but may diſtrain the patentee, or uſe his common. Br. Entre-Cong. pl. 42. cites 21 H. 7. 1.

3. If *leſſee for years makes a leaſe at will, and leſſee at will makes a leaſe for years*, and then he in remainder grants over his land, this is good, tho' the deed of the grant of the intereſt be not made upon the land; becauſe he is not out of poſſeſſion, but *at his election.* Agreed. Lat. 75. in Sir Thomas Fiſher's Caſe.

(E) *Favour'd, By Acceſſion of Right.*

1. THE *right waits upon* the poſſeſſion. As if the *ſon and a ſtranger diſſeiſes the father* and the *father dies*, this right infuſes itſelf into the poſſeſſion, and changes the poſſeſſion; and it is a releaſe in fact by the father to the ſon. Arg. Godb. 310. cites 11 H. 7. 12.

2. So a *diſſeiſor dies ſeiſed, and his heir* enters and *is diſſeiſed by A.* and the *firſt diſſeiſee releaſes to A.* all his right; all the right now is in A. the ſecond diſſeiſor; becauſe the poſſeſſion and the right *meet together* in A. Arg. Godb. 310. cites 9 H. 7. 25. Br. Droit. 57.

3. Per ſtat. 21 *Jac.* 16. *peaceable poſſeſſion for twenty years tolls entry*, and after ſuch poſſeſſion *releaſe of actions* gives right, and there is no remedy for the fee by writ of right after ſuch poſſeſſion and releaſe of actions. Jenk. 16. pl. 28.

(F) *Privileges of Poſſeſſion.*

1. POſſeſſion *prevents election*; as if A. ſells 1000 coard of wood to B. to be taken at B.'s election, and then A. or any body elſe cuts down ſome of the wood, B. cannot take that which is cut down; but muſt make his grant good out of the reſidue: ſo of *eſtovers* granted; and if no wood is left for his eſtovers, B. has no remedy but an action ſur caſe. Cro. E. 820. Paſch. 43 Eliz. B. R. Baſſet v. Maynard.——als. Sir Thomas Palmer's Caſe.

2. *Buſhes cut in a common by a ſtranger* cannot be carryed away by a commoner, where the commoner claims common of eſtovers only: but if he preſcribes to have *omnes ſpinas creſcentes*, he may then carry them away; and in ſuch caſe the licence of the lord is not material; for he cannot cut any himſelf. Cro. J. 256. Mich. 8 Jac. B. R. Dowglaſs v. Kendall.

When no title is found for the defendant, and it is found that he ouſted one that had elder poſſeſſion, his *entry is tortious*; per Clench J. Goldſb. 175.

3. He that has poſſeſſion has *right* againſt all but him that has the very right. Chan. Caſes 25. Trin. 15 Car. 2. Smith v. Oxenden.

Carth. 9. S. C. is that defendant pleading that W. S. *poſſeſſionatus fuit*, without ſhewing any title, was not good; but ſuch plea was adjudged good on a demurrer, without ſhewing any other title than poſſeſſion, and the copy of the record produced in Court, cites 2 Mod. 70. Searle v. Binion.—But in treſpaſs by one ſeiſed in fee-poſſeſſion is no juſtification without *ſhewing how*. 2 Saund. 401. Pearle v. Bridges.

4. Where the intereſt of the land is not in queſtion, a man may *juſtify in treſpaſs* upon his own poſſeſſion. 3 Mod. 132. Trin. 3 Jac. 2. B. R. Lanford v. Webber.

5. In

5. In many caſes, where a man has the poſſeſſion, tho' he has *no property* in the goods, he may have treſpaſs. Carth. 85. Mich. 1 W. & M. B. R. cites 4 Rep. Lutterel's Caſe. But not trover; for in treſpaſs there are many pleas which will ſerve, as his freehold &c. which will not in trover and converſion. Per Doderidge J. and judgment accordingly. 2 Bulſt. 134. Holman v. Carwithy.

(G) *Sufficient for what Purpoſes, as to Actions.* See Treſpaſs (S.)

1. *RAviſhment of ward;* and *counted of tenure and chivalry, and that the plaintiff ſeiſed the ward, and the defendant raviſh'd him;* the *defendant ſaid that he held of him in chivalry, by which he ſeiſed him, abſque hoc that the plaintiff ſeiſed him, or that he held of the plaintiff* prout &c. And held that the *ſeiſin of the ward* is not traverſable; the reaſon ſeems to be, becauſe a man ſhall have this action without ſeiſin of the ward; for the *law adjudges poſſeſſion, becauſe it is tranſitory* &c. and therefore he omitted his traverſe, and they were at iſſue upon the other traverſe; quod nota bene. Br. Traverſe per &c. 120. cites 24 E. 3. 78.

2. A man may have *replevin* who has not property; per Brigges. Br. Traverſe per &c. pl. 263. cites 21 E. 4. 54. A poſſeſſory right is ſufficient to maintain an action of *treſpaſs*, tho' *not a replevin*. 10 Mod. 25. Trin. 10 Ann. B. R. in Caſe of Templeman v. Caſe.——The reaſon why it is not good in *avowry*, is becauſe it *comprehends a title in itſelf*. Arg. 12 Mod. 507.

3. *Property* draws with it the actual poſſeſſion of goods whereupon to have *treſpaſs*. Lat. 214. in Caſe of Hudſon v. Hudſon. S. P. Br. Treſpaſs, pl. 303. cites 2 E. 4. 25.

4. *As* if a man in London gives to me his goods in York; if another takes them I ſhall have treſpaſs. Lat. 214. in Caſe of Hudſon v. Hudſon. per Littleton; quod Danby conceſſit; for contrary of *land*, he has property by the gift. And this ſeems to be law; for *goods are tranſitory*; which *is local*.—Br. Treſpaſs, pl. 169. cites 14 H. 8. 23.

5. In *treſpaſs*, defendant *juſtified by diſtreſs for rent and ſervices*. The plaintiff replied *hors de ſon fee*. Defendant *demurred*; becauſe he ſaid, ſuch plea is not pleadable without taking the tenancy upon him, and cited Co. Litt. 1. b. But it was anſwered, that this is meant in caſes of aſſiſe and replevin where the title is in queſtion; but this being but an action of treſpaſs, the poſſeſſion is ſufficient to maintain the action againſt any that has not a better title. And judgment for the plaintiff. Niſi. Freem. Rep 221. pl. 228. (bis) Hill. 1676. Anon.

6. Poſſeſſion is ſufficient cauſe to *maintain action* againſt a tort-feaſor and a declaration upon the poſſeſſion is good. Carth. 84. Mich. 1 W. & M. B. R. Hebblethwait v. Palins.—3 Mod. 48. S. C.——Cro. C. 575. Sands v. Trefuſes.——6 Mod. 312. Tenant v. Goldwin.

7. Inſtitution and *induction upon a preſentment without a title*,

gives the party ſuch a poſſeſſory right, as he ſhall not loſe without a qua. impedit. Arg. 10 Mod. 174. Trin. 12 Annæ. B. R. The Queen v. the Corporation of Buckingham.

8. In caſe of an *ejectment*, unleſs the *perſon turned out*, tho' by one that has no right, can *prove his right*, he ſhall not recover tho' this is a poſſeſſory action. Arg. 10 Mod. 177.

[459] (H) Sufficient, *as to other Purpoſes* than Actions.

1. POſſeſſion *executed*, *hinders* poſſeſſion *executory*. As if bargain and ſale be of land, and before inrolment bargainee takes feoffment; this hinders the inrolment; becauſe the taking of the livery has deſtroy'd the uſe which paſſes by the bargain. Quod fuit conceſſum. Yelv. 124. Hill. 5 Jac. B. R. In Caſe of Darby v. Bois.

2. *Grant of lands in poſſeſſion.* A poſſeſſion by wrong or by right is ſufficient to paſs lands granted by name of lands in poſſeſſion; as an uſual eſcape of leſſee's beaſts into a wood incloſed, but not leaſed to him. Roll. R. 20. Paſch. 12 Jac. B. R. Dockwray v. Beſis.

D. 145. b. 269. b. pl. 20. in marg. —3 Le. 17.

3. Poſſeſſion *countervailes livery*; ſo that a gift in tail &c. to the leſſee at will or tenant ſufferance is good without livery and ſeiſin. Noy. 56. Cooper v. Columbell.

4. Tenant for years cannot make a leaſe *within the ſtatute of uſes*, and by this means to give poſſeſſion to the defendant to make him *capable of a releaſe of the reverſion*; per Powell J. Lutw. 570. Hill. 9 W. 3. In Caſe of Chaloner v. Davis.

See (F) pl. 4. 5. in Notis.—— (G).

(I) *Pleadings.* Poſſeſſionatus fuit.

1. IN *treſpaſs* the *defendant ſaid that he leaſed to J. N. for life, who alien'd in fee to the plaintiff, by which he entered;* and the *plaintiff ſaid that he ne aliena pas;* and per Cur. this is a good anſwer; for per Finch. he has title againſt all by his poſſeſſion, except againſt the plaintiff; and when the plaintiff has ſhewn cauſe of entry, and the defendant has travers'd this cauſe, this is ſufficient. Br. Titles, pl. 6. cites 40 E. 3. 5.

Cro. Car. 118. SKEVIL v. AVERY accordingly. —3 Mod. 132. LANGFORD v. WEBLER accordingly. —— Carth. 9. S. C.— *And* they

2. In *treſpaſs for taking of his cattle*, the defendant pleads that he was poſſeſſed *of Black-acre pro termino diverſorum annorum adtunc & adhuc ventur'*, and being ſo poſſeſſed, the plaintiff's cattle were doing damage, and he diſtrain'd them *damage feaſant* there, and ſo juſtifies the taking &c. The plaintiff *demurs*, and aſſigns ſpecially for cauſe that the defendant *did not particularly ſet forth the commencement of the* years, but only that he was poſſeſſed of an acre for a term of years to come; and regularly where a man makes a title to a particular eſtate, in pleading he muſt ſhew the particular time of the commencement of the title, that the plaintiff

plaintiff may reply to it. The Ch. J. and the whole Court held that the plea was good. 2 Mod. 70. Paſch. 28 Car. 2. C. B. Searl v. Bunion.

took this *difference*; *where* the *plaintiff brings an action for the land*, or doing of a *treſpaſs upon the land*, he is ſuppoſed to be in poſſeſſion; *but if he* will *juſtify* by virtue of any particular eſtate, he muſt ſhew the commencement of that eſtate, and then ſuch pleading as here will not be good. *But* when the *matter* is *collateral to the title of the land*, and for any thing which appears in the declaration, the title may not come in queſtion, ſuch a juſtification as this will be good. In this caſe no man can tell what the plaintiff will reply; it is like the caſes of inducements to actions, which do not require ſuch certainty as is neceſſary in other caſes. 2 Mod. 70. Searl v. Bunion.—*So* where an action is brought *for a nuſance*, and he intitles himſelf generally, by ſaying he is poſſeſſionat. pro termino annorum, 'tis well enough, and he need not ſet forth particularly the commencement, becauſe he doth not make the title his caſe; for which reaſon judgment was given for the defendant. 2 Mod. 71. Searl v. Bunion.—*But* it has been ſince adjudged that poſſeſſionatus fuit is not good, being pleaded in bar. Hill. 12 W. 3. Lutw. 1492. Pell v. Garlick.—S. P. Lutw. 1161. Fowkes v. Joice; but no judgment.

One can't plead his poſſeſſion in bar *without more*, except it be in the caſe of *battery*, where it may be *meerly collateral*; and the true *diverſity* is between a *declaration* and a *plea*; for one may count upon his poſſeſſion without more, but not juſtify by virtue of it; for you can never give poſſeſſion in bar without making a title. Per Powel J. 12 Mod. 508. Paſch. 13 W. 3. in Caſe of Pell v. Garlick.

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3. Action upon the *Caſe*, in which the plaintiff declared, that the firſt day of May in the firſt year of the preſent King and Queen, he was *poſſeſſed of a houſe from which a* courſe of *water per & trans* the garden of the defendant *currere debuit & debet &c.* The Court gave judgment for the plaintiff, Niſi; but an exception being taken, becauſe he does *not ſay* that the water *ever ran from the houſe*, *or* that he *was poſſeſſed* of it, *but only* that *debuit*, the Court ordered it to be put into the paper again, & adviſare vult; and afterwards this being a poſſeſſory action, it was ruled to be well enough. Skin. 316. Paſch. 4 W. & M. B. R. Jackſon and Savage.

4. If it appears that the *defendant is in poſſeſſion*, in ſuch caſe the plaintiff ought to intitle himſelf; for he who will intrude and diſturb my poſſeſſion, ought to ſhew a good title to do it; *but* where the *action* is brought *againſt a tort-feaſor*, *not in poſſeſſion*, there it is ſufficient for the plaintiff to ſhew a poſſeſſion, and not to ſhew any other title, and by this give the defendant, who is a tort-feaſor, an opportunity to diſpute his title, but to ſhew a poſſeſſion generally is ſufficient; and if the defendant will compel the plaintiff to ſhew a title, he may do it by his plea, and compel him to make title in his replication. Arg. Skin. 622. Mich. 7 W. 3. B. R. In Caſe of Stroud and Birt.

5. Plaintiff declares that he was *poſſeſſed of a tenement and* a piece of *land*, *to which he ought to have common* levant and couchant upon his tenement in &c. and *that* the *defendant had* entred and made diverſe holes in the acres, *and ſtored them with conies*, ſo that &c. The defendant demurred to the declaration. Judgment for the plaintiff in C. B. and a writ of error brought, and error aſſigned, that the plaintiff had not entitled himſelf to this common, but only ſaid *poſſeſſionat. & habere debuit*; but the action was adjudged to be well brought, it not appearing that the defendant was in poſſeſſion, but only a tort-feaſor. The action was adjudged to be well brought upon the reaſon and au-

thority of St. John and Moody's Case; but it would have been otherwiſe if it had appeared to be the land of the defendant. Skin. 621, 622. Stroud and Birt.

6. *No iſſue can be*, or ever was, *taken upon* a poſſeſſion only, viz. *poſſeſſionatus vel non &c.* Carth. 445. Paſch. 10 W. 3. B. R. Silly v. Dally.

[For more of Poſſeſſion in general, ſee Entry, Property, Right, Seiſin, Treſpaſs, and other proper Titles.]

Poſſibility.

(A) Poſſibilities. *What* ſhall be ſaid to be *good*; *and how conſider'd* in Law.

See Maxims—*Duplicationem poſſibilitatis lex non patitur*; as if land is given to a man and to two women, and the heirs of their bodies. Per Coke Ch. J. Bulſ. 108. cites 44 E. 3. Fitzh. tit. Taile, pl. 1. and ruled accordingly, that where land was given to two men, and two women, and to the heirs of their bodies, it was but for life.

1. *Poſſibilitas poſt diſſolutionem executionis nunquam reviviſcitur, & poſt executionem ſtatus lex non patitur poſſibilitatem.* Roll. R. 321. 3 Bulſ. 108.

[461] As 9 H. 6. 24. b. The *remainder to a corporation not in being at the time* of the limitation of the remainder is void, tho' ſuch be erected afterwards during the particular eſtate; for this was potentia *remota*. Ibid. 51. a. b. And ſays this diverſity well appears in the common caſe in our books, viz. If a leaſe be made for life, the *remainder to the right heirs of J. S.* this is good; for by common poſſibility J. S. may die during the life of tenant for life. But if, at the time of the limitation of the remainder, there be not any ſuch J. S. but during the life of the tenant for life J. S. is born and dies, his heir never ſhall enter, as is agreed in 9 H. 7. 13. b. And in 19 E. 3. 46. the Caſe was that upon fine levied to R. he granted and rendered the tenements to one J. and M. his feme for their lives, the remainder to G. ſon of J. in tail, the remainder to the right heirs of J. and in truth at the time of the fine levied, J. had not any ſon named G. but after he had iſſue named G. and died. And in præcipe againſt M. it was adjudged, that G. ſhall not take the remainder in tail, becauſe he was not born at the time of the fine levied, but long after; by which another, who was right heir of J. by judgment of the Court was received; for when J. had not any ſon named G. at the time of the fine levied, the law does not expect that he ſhall have a ſon named G. after; for this is potentia remota.

2. Poſſibilities are two-fold, viz. poſſibilitas *remota*, and *propinqua*. A poſſibility which ſhall make a remainder good, muſt be a common poſſibility, and potentia propinqua, as death, or dying without iſſue, or coverture, or the like; and not a remote poſſibility, which ſhall not be intended by common intendment to happen. 2 Rep. 51. a. Paſch. 30 Eliz. per Cur. in Cholmley's Caſe.

3. In

3. In præcipe quod reddat againſt an abbot of land which is of their foundation, it is a good challenge to the array, to ſay, *that the founder was ſheriff*, and the array is made by him or his bailiff, for the poſſibility which he has to have the lands if all the monks ſhould die. 21 E. 4. 63. b. pl. 33. per Vaviſor.

4. *Covenant to ſtand ſeiſed* of land which the covenantor has not at the time of the covenant, tho' he *purchaſes afterwards* the land, yet no uſes will ariſe. Cro. E. 401. Trin. 37 Eliz. B. R. Yelverton v. Yelverton.

5. Poſſibilities which perhaps ſhall never happen, ſhall not *bar preſent* and due *debts* upon a bond. Arg. Bridg. 80. Hill. 13 Jac. cites 5 Rep. 28. b. Harriſon's Caſe.

6. There cannot be a poſſibility *upon a poſſibility* by the rules of law. Arg. Cro. J. 461. Hill. 15 Jac. B. R. In Caſe of Child v. Baily. 10 Rep. 50. b. in Lampet's Caſe. —Cro. C. 577. Mayor &c. of London v. Alford.—Pollex. 3. a. Pearce v. Reeve.——8 Rep. 75. Lord Stafford's Caſe.—2 Chan. Rep. 237. contra. That there may, and that in truth every executory deviſe is ſo. Per Lord Chan. Nottingham, 34 Car. 2. In the Duke of Norfolk's Caſe.

7. *The law reſpects preſent benefits* more than future poſſibilities. Arg. Cro. J. 481. Paſch. 16 Jac. B. R. cites 5 Rep. 25.

(B) *Grantable over.* In what Caſes.

1. ONE *jointenant bargains and ſells all the land*, the other jointenant dies before inrolment; yet but one moiety ſhall paſs. Mo. 776. In Caſe of Whitlock v. Hartwell, cites 2 E. 6. Brooke. *So if a jointenant covenants to ſtand ſeiſed to the uſe of A. of the moiety of his companion* after his death, no uſe ſhall ariſe, becauſe 'tis only a bare poſſibility. Noy. 14. Whitlock v. Hartwell.

2. *Leaſe of* land and 1000 *ſheep* for 11 years, and leſſee covenanted at the end of the term to leave 1000 ſheep between two and four years old. They are not grantable over during the term; per tot. Cur. And per Windham J. If I leaſe ſheep to A. for two years, now upon ſuch leaſe ſomewhat remains in me; but that cannot be properly ſaid a property, but rather the *poſſibility of a property*, which cannot be granted over. Le. 42. Mich. 28 and 29 Eliz. C. B. Wood v. Foſter. [462]

3. A *copyhold* was ſurrendred to the uſe of another in tail, and the ſurrenderor had iſſue three daughters and dies; and one ſurrenders in fee; and agreed, that if this was but a poſſibility, it could not be conveyed to the other by a *ſurrender*. Arg. Roll. R. 318. cites 33, 34 El. Gravenor's Caſe.

4. Fine by A. to the uſe of himſelf for life, *remainder to his wife that ſhould be at the time of his death for life*, remainder to the ſon of A. in tail. A *fine* levied by A. and his wife, who afterwards ſurvived him, and other uſes declared is *no bar* to her, becauſe it was uncertain who would be the perſon; but had the Mo. 634. S. C. ſays, that Warburton, Walmſley, & tota Curia held that the

was barr'd by eſtoppel, but that Anderſon and Kingſmill held, that the fine had extinguiſh'd the uſe by prevention.—Pl. C. 562. b. 563. Arg.

perſon been certain, there perhaps, notwithſtanding it was but a poſſibility, it might have been a bar. Per two Juſtices. Cro. E. 826. Paſch. 41 Eliz. C. B. Wells v. Fenton.

A poſſibility may be *tranſferr'd by confirmation* or *releaſe* to him who has the *poſſeſſion* of the land; per Croke J. and cites 4 Rep. 64. Fulwood's Case, and 10 Rep 48. a. Lampett's Case.——Cro. Car. 479. Baker v. Willis.——Ch. Prec. 484. Hill. 1717. in Caſe of Pinbury v. Elkin.—A notion has obtained at law that 'tis *not aſſignable*, but no reaſon for it, if it were res integra; but the law allows it to be releaſed. Per Cowper K. 2 Vern. 563. Mich. 1706. Thomas v. Freeman.

5. A poſſibility cannot be transferred to another. Per Berkley J. Cro. C. 477. Trin. 13 Car. B. R. In Caſe of Baker v. Willis.

6. Quære, Why the *truſt of a poſſibility* in the remainder of a term is diſpoſable over, and the poſſibility *in intereſt* in the reverſion is not aſſignable? Chan. Caſes. 9. Hill. 13 and 14 Car. 2. In Caſe of Goring v. Bikerſtaff.

7. *Ceſty que truſt of a ſurplus* has no power to ſell the eſtate or thing out of which the ſurplus is to ariſe, it being but a mere poſſibility. See Chan. Caſes 175. Trin. 22 Car. 2. Backhouſe v. Middleton, and 208. Trin. 23 Car. 2. Lord Cornbury & Ux. v. Middleton.

(C) *Releaſed or Diſcharged*, In what Caſes.

1. A Poſſibility *of a uſe* cannot be *releaſed or diſcharged*. Arg. 1 Rep. 99. In Shelly's Caſe, cites 3 El. Wood's Caſe.

The daughter has a preſent intereſt, but 'tis ſuch as can't be releaſed nor granted. Per Coke Ch. J. 2 Bulſt. 130. cites Pl. C. 524. b. Welkden v. Elkington.

2. Leſſee for years *deviſes his term to his wife*, if ſhe lived ſo long; and if ſhe dy'd, then the *reſidue to his daughter which ſhould then be unpreferred*, and dy'd; his *daughter unpreferred releaſed to her mother* all her right in the ſaid land. The mother dy'd within the term. The releaſe ſhall not bind the daughter; becauſe at the time of the releaſe ſhe had no title. Arg. 4 Le. 135. ſays it was ſo adjudg'd 23 Eliz. in Falſor's Caſe.

3. If an award be that *if A. give B. at Midſummer* a load of hay, *then upon the delivery of it B. ſhall pay* 10 *l.* In this caſe the 10 l. cannot be *releaſed* before the day; for it reſts merely in poſſibility and contingency, whether it ſhall ever be paid; for it is only a duty on the delivery of the hay, and not before. Yelv. 215. Hill. 9 Jac. B. R. In Caſe of Bridges v. Einon.

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S.C. and P. cited Cro. C. 478. in Caſe of Baker v. Willis.—And yet af-

4. *Conuſor* of a *fine of land in ancient demeſne at common law* releaſes *to conuſee in poſſeſſion* by his deed, or confirms his eſtate by his deed; the conuſee ſhall retain and have the land, tho' the fine be annulled; becauſe the releaſe or confirmation made to him in poſſeſſion makes his eſtate firm and rightful againſt releaſor and his heirs. 10 Rep. 50. cites F. N. B. 98. and ſays this

this opinion was affirmed for good law per tot. Cur. in Lampet's Caſe.

ter the fine levied the conuſor had not any right

in the land, but only poſſibility to have the land again after the fine ſet aſide by writ of diſceit to be brought by the lord of whom the land is held. 10 Rep. 50. a. Mich. 10 Jac. in Lampet's Caſe.

5. A future right or poſſibility *which may be releaſed*, muſt have foundation and original *inception*, and muſt be a neceſſary and common poſſibility. 10 Rep. 50. b. Mich. 10 Jac. Lampet's Caſe.—Cites 2 Rep. 51. Cholmley's Caſe.

6. A *releaſe* cannot be made when there is an *uncertainty in the perſon*, as leaſe for life, remainder to the *right heirs of J. S.* If leſſee is diſſeiſed, and the eldeſt ſon of J. S. releaſes to the diſſeiſor, and after J. S. dies, the releaſe is void for the uncertainty whether he ſhould be right heir at his father's death. 10 Rep. 51. Mich. 10 Jac. in Lampet's Caſe.

7. The law has allow'd releaſes of *rights*, which are in the nature only of poſſibilities, that a man may releaſe *to him that has the poſſeſſion* a poſſible right only, tho' it does not allow him to transfer or convey away to a ſtranger ſuch a right, and that is the reaſon the law allows a man to releaſe an *executory intereſt in a term* which he has deviſed to him, and is in the nature only of a poſſibility; but yet he *cannot aſſign it away to a third perſon*, tho' he may releaſe his right to the poſſeſſor of the land by way of extinguiſhment; per Ld. Ch. J. Trevor in delivering the opinion of the whole Court. 11 Mod. 152. Hill. 1707. C. B. in Caſe of Archer v. Bokenham.

8. A. deviſed to *M. his wife for life*, and after her death *to B. and his heirs, provided if C. within 3 months after M.'s death pay to B. 500 l. then to C. and his heirs*, C. may releaſe or extinguiſh his right; per Cowper C. and the Maſter of the Rolls. Ch. Prec. 486. Paſch. 1718. Markes v. Markes.

(D) *Deviſed.* In what Caſes.

1. *MOrtgage by A. to B.* for payment of 100 l. to B. or his heirs ſuch a day, and *before the day of payment B. deviſed*, that *if A. pay the 100 l. J. S. ſhall have it.* Per omnes J. this deviſe of this poſſibility is not good, contra to 12 E. 2. Fitzh. Cond. 9. 3 Le. 125. pl. 244. C. B. Hill. 29 Eliz.

2. A. poſſeſſed of a *term*, deviſed the ſame *after his wife's death to B. his ſon*, and made the *wife executrix* who *proved the will and conſented to the legacy.* Afterwards *B. by will gave the lands to C. and died, living his mother.* The mother, after B.'s death, by her will gave the lands to J. S. Ld. Keeper decreed the lands to C. the deviſee of B. Pollex. 44. 16 May, 16 Car. 1. Veizey v. Pinwell.

S. P. and tho' the executrix and deviſee for life aſſigned the term over to a ſtranger in truſt for her uſe, and ſo

to deſtroy the poſſibility, yet Ld. C. Ellesmere decreed that the poſſibility was founded upon a truſt that the executor ſhould preſerve the leaſe, ſo as it might go according to the will, for performance whereof the executor is a truſtee, and therefore B. is ceſty que truſt, and that though the poſſibility be not grantable nor deviſable by the rules of law, yet *of the uſe ceſty que truſt may declare his will*

as ceſty que uſe might of lands before the ſtatute of 1 R. 3. and ſo *the will of B. amounts to a declaration of the truſt*, and ought to bind the executor truſted. Mo. 806, 807. Mich. 5 Jac. in Canc. Cole v. Moor.

* S. P. And Ld. C. Parker decreed, that the adminiſtrator de bonis non &c. of B. aſſign over the term (the deviſee for life being dead) to the deviſee of B. the deviſee of C. Mich. 1719. Wms's Rep. 572 to 577. Wind v. Jekyl and Albone.

3. J. S. deviſed to B. and the heirs males of his body, and for want of ſuch iſſue *to the heirs of B. in tail male, and for default &c to C. and his heirs. C. during A.'s life deviſed* the lands to D. Decreed the lands to D. Fin. R. 403. Hill. 31 Car. 2. Pitcairne v. Brace, Wheeler & al.

4. A. deviſed land to B. and his heirs in truſt for C. and the heirs of her body, and *for want of ſuch iſſue the land to be conveyed to D.* and his heirs. D. *deviſed* the lands to J. S. and dy'd, and then C. dy'd without iſſue, yet Chancery would not make good the deviſe by D. but reſolved that D. had no eſtate deviſable, but a mere poſſibility during the life of C. or any of her iſſue. 3 Lev. 427. in Canc. Trin. 7 W. 3. Biſhop v. Fountain & al.

[For more of Poſſibility in general, ſee Deviſe, Grant, Releaſe, and other proper Titles.]

(A) Poſtea.

1. IT was ſaid, that a man ſhall *not aver* againſt a poſtea *in the King's Bench* or the Common Pleas, to ſay, *that it was contrary to the verdict*; *nor* ſhall he be received to ſay, *that* the Judges gave a judgment, and *the Clerks have entered it contrary to the judgment; but otherwiſe* it is *in* Court Barons or other *baſe Courts*, not Courts of Record. Ow. 49, 50. Paſch. 36 Eliz. Anon. cites 10 E. 3. 40.

Jenk. 216, 59. The Clerk may certify it, though his office is determined; for he was ſworn to execute the ſaid office.—Clerks of aſſiſe and aſſociates are to make return of poſteas, and *deliver them to the prothonotaries on the quarto die poſt* of the return of the writ of niſi prius. Rules of Prac. in C. B. Eaſt. 2 Ja. 2.

2. Where the *Judge* that took the niſi prius *dies before the return of* the poſtea certify'd, the Clerk of the Aſſiſes may well certify it, or the executors of the Judge upon certiorari directed to them for this poſtea. Jenk. 174. pl. 44. cites D. 163.

3. Upon ſearch of the notes of the ſpecial verdict it appears *livery and ſeiſin* was *found*. But the Clerk of Aſſiſe had *omitted* that

that in the entring of the poſtea. Reſolved by the Court, that the Clerk ſhould *amend* the poſtea, and then the record ſhould be amended accordingly. Noy. 118. Hill. v. Prowſe.—cites 4 Rep. 52.

4. The *Court may ſtay* the *bringing in* of *the poſtea, and entring up of judgment* upon a verdict, if they find cauſe to do it, viz. for ſome undue practice in the proceedings to the trial, altho' the plaintiff's cauſe was good; for it is not enough to have a good cauſe, but it muſt be alſo legally proſecuted. 2 L. P. R. 338. tit. Poſtea, cites Mich. 22 Car. B. R.

5. *Error* to reverſe a judgment was *aſſign'd in the poſtea*, becauſe it was *not ſaid, that the Juſtice of Aſſiſe aſſociato ſibi &c.* as it ought to be by the ſtatute. Roll Ch. J. ſaid, The Juſtice of Aſſiſe may have a *ſpecial commiſſion to go the circuit alone*, and then it muſt not be ſaid ſo; but if it be *per formam ſtatuti*, then it ought to be aſſociato ſibi &c. But the *Clerk of the Aſſiſe may bring in his notes by which he made the poſtea, and amend it by them*; [465] for it is his fault to make the return ſo. Sty. 120. Trin. 24 Car. Lovel v. Knatchford.

6. Altho' the verdict given be prejudicial to the *plaintiff* as he conceives, yet he *ought to bring in the poſtea*. 1651. B. S. 13 May. For he muſt abide by the trial, *tho' it may prove prejudicial unto him*, that if he will not enter the verdict the defendant may. 2 L. P. R. 337. tit. Poſtea.

7. A poſtea *is a record* of this Court *truſted with the attorney in the cauſe* by the Clerk of the Aſſiſe, and the attorney is *bound*, if he be ſo truſted, *to deliver it into the office*, that the judgment may be entred by it by the officer of the Court. Trin. 1651. B. S. And if he do it not, the Court will inforce him to do it. 2 L. P. R. 338. tit. Poſtea.

8. It is *not neceſſary to annex the diſtringas* unto the poſtea, altho' it is uſual ſo to do. Trin. 1651 B. S. for they have no relation one to the other. 2 L. P. R. 338. tit. Poſtea.

9. There is *no general rule* of Court for the Clerk of the Aſſiſe *to bring in the poſtea* into this Court *by a preciſe time*; for ſometimes poſſibly he may be able to bring it in ſooner than at another time: but if he be negligent, and return it not in convenient time, the parties griev'd may move the Court or at the ſide-bar, and thereupon the Court will make a *rule that he bring it in ſpeedily*, Mich. 22 Car. B. R. to avoid farther delay to the party concerned. 2 L. P. R. 337. tit. Poſtea.

10. Formerly after a nonſuit at the aſſizes for want of confeſſing of leaſe, entry and ouſter, the plaintiff's attorney immediately made out a *writ of poſſeſſion*: but the practice is ſince altered; ſo that now it *cannot be* done *until after the poſtea comes in* at the day in Bank; for it may be that there was not due notice of trial given; or there may be ſome other good reaſon ſufficient to ſet aſide the nonſuit. 2 L. P. R. 338. tit. Poſtea.

11. Note, that he who *moves in arreſt* of judgment upon a declaration muſt *always have the roll in Court*. But in this Court they *have only* 4 *days after term begun to move* in arreſt of judgment, The defendant has *four days* by the rules of the

Court *to ſpeak in arreſt of judgment after the poſtea is brought into the Court*; and *if the party* for whom the

ment, *be the poſtea in or not*, and thereupon the Court, if there be cauſe, will give day over. *But in B. R.* the practice is to have 4 *days* to move in arreſt of judgment *after the poſtea come in, tho'* it be *more than a year after the verdict*. But in this Court, after the 4 firſt days of the term next after the verdict, they may ſign judgment, tho' it be as ſoon as the poſtea comes in. Sid. 36. pl. 6. Paſch. 13 Car. 2. in C. B. Anon.

verdict paſſed, *will not bring it in, upon notice* given to him by the party that he intends to move in arreſt of judgment, the *Court*, upon a motion ſetting forth this matter, *will order judgment to be ſtaid* until four days after it ſhall be brought in, that the defendant may have time to conſider upon the record what to move out of it in arreſt of judgment. 2 L. P. R. 337. tit. Poſtea.

12. Poſteas *on qui tam* proſecutions ſhall be *delivered to the prothonotary*, and not to the proſecutor. Rules of Pract. in C. B. Eaſt. 34 Car. 2.

13. When a poſtea is *miſlaid*, we often order another to be made by the notes in the Clerk of Aſſizes book; per Holt Ch. J. Comb. 285.

14. A *fine* was ſet on ſeveral defendants, whereas the *poſtea* was *not returned*; whereupon the next day upon motion the rule for ſetting the fine was diſcharged. 12 Mod. 206. Mich. 10 W. 3. Anon.

After the poſtea is brought into Court, and *the record has been read in Court*, in order to the ſpeaking to

15. Once a poſtea is *brought into Court*, tho' the *plaintiff take it out again*, yet it remains in poſſeſſion of the Court, and the officer of the Court may command the plaintiff to bring it in; and the defendant may give the plaintiff notice to bring in a poſtea, in order to move in arreſt of judgment. 12 Mod. 385. Paſch. 12 W. 3. Anon.

ſome matter in law in it, the attorney in the cauſe ought not to have *the poſtea* any longer in his cuſtody, but it *ought to* remain in Court, and be *filed of record* in the Court. 2 L. P. R. 338. tit. Poſtea.

[466] 16. If a *capias* be *taken out and executed within* 4 *days after return* of the poſtea, it is ill; ſecus if *taken out within the* 4 *days and executed after*; and if there be not 4 days in term after return of the poſtea, they muſt be made up in vacation before execution executed; per Holt Ch. J. 12 Mod. 502. Paſch. 13 W. 3. in Caſe of Spurraway v. Rogers.

17. In ejectment on the trial at the aſſizes, a Caſe was made and referred to the Judge of Aſſize, and he afterwards referred it to the opinion of the Court; and now a queſtion aroſe, *in what manner the poſtea is to be delivered to the party, whether by a certificate from the Court by rule to the Judge* who tried the cauſe, and when by his order, *or* whether the Court ſhould make a *rule for the delivery* thereof *without applying to the Judge* of Aſſize? The Court, after due conſideration, *made a rule* for the delivery of it without any application to the Judge of Aſſize. Rep. of Pract. in C. B. 85. Hill. 6 Geo. 2. Makepeace v. Stevens and others.

18. *On ſigning judgment*, the poſtea is *to be left with the clerk of the judgments*. Rules of Pract. in C. B. Trin. 13 Geo. 2. Reg. 2.

[For more of Poſtea, ſee Amendment, and other proper Titles.]

Powers.

Powers.

(A) Powers to make Leaſes [in general.] *To whom.* [And *How.*]

[1. IF a man *covenants for natural affection to ſtand ſeiſed* to the uſe of himſelf for life, with divers remainders over, *with a power* to make leaſes, he cannot make leaſes *to ſtrangers* for money; for *the leaſes ought to ariſe upon the firſt covenant*, and then thoſe ſtrangers are not within the conſideration of natural affection. Trin. 5 Ja. B. R. between * *Croſſe* and *Barſe*; per Curiam agreed. 1 Rep. *Mildmay.* 176. b. reſolved.]

* Cro. Jac. by name of Croſs v. Fauſtenditch.—A power to make leaſes was *reſerved on a covenant to ſtand ſeiſed* to uſes on conſideration of natural affection. A *leaſe was made for proviſion for younger children.* Decreed good againſt the heir for two reaſons, 1ſt. For that the law was not then adjudged in MILDMAY's Caſe. 2dly, Becauſe the ſon did claim by the ſame conveyance by which the power was limited. Chan. Caſes 263, 264. cited by Ld. Keeper, Mich. 27 Car. 2. as decreed by the Ld. C. Egerton, in Caſe of Prince v. Chandler.

One covenants to ſtand *ſeiſed to the uſe of himſelf, remainder* of one moiety *to A.* and of the other *to* B. in tail, *remainder* to his own right heirs, *reſerving* to himſelf a *power to diſpoſe of the eſtate for life*, lives, or years, for the better payment of his debts and legacies; accordingly he makes a leaſe for 1000 years, and well he might; for it was his own eſtate, and therefore in ſettling it he could reſerve to himſelf what liberties he pleaſed. Arg. Mo. 145. Hill. 26 Eliz. Mildmay v. Standiſh.

[2. *So* by force of ſuch power he cannot make leaſes to any *of his blood*; becauſe the proviſo and power *was void in the creation, in as much as it was to leaſe to any perſon*, as well thoſe that are out of the conſideration, as thoſe that are within the conſideration. Co. 1. *Mildmay.* 176. b. Curia.]

Upon covenant to ſtand ſeiſed, a man cannot reſerve power to make leaſes or jointures, or to prefer younger children; but *upon eſtate executed*, he may; per Moore. Arg. Mo. 381. Mich. 36 & 37 Eliz. in Perrot's Caſe.—Becauſe it was general, and not to any particular purpoſe, nor upon any particular conſideration, no uſe can ariſe out of the covenant to ſtand ſeiſed, as it might out of feoffment or fine, ſo that a leaſe made by the huſband was void, and in debt by the wife after his death it was adjudged that no rent was due. 1 Lev. 30. Paſch. 13 Car. 2. [467] B. R. Dorothy Chute's Caſe.—Arg. Mo. 373. in Perrot's Caſe.—S. P. but it may be done by *fine or tranſmutation of poſſeſſion*, if the covenant be, that the owner will ſtand ſeiſed to thoſe uſes. Cary's Rep. 30. cites 27 June 1602. 45 Eliz.—S. P. per Cook attorney-general. Goldſb. 173. that ſuch power cannot be reſerved by way of covenant, but may by *feoffment to uſes*; and it was ſaid by Walter to have been adjudged on a writ of error in * SHARINGTON's Caſe, That if a man *covenant with his eldeſt ſon in conſideration of natural love to ſtand ſeiſed* to the uſe of himſelf for life, the remainder to his eldeſt ſon in tail, with *proviſo*, that he himſelf might *make leaſes to his ſecond ſon, or to any other of his kindred for* 21 *years or three lives*, this was held good; for they to whom the leaſes are to be made, are within the conſideration, viz. of the blood, and ſo the uſe may well ariſe to maintain thoſe leaſes; *but* if the proviſo had been *to make leaſes to any man*, and he *by force thereof made leaſes to his ſecond ſon*, thoſe leaſes are void, becauſe *not within the conſideration of the covenant* by intendment of the law *at the firſt*; for the law at the beginning adjudged the proviſo merely void.—* S. C. Pl. C. 300. Trin. 6 & 7 Eliz. Sharington and Pledall v. Strotton.

[3. If

See (A. 3) —Brownl. 169. Mich. 6 Jac. S. C. by name of CHAPPEL v. WHITLOCK, but no judgment, but only ſays, that it is uncertain.

[3. If a man *has power to make leaſes for three lives*, he *cannot* make a *leaſe for* 99 *years determinable upon three lives*; for this is not within his power. Co. 8. *Whitlock*. 70. b. per Curiam.]

See A. 3.

[4. If a power be limited to make leaſes, *provided that the leaſes ſhall not exceed* 3 *lives or* 21 *years, he may* make a *leaſe for* 99 *years if three lives ſo long live*; becauſe the power is indefinite, and the proviſo of reſtraint is, that it do not exceed three lives; and a leaſe for 99 years, if three lives ſo long live, does not exceed three lives, in as much as an eſtate for three lives is a greater eſtate in law than the other, which is but a chattel. Co. 8. *Whitlock*. 70. b. reſolved.]

See A. 5.

[5. If a man *ſeiſed in fee of the reverſion of diverſe lands, and in demeſne as of fee of other lands, levies a fine of all to* the uſe of *the conuſee for* 15 *years for a valuable conſideration, and after* to the uſe of *the conuſor for life of the conuſor, provided that it ſhall be lawful for the conuſor to make leaſes for three lives or* 21 *years* in poſſeſſion, *reſerving the ancient rent*; the conuſor by this proviſo within the 15 years may leaſe a tenement which was in leaſe at the time of the fine levied, but now expired, and ſo by this * deſtroy the eſtate of the conuſee for 15 years, by reaſon of the word (*poſſeſſion*). P. 12 Ja. B. R. per Coke.]

* Fol. 261.

See (A. 3)— * Cro. E. 5. Paſch. 24 Eliz. B. R. by the name of the COUNTESS OF SUSSEX v. WROTH. becauſe for the time it was a leaſe in reverſion,

[6. *Leſſee for life* of a manor, with *power to make leaſes for* 21 *years*, cannot make a *leaſe* of the manor *to commence at the feaſt of St. Michael next enſuing for* 21 *years*; becauſe the power ſhall be taken ſtrictly, and when it is limited indefinitely to make leaſes, and does not expreſs how, it ſhall be intended more ſtrictly, viz. only in poſſeſſion; for it was not intended that the land ſhould be charged with more than 21 years from the making of it. Trin. 30 El. between * *Leaper and Wroth* adjudged, cites Co. 6. *Fitzwilliams*, 33.]

and if he might make a leaſe to commence at Michaelmas following, he might make it to commence 20 years after; and it being a liberty and power, it muſt be ſtrictly purſued —— Le. 35. pl. 44. S. C.—3 Le. 130. pl. 184 Paſch. 28 Eliz. S. C. argued.—4 Le. 65. pl. 150. Paſch. 24 Eliz. S. C. argued.—— S. C. cited Mo. 199. in Mountjoy's Caſe.—S. C. cited Mo. 494. in Ld. Buckhurſt's Caſe.

See (A. 3) ——S. P. Yelv. 222. Trin. 10 Jac. B. R. Shecomb v. Hawkins.—Cro. J. 318. Hill. 10 Jac. S. C. by the name of Shecomb v. Hawkins.

[7. *So* by ſuch power the leſſee *cannot make any leaſe in reverſion*, but only in poſſeſſion; for the intent was, that there ſhould not be any eſtates made by him, by which any part ſhould be charged with more than 21 years. Co. 6. *Fitzwilliams*. 33.]

See (A. 3) —D. 357. a. pl. 43. Paſch. 19 Eliz.

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Manwood and Dyer thought the leaſe good;

[8. If *baron ſeiſed in right of the feme, leaſes for* 21 *years*, rendering the ancient rent according *to the ſtatute of* 32 *H.* 8. *and after it is enacted by a private act, that the baron ſhall have the lands* in leaſe *for his life, the remainder to the feme for life*; *and that all leaſes and grants* thereof *made, or to be made, by the baron for three lives or* 21 *years, or leſs, reſerving the ancient rent, ſhall be good during ſuch terms*; the baron, by force of this ſtatute, may make a leaſe

a leaſe for 21 years to commence after the firſt leaſe, tho' the firſt leaſe be not expired at the making of this ſecond leaſe; for here *no reſtraint* is made to grant leaſes in reverſion, as is in the ſtatute of 32 H. 8. and therefore it ſeems it was the intent of the makers to give power to make leaſes in reverſion. D. 19. El. 357. 43.]

but * Mounſon e contra. —Le. 36. pl. 44. S. P. Becauſe the firſt leaſe was in eſſe, and not made by

force of the ſaid private act; but had the ſaid former leaſe been made by virtue of the ſaid ſtatute, the ſecond leaſe had been utterly void, cites it as the Lord Northampton's Caſe.—* In the margin of Dier, 357. it is ſaid that Mounſon's ſeems the better opinion.——3 Le. 71. S. C. Hill. 20 Eliz. C. B. but no judgment.—S. C. cited as conceived to be good. 3 Le. 132.

[9. If a *power* be *to make leaſes for lives, and for* 80 *years determinable upon the death of three lives*, reſerving the ancient rent. The leſſee may grant a reverſion for 80 years determinable upon three lives, reſerving the ancient rent where there is an eſtate for life in poſſeſſion, tho' the words are *in reverſion*, and *not of* the reverſion, yet it is good; for * *debt lies againſt the grantee of the reverſion for the rent* well enough, and ſo no miſchief to them in reverſion. M. 10. Ja. B. between *Perot and Curtis* plaintiffs, *v. Cable*; per Coke and Winch.]

See (A. 3)—* S. C. cited 2 Jo. 25.—Goub. 195. pl. 281. S. C. by the name of PERROT v. KEEBLE, ſays the power reſerved was *to leaſe for*

80 *years in poſſeſſion or reverſion, if A. B. and C. ſhould ſo long live*, reſerving the ancient rent. He *granted the reverſion for* 80 *years*, reſerving the ancient rent. The queſtion was, Whether he had purſued his authority, becauſe by the meaning of the proviſo the power was, that the conuſor of the fine whereupon and to whom the power was reſerv'd ſhould have the rent preſently, or when the term did begin. But the Court were of opinion, that he had done leſs than by the proviſo he might have done; for this grant of the reverſion doth expire with the particular eſtate for life. But if he had made a leaſe to begin after the death of the tenant for life, the ſame had been more than this grant of the reverſion. And Coke Ch. J. ſaid, that the grantor may preſently have an action of debt againſt the grantee of the reverſion for the rent. But becauſe it was not averred that any of the ceſty que vies were alive at the time when the grantor did diſtrain for the rent, judgment in the principal caſe was reſpited.—Brownl. 173. S. C. by name of DABEL v. PERROT, ſtates it thus, viz. Tenant in tail hath power to make a leaſe for 80 years, if three perſons ſo long live, and reſerving the old rent due and payable yearly; and he maketh a grant in reverſion for years, and whether that be good or no was the queſtion, there being a leaſe for life in poſſeſſion; the ſecond leaſe was for 80 years, if three ſo long live; for the matter in law, the Court held the leaſe good, but for want of an averment of the life of &c. the plea was not good.

[10. If a man *poſſeſſed of a manor for* 99 *years*, makes his will, and *deviſes to A. his wife for her life, to ſet, let, and make eſtates out of it and them, in as ample manner as I myſelf might, if I were living, during the ſaid term of her life*; *and after* the death of A. he deviſes it *to B. his daughter, and to the heirs of her body begotten*, and after dies, and *A. being made executor, conſents to the legacy, and* after *makes a leaſe of a tenement parcel of the ſaid manor to C. for* 99 *years, if three lives ſo long live, and* then *dies*; this is a good leaſe againſt B. the daughter: tho' it was objected that by this clauſe ſhe has only power to diſpoſe of it during her life; for otherwiſe ſhe may deſtroy the remainder limited to the daughter. But if this ſhould not give power to her to make leaſes to continue after her death, this clauſe would be merely idle and void, and the words *ſet, let, and make ſtates*, mean according to the uſage of the country in Somerſetſhire, where it was to make leaſes for lives or years, it being a manor, and he truſted his wife to diſpoſe of it in ſuch manner that his daughter ſhould have

See (A. 6)—S. C. Sty. 258. 275. and 315. and there Roll Ch. J. held, that the leaſe was good; for a will ought to be ſo interpreted, that all the parts of it may ſtand together; and if the feme here have not power to make this leaſe, the clauſe of

giving her this leaſe is idle; and the meaning is ſo; without doubt the feme hath the ſole eſtate in law in her, and the power given her is but a reſtoring to her of that which ſhe had before by the law; and her conſenting to the legacy doth not take away her power to make eſtates. And this limited power, and the remainder of his daughter may ſtand together; for it may be that the wife would not make ſuch a leaſe, and then the daughter ſhould have had the land in tail; but if ſhe diſpoſe of it, the daughter ſhall not have it. Jerman agreed with Roll. Nicholas J. held, that the feme could only diſpoſe of the land during her life; and that the teſtator's intent by the words was, that the feme ſhould not be tied to occupy the lands herſelf during her life, but might diſpoſe of them. Aſh. held according to Nicholas, that ſhe can diſpoſe of the lands only during her life; for the power is only given during her life; and this interpretation will make all parts of the will ſtand together, better than the other interpretation. Adjourned.

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have the poſſibility of it after the eſtates ended. Mich. 1651. between *Hele and Green*. Per Curiam adjudged upon a ſpecial verdict.]

See (A. 5)—Vaugh. 33. Triſtram v. Roper. S. P.

[11. If a *power* be *to make leaſes for three lives, or* 21 years, *of lands uſually letten*; lands which has been *three times letten*, is within the proviſo. P. 2 Ja. B.]

See (A. 5)—2 Jo. 37. S. P. by Vaughan Ch. J.

[12. *So* land which has been *twice letten* is within the proviſo. P. 2 Ja. B.]

Vaugh. 32. Hill 19 and 20 Car. 2. in C. per Vaughan Ch. J. in Caſe of TRISTRAM v. ROPER, and ſaid the words (uſually demiſed) might be taken in two ſenſes; firſt, for the often farming or repeated acts of leaſing; ſecondly, for the common continuance of lands in leaſe; for that is uſually demiſed; and ſo land *leaſed for* 500 *years long ſince* is land uſually demiſed, that is, in leaſe, tho' it has not been more than once demiſed, which is the more received ſenſe of the words (land uſually demiſed.)—Land which has been uſually *let at will rendring rent* is ſaid to be uſually demiſed. Per Cur. Cro. J. 76. Trin. 3 Jac. B. R. in Caſe of Baugh v. Haynes.—Land uſually demiſed *by copy of Court*, but never otherwiſe before than by copy only, may be ſaid land uſually demiſed. Mo. 759. pl. 1050. Paſch. 3 Jac. Banks v. Brown.

Fol. 262.

[13. *But* land which has been *but once* letten, is not within the proviſo. *For uſus fit ex iteratis actibus*. P. 2 Ja. B.

See (A. 5)——S. P. per Vaughan Ch. J. in delivering the judgment of the Court. 2 Jo. 37. in C. B. Tuſtian v. Roper.

See (A. 5).

[14. If land has been leaſed *by a contract from year to year for three years*, it is not within the proviſo; for it is *but one leaſe*. Contra. P. 2 Ja. B.]

See (A. 4)——S. C. cited 12 Mod. 151.——Settlement of *land and tythes*, with power to make leaſe, *ita quod 5s. per acre rent be reſerved*; leaſe made of the land and tythes rendring 5s. per acre for the land, and nothing

[15. If a *conveyance* be made *to uſes of diverſe manors and lands*, that is to ſay to the uſe *of J. S. for life &c. with a power to make leaſes of the premiſſes, or any part* or parcel of it, *for three lives, or years determinable upon three lives, ita quod ſuch rent, or more, be reſerv'd* upon every leaſe, *than was reſerved or paid for it within two years then next before*, and *ſome of the land was not leaſed before at any rent within the two years*; he may by force of this power make ſuch leaſe of this land, reſerving what rent he pleaſe. For it appears by the generality of the words that it was intended that he ſhould have power to leaſe all the land; and this is not like to leaſes to be made by force of the ſtatute of 32 H. 8. or 13 El. for there the intent is apparent that no land ſhould be leaſed, but that which was leaſed before. Tr. 10 Car. *Cumberford's Caſe*. Reſolved by the three Chief Juſtices upon reference to them out of the Court of Wards, as Maſter Cholmley ſaid to me, and this concerned Maſter *Chamberlain* of the

Court of Wards. And Sir Henry Calthorpe, the now attorney of the Court of Wards, ſhewed me the report of it, he being of counſel againſt this reſolution.]

for the tithe is good. 2 Lev. 150 * Walker v. Waſeman.

—Vent. 294. S. C. but ſays the rectory was demiſed reſerving a rent, and that the rectory conſiſted of tithes only, and reſolved that the leaſe was good; for the *laſt clauſe being affirmative, ſhall not reſtrain the generality of the former*; and ſays the reſolution was chiefly grounded on the Caſe of CAMBERFORD, reported here by Roll.——S. C. cited by Holt Ch. J. who ſaid that tho' the words of the qualification are general, yet the application may be particular. 5 Mod. 382. in Caſe of Winter v. Loveday.——* S. C. cited Holt Ch J. 12 Mod. 151. in Caſe of Winter v. Loveday.

16. A. had a wife and one child; B. by indenture between him of the one part, and A. his wife, and the children betwixt them begotten at the aſſignment of the huſband, of the other part, *leaſed* land *to A. his wife and their children, at the aſſignment of A for years*. Afterwards ſeveral other children were born, the wife died, and *A. aſſigned to an after-born child*. But it was held [470] per Cur. that this was not within his power; and ſo adjudged. Trin. 26 Eliz. Cole v. Friendſhip.

17. A. deviſes land to B. an infant —A. can't appoint that *C. ſhall leaſe* the land *in B.'s name*; but if A. had deviſed that C. ſhould make a *feoffment*, or a *leaſe for life*, in ſuch caſe C. had an intereſt; for otherwiſe he can't make livery; and none can authorize any to make leaſes in the name of another, but of him in whoſe name the leaſe ought to be made. Cro. E. 678. 734. Trin. 41 & Hill. 42 Eliz. B. R. Piggot v. Garniſh.

18. If a power be reſerved to make leaſes by a *covenant without tranſmutation of poſſeſſion*, Chancery will not help, becauſe the firſt is void in law. If *upon tranſmutation* of poſſeſſion, and the *power not preciſely followed*, that is doubtful, and rather moſt ſtrong againſt help; for then the eſtate works, and the power gone; and upon wills no help. Per Egerton C. 11 October, 1 Jac. Cary's Rep. 41. Pigot's Caſe.

19. Where a man has power to make leaſes &c. which ſhall *charge* and incumber *a third perſon's eſtate*, ſuch powers are to have a rigid conſtruction; but where a power is *to diſpoſe of a man's own eſtate*, it is to have all the favour imaginable. 2 Vent. 350. Paſch. 33 Car. 2. Sayle v. Freeland.

8 Mod. 250. cites 6 Rep. 32. Fitzwilliams's Caſe.—— Gibb. 214. 219. Hill. 4 Geo. 2.

B. R. Fitzgerald v. Lord Fauconberge.——*So* where the power is *reſerved to one that ſhould have been heir* to the eſtate if the ſettlement had not been made; but otherwiſe, in caſe of the eſtate being ſettled on a *ſtranger*. Arg. 9. Mod. 13. Mich. 9 Geo. Lady Coventry's Caſe.

Tho' a more favourable conſtruction is to be put upon a power reſerved to the owner of the eſtate, yet that is to be underſtood of a *voluntary conveyance*. Gibb. 220. Hill. 4 Geo. 2. in Canc.

20. The *admitting* at law powers of revocation of uſes was *after the ſtatute of uſes*, but it was ſome time after that before a *conſtructive revocation* was allowed of; per Jekyll Maſter of the Rolls, who ſaid that Scroopt's Caſe 10 Rep. 143. 144. was founded only on one authority, which was the Caſe of Frampton v. Frampton, cited there. Gibb. 218. Hill. 4 Geo. 2. in Canc. in Caſe of Fitzgerald v. Lord Fauconberge.

(A. 2) *Extent thereof.*

1. WHERE a man's power is limited to *leaſe lands ſo ſpecially qualified*, that is, to let and ſet as uſually at any time before, when he could not leaſe at all without ſuch ſpecial power given him, he is *abſolutely barr'd* from leaſing land, which is not ſo qualified. Vaugh. 33. Hill. 19 & 20 Car. 2. C. B. Triſtram v. Ballinglaſs al. Roper.

2. A leaſe within a power to *demiſe in poſſeſſion* muſt be *conſtrued* of a leaſe to commence in poſſeſſion after another leaſe or intereſt already created before the reſervation of the power, and not after; per Holt 2 Salk. 537. Mich. 9 W. 3. B. R. Winter v. Lovedore.

Mod. 151. S. C. and P.—5 Mod. 382. S. C. and P.—— There were other lands which the power might work upon, as lands in B. and S.

3. Where a *qualification is annexed* to a power of leaſing, which if obſerved goes in *deſtruction of the power*, the law will diſpenſe with ſuch qualification; as power *to leaſe a manor, or any part* thereof, *ſo as the ancient rent be reſerved*; yet he may by this power leaſe the *ſervices* parcel of the manor on which no rent can be reſerved, otherwiſe the expreſs power would be defeated. Per Holt Ch. J. Carth. 429. Mich. 9 W. 3. B. R Winter v. Loveday.

mentioned likewiſe in the ſettlement; and even as to the manor the power is not wholly void; for *he may thereby leaſe the rents and ſervices, tho' no rent can be reſerved thereout.* Per Holt Ch. J. 12 Mod. 151. S. C.

[471] See (A) pl. 3, 4, 6, 7, 8, 9.

(A. 3) Where the Power is *purſued.* In *reſpect of the Years or Lives limited.*

But if a man has power *to make leaſes ſo as the ſame do not exceed 99 years* a confectione, if he makes a *leaſe for 60 years to commence 20 years after*, it is good; for he does not exceed the number of 99 years from the making the leaſe. And. 274. Mich. 33 Eliz. in Caſe of Harcourt v. Pole and Seles.

1. POWER in uſes to make leaſes not exceeding 99 years *a tempore confectionis*; he leaſes for 50 years *a die* confectionis, it is not good. Mo. 733. in marg. cites 34 Eliz. Harcourt v. Poole.

2. A. made a *jointure* on M. his wife, with power *to make leaſes for 21 years in poſſeſſion.* A. died; M. married J. S. and then J. S. and M. *made a leaſe to commence in præſenti of lands*, ſome whereof were *in leaſe before*, and ſo the lands not in poſſeſſion. As to the executing ſuch power by the wife and her ſecond huſband, it was held well executed; but that by this power a leaſe could not be made of lands *not in poſſeſſion. Hill. 14 & 15 Car. 2. in Canc. Per Lord Chancellor, aſſiſted by Bridgman and Hale. Sid. 101. D. of Buckingham v. Ld. Antrim & Ux.

* Cro. J. 318, 319. Shecomb v. Hawkins.

3. R. ſeiſed of lands in fee *made a leaſe for 99 years, if three perſons or any of them ſhould ſo long live. R. levied a fine* thereof *to* the uſe of *A. for life*, the remainder *to B. for life*, the remainder *to C. in tail*; *proviſo that every of them may ſucceſſively make leaſes for 99 years, or three lives in poſſeſſion, or for two lives in poſſeſſion and one in reverſion, or for one life in poſſeſſion and two in reverſion*; during the firſt term A. made a leaſe for life to the defendant. Keeling J. inclined that this leaſe is within the power; for the ſettlement being only of the reverſion, a preſent leaſe of the reverſion is within it. Windham and Twiſden held that the ſettlement being of a reverſion, if the words of the power had been general to make leaſes, leaſe *of the reverſion*, or leaſe *in reverſion* had been within it; but the power being expreſsly to make leaſes in poſſeſſion, this leaſe in reverſion is not within it. Sed adjornatur. Lev. 167. 168. Trin. 17 Car. 2. B. R. Opy v. Thomaſius.

Sid. 260. S. C. ſays it was admitted not to be within the power. But judgment was given upon another point, viz. that the leaſe was not avoidable by conuſee of a fine levied by tenant in tail.

4. A. tenant for life, with power *to leaſe for three lives*, remainder to B. his ſon, remainder to the right heirs of A. in fee. *A. made a leaſe for three lives, and died*, and then *living thoſe three lives, B. made a leaſe for two lives.* Reſolved that this leaſe in reverſion by B. is not good; for now the premiſſes are charged with five lives inſtead of three. Carth. 257. Hill. 4 W. & M. B. R. Simmonds v. Cudmore.

5. Power *to demiſe for one, two or three lives in poſſeſſion, or in reverſion for one, two or three lives, or thirty years*, or for any number of years determinable on one, two or three lives, ſo as ſuch demiſe be not of the demeſne lands. He may make a leaſe in reverſion *for thirty years abſolutely*, by virtue of this power, becauſe the limitations and reſtrictions are disjoined, and the latter part is carried on by way of enlargement of the power; per 3 J. contra Rokeby J. 2 Salk. 537. Mich. 9 W. 3. B. R. Winter v. Loveday.

This power to make a leaſe *in* reverſion *muſt be taken to be* a leaſe *of the reverſion itſelf*, and not a concurrent leaſe; and it cannot be otherwiſe, in Caſe of

becauſe a freehold cannot *commence in futuro.* Per Holt Ch. J. Arg. Carth. 429. Winter v. Loveday.——5 Mod. 383. S. C.

6. Where there is a power given to make leaſes *in poſſeſſion and reverſion*, in ſuch caſe if a leaſe be made in poſſeſſion, and afterwards ſome life drops, he can't make a new leaſe in reverſion of the ſame lands, becauſe his power is executed by making the firſt leaſe. Per Holt Ch. J. Carth. 429. Mich. 9 W. 3. B. R. Winter v. Loveday.

(A. 4) Where the Power is purſued in reſpect of the *Rent reſerved. Ancient Rent.*

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See (A) pl. 15.——See Rent.

1. POWER reſerved to make leaſes, *reſerving ſo much rent* or profit *as had formerly* been reſerv'd upon every demiſe for 21 years, or three lives in poſſeſſion only. It was held, 1. That

* Power to *make leaſes reſerving ſuch yearly rents or more, as the ſame were then let at.* Lands demiſable by this power, muſt be lands then in leaſe, on which ſome rent is reſerved, and a *leaſe of the capital meſuage*, without any rent reſerved, and which was not in leaſe at the time of the power reſerved, is not a good leaſe. 8 Mod. 249 Paſch. 10 Geo. Baggot v. Oughton.—Vaugh. 35.——Affirmed per tot. Cur. on a further argument, and afterwards affirmed by Lord Chancellor, and affirmed afterwards in the Houſe of Lords. 8 Mod. 351. S. C.——+ A leaſe by virtue of a power was made *of the land inter alia reſerving proinde the rent of 6s. per annum*, and *avers that the ancient rent was 6s. per annum*. This was objected to be no good reſervation; for that the rent iſſues out of other lands, as well the land within the power, and ſo cannot be ſaid to be the ancient rent reſerved upon that; but the Court ſaid it might be intended that the *inter alia* might comprehend nothing but ſuch things out of which a rent could be reſerved, and then the 6s. was reſerved only for the land within the power: however the *proinde* might reaſonably be referred only to the land within the power, and not to the *inter alia*, and that a diſtinct reſervation might be for that land. And ſo judgment was given for the plaintiff the leſſor. Vent 359. Trin. 31 Car. 2. How v. Whitfield. B. R.

* *lands in poſſeſſion of feoffor* may by this power be demiſed without rent. 2. If *ſeveral parcels are demiſed in one leaſe*, as here, and *ſeveral rents* upon each of them, and ſome more and ſome leſs than uſually before or at the time of the feoffment, but the intire rent or profit is reſerved in the whole, yet it is not good for thoſe which have leſs rent put upon them, tho' it is for the others. 3. Here one piece of land was demiſed *with another*, and *no more rent* put upon it; and held not good, tho' it don't appear that any thing had formerly been reſerved to the lord, but ſomething given to the bailiff for the other. 4. In former leaſes the coppice-woods had been reſerved to the lord in a piece of land called the Park, and 40 l. rent was reſerved for it, but now is demis'd for the †*ſame rent, with coppices added*; and this was not inſiſted upon, becauſe void for the other point; and for the coppice it ſeems leſs profit in this caſe, tho' perhaps rent is not reſervable out of them, and the power is, that *the ſame rent* or profits ſhall be reſerved. 5. If the *bailiff demiſe a farm*, and *reſerve part to himſelf*, and raiſe the *whole rent* to the lord *of the reſidue* of the land, this is not in rent or profit to the lord formerly reſerved. Clayt. 99. Aug. 23. 1641. Campian v. Thorp.

2. Power to make leaſes for 21 years, rendring *rent* 10 l. per annum *payable at Michaelmas or twenty days after*; and he made a leaſe for 21 years, rendring 10 l. rent payable at Michaelmas, no judgment whether the power was well purſued. Allen 90. Mich. 24 Car. B. R. Ludlow v. Beckwith.

3. One by virtue of a power makes a leaſe, and *reſerves two parts in three of the improved value as a rent*, without mentioning any ſum certain, ſo as the rent is uncertain, and lies only in averment, which if aver'd by the plaintiff at law and diſproved, he would be nonſuited in any action. The Court declared it a good leaſe, and decreed that the ſum paid, viz. 190 l. per ann. (if no greater value be proved) ſhould be the ſtinted ſum, tho' the premiſſes ſhould riſe or fall in value. 2 Ch. R. 156. 31 Car. 2. Audley v. Audley.

4. In ejectment the Caſe was; Sir John Forteſcue ſeiſed in fee, by *leaſe and releaſe* ſettles the lands in queſtion to the uſe of *himſelf for life*, and then to *truſtees for 99 years, if A. B. ſo long lived, upon ſuch truſts* &c. as he ſhall direct; and after to the *firſt ſon of*

J. F.

J. F. &c. with power *to make leaſes with fine or without fine*, and *rendring ſuch rents* and ſervices as *he ſhall think fit*; after this he *by another deed declares the truſts of the term*, and after this he makes a *leaſe without rendring rent* to Talbot, who was the leſſor of the plaintiff. It was objected that here * *no rent was reſerved* upon the leaſe, and ſome rent ought to be reſerved; and there not being any, his power is not well executed: non allocatur; for it being to reſerve ſuch rent *as he ſhall think fit*, and he having thought fit to reſerve no rent, this ſhall not avoid the execution of the power, and eſpecially he *not* having ſaid *ſuch yearly rent*; ſo that a pepper-corn reſerved payable 40 years after had been ſufficient; and therefore ſuch matter ſhould not be regarded as a cauſe ſufficient to avoid the leaſe, where he had made it ſubject to a truſt to pay the rents, iſſues and profits to ſuch perſons as he ſhall direct; and ſo the Court ruled and directed the jury to find for the plaintiff. Skin. 427. Paſch. 6 W. & M. B. R. Talbot and Tipper.

5. Power to *make leaſes* of ſeveral manors, *reſerving the antient* and accuſtomable *rent*, or more: he *compriſes them all in one leaſe*, and expreſſes the *reſervation in the very words of the power*. It was decreed not well purſued, per Lord Chanc. Cowper and Lord Trevor, Holt Ch. J. contra. 3 Ch. R. 102. Orby v. Lord Mohun.

2 Vern. R. 531, 542 Paſch. 1706. S. C.—— 9 Mod. 14. S. C. cited ——S. C. Chan. Prec. 257. Trin. 1706.——S. C. cited by the Maſter of the Rolls. Hill. 1731, and ſaid that it was afterwards affirmed in the Houſe of Lords. 2 Wms's Rep. 509.——S. C. cited Arg. 10 Mod. 473. ſays, that tho' this was ſuch a defect as this Court by ſending it to a Maſter might have ſupplied, yet it would not interpoſe, becauſe to the prejudice of a third perſon, viz. the remainder-man.—— 2 Freem. Rep. 203. S. C. and that the execution of a power ought not to be in the words of creating the power; for ſuppoſe the power had directed the leaſes to be made (under the ſame covenants), ſure it would not have been good to make a leaſe generally ſaying (under the ſame covenants), without inſerting any covenant; or ſuppoſe the ſame had been upon an alternative, reſerving one or the other of two things, it could not have been a good execution of it to have reſerved it ſo in the leaſe; but it muſt have been reduced to one of them.

(A. 5) Where the Power is purſued, in reſpect of the *Thing leaſed*.

See (A) pl. 5, 11, 12, 13, 14.

1. SEttlement of a *manor* with power to demiſe the premiſſes, ſo as ſuch demiſe be not of the *demeſne lands*. *Copyholds* are within the exception. And if there were nothing elſe for the power to work upon in this caſe, he may by virtue thereof demiſe the *rents* and *ſervices*. 2 Salk. 538. Mich. 9 W. 3. Winter v. Lovedore.

Carth. 428. S. C.—— 5 Mod. 244. S. C.—— 252. per Holt Ch. J. S. C.

See (A) pl. 10.

(A. 6) To make Leaſes. Well purſued or executed; In reſpect of the *Eſtate of the Perſon doing it.*

1. A *Deviſed to B. in tail*, the reverſion *to C. in fee, upon condition that B. grant a rent-charge to D. in fee;* and adjudged that this is a good rent-charge, and ſhall bind him in the remainder after the tail determined. Noy 80. in the Caſe of DANIEL v. UPTON, cites 10 H. 7. 20.

Dal. 42. pl. 82. S. C.

2. A ſtatute was made 2 & 3 P. & M cap. 4. by which an *authority* was given to Cardinal Pool *to diſpoſe, order, imploy, and convert* the *benefices appropriated to the increaſe and augmentation of the livings of the incumbents* there. The Cardinal made a leaſe for term of years of a parſonage appropriate. And it was held, that this leaſe was void; for he *had no authority but to the intent ſpecified* in the ſame ſtatute; for he had not the fee ſimple given to him by any words in the ſame ſtatute, and yet the fee ſimple was out of the perſon of the Queen by the ſame ſtatute; for ſhe thereby renounced all her intereſt and right in
[474] them. And for ſo much Dyer ſaid, that the fee ſimple was in abeyance. But Weſton ſaid, that he had always taken it that the fee ſimple was in the Queen. Mo. 42. pl. 129. Trin. 4 Eliz. Cardinal Pool's Caſe.

3. Huſband and wife ſeiſed of lands in right of his wife, *levied a fine* to the uſe of themſelves for their lives, and after to the uſe of the heirs of the wife, *proviſo* that it ſhall and may be lawful to and for the huſband and wife at any time during their lives *to make leaſes for* 21 *years, or three lives.* The wife being covert, made a leaſe for 21 years; adjudged a good leaſe againſt the huſband, tho' made when ſhe was a feme covert, and by her alone, by reaſon of the proviſo. Godb. 327 pl. 419.

4. A fine was to the uſe *of A. for life*, the remainder *to his executors adminiſtrators and aſſigns for* 80 *years*, with *power to him and his aſſigns to leaſe in poſſeſſion or reverſion for* 21 *years*, determinable upon three lives, reſerving the ancient rent. *A. deviſed the term of* 80 *years to B.* and died. A.'s executors aſſented, *and then B. died, and it came to B.'s executors, who aſſigned it to W. R.* and *W. R. made a leaſe.* The Court was of opinion, that W. R. tho' aſſignee after ſo many removes, might execute this power, and that aſſignees might include aſſignees in law, as well as fact. But however, that A. deviſing this term to B. the ſaid B. was aſſignee, and the power in the greateſt ſtrictneſs of acceptation was in him, and conſequently muſt go to his executors, and by the ſame reaſon to their aſſignee. Vent. 338, 339. How v. Whitfield.

(A. 7)

(A. 7) *Where* the Power is *exceeded. How it ſhall be*; Where it is to Leaſe or Charge.

1. WHERE a man has a warrant to do a thing, and he *does it and more*, ſo as *he exceeds* his warrant, yet it is good for that part for which it is warranted, and void for the reſt; as if a man makes a warrant of attorney to make livery and ſeiſin of the manor of Dale, and he makes livery of the manors of Dale and Sale, it is good for the manor of Dale, and void for the manor of Sale; per Dyer J. 3 Le. 29. Mich. 15. Eliz. C. B. in Sir Peter Philpot's Caſe.

S. P. 1 Lev. 151. Mich. 16 Car. 2. Arg. in Caſe of Jenkings v. Keymis. —*So* if a power be *to charge land with* 1000*l.* for children's portions, and *he charges it with* 8000*l.* it is good as to the 7000*l.* G. Equ. R. 168. Paſch. 8 Geo. 1. cites Parker v. Parker.

2. A. has power to make a leaſe *for ten years*, and he *makes a leaſe for* 20, the leaſe ſhall be good for the ten years; ſaid to be ſo ſettled ſeveral times in this Court. 3 Ch. R. 11. 26 June 15 Car. 2. Parry v. Brown.

Nelſ. Ch. R. 87 Parry v. Bowen. —— Chan. Caſes 23 S. C. Trin. 15 Car. 2. by name of Pawcy v. Bowen.—*So* if a power is given to A. to leaſe for 21 years, and he leaſes for 21 *years, and limits a further intereſt* by the ſame deed, thus, viz. *and from and after* the term aforeſaid for one year more; the power is well executed by the firſt limitation, and the exceſs is ſurpluſage not to be regarded. But per Cur. there is a difference where the *limitations*, tho' ſeveral, *make but one eſtate*, and where *ſeveral eſtates*. Gibb. 157. Mich. 4 Geo. 2. C. B. in Caſe of Peters v. Maſham.

3. A ſettlement is directed to be made on A. with a power *to make a jointure of a moiety*. But *before the conveyance made by the truſtees to A. he made a jointure of more than a moiety*. Upon this matter being mov'd to the Court, Ld. Ch. Parker ſaid, that here neither is nor can be any jointure; for A. has no legal eſtate, and ſo can paſs none, and therefore could take no notice of this *equitable appointment*, nor can it properly come in queſtion at this time, not being to take effect till after A.'s death, and perhaps never will, as he may ſurvive his wife. Wms's Rep. 604. Hill. 1719. Blackborn v. Edgley.

(A. 8) Where it is *well executed.* [475]

1. GRANT of *authority to make eſtates of his lands*; by thoſe general words, he may make leaſes for years, or life, or gifts in tail, feoffments or other eſtates whatſoever. Arg. 4 Le. 66. Paſch. 24 Eliz. Counteſs of Suſſex v. Wroth.

2. He that has reſerved power upon a feoffment of uſes *to make leaſes* may execute his power in *words limiting the uſe without words of demiſe* of the land. As if he ſays, I limit the uſe for 21 years or three lives to ſuch perſons, this is good eſtate within the power; becauſe the proper operation of the power is to limit the uſe, and not to give the eſtate of the land, but this comes after by the ſtatute of 27 H. 8. Arg. Mo. 514. Mich. 37 & 38 Eliz. in Ld. Buckhurſt's Caſe.

Where *tenant for life* has power to make leaſes, it is not always neceſſary to *recite his power* when he makes a leaſe.

3. *Tenant in tail with power reſerved to leaſe* for life or years, makes a leaſe for life to J. S. and dies without iſſue. The leaſe was generally made without declaring whether he made it by virtue of his *intereſt as tenant in tail*, or by virtue *of his power reſerved*; whether it be good or not dubitatur? Mo. 645. Paſch. 44 Eliz. Bibel v. Dringhouſe.

But if he makes a leaſe which will not have an effectual continuance, if it be *directed out of his intereſt*, there it ſhall be as if made by virtue of his power; per Hale. Vent. 208. Mich. 24 Car. 2. B. R. ſaid it was ſo reſolved in one Rogers's Caſe.

S. P. per Hale Ch. J. and ſays, it was ſo adjudged for lands in Blandford Forum. Vent. 291. cites Roger's Caſe.

4. If *tenant for life* be *with power to make a leaſe for life*, this power is well executed by deed *without livery*, and better than with it; for per Twiſden J. if livery had been made, it has been held that it ſhould be a forfeiture; but Hale Ch. J. denied that; for by the ſealing of the deed the power is executed, and the livery void. 2 Lev. 149. Mich. 27 Car. 2. B. R. in Caſe of Wigſon v. Garret.

—— The reaſon of its being a forfeiture is, becauſe the proviſo for making leaſes extends only to a declaration of uſe for three lives or 21 years, and therefore when he deals with the poſſeſſion by livery, he exceeds the power and forfeits his own eſtate. Arg. Mo. 414. Mich. 37 & 38 Eliz. in Ld Buckhurst's Caſe ſays it has been ſo held. —— Hale ſaid, he conceiv'd it no forfeiture; becauſe the leaſe takes effect by the deed, and ſo the livery comes too late. Vent. 291. in the Earl of Leiceſter's Caſe.

(A. 9) *Determined, or extinguiſhed.*

1. A. Leaſes for life to B. and afterwards levies a fine to the uſe of R. for life, the remainder to A. in fee, with a proviſo or power to make leaſes for 21 years, or three lives, and that the conuſees ſhould ſtand ſeiſed to ſuch uſes. And afterwards A. *covenants to ſtand ſeiſed to the uſe of P.* in tail, with divers remainders over. And after A. grants the reverſion aforeſaid to L. for life, who diſtrains C. and avows, and judgment was given againſt the avowant; becauſe *by the covenant* to L. A. had deſtroyed his power to make leaſes &c. Noy. 66. Cooke v. Bromehill.

2. In ejectment the caſe was, Sir John Forteſcue ſeiſed in fee, by *leaſe and releaſe* ſettles the lands in queſtion to the uſe of *himſelf for life*, and then to *truſtees for 99 years if A. B. ſhall ſo long live, upon ſuch truſts* &c. *as he ſhall direct*, and after to the *firſt ſon of J. F.* &c. with *power to make leaſes with fine or without fine*, and *rendering ſuch rents* and ſervices *as he ſhall think*
[476] *fit*; after this he *by another deed declares the truſts of the term*, and after this he makes a leaſe *without rendering rent* to Talbot, who is the leſſor of the plaintiff. To this, objection was taken, for that he having declared *the truſts of the term for payment of his debts*, the eſtate is bound by it, and he may not execute his power to make leaſes after: non allocatur; for the term was originally ſubject to the power, being contained in the ſame deed, and he having executed his power, the leaſes are

precedent

precedent to the term, and controul it. Skin. 427. Paſch. 6 W. & M. B. R. Talbot v. Tipper.

(A. 10) To make leaſes. *Decreed, tho' not ſtrictly purſued.*

1. M. In purſuance of a power reſerved to her by a marriage ſettlement to make leaſes for three lives or 21 years of any part of her eſtate, in conſideration of her owing ſeveral debts, and particularly 200l. which J. S. was bound for, demiſed to the ſaid J. S. his executors &c. for 21 years, to commence from and after the 25 March then next enſuing, for ſaving harmleſs the ſaid J. S. his heirs &c. from the ſaid bond. It was inſiſted, that the *power reſerved to* her was only to *make* a leaſe or *leaſes in poſſeſſion*, and *the leaſe made to J. S. was to commence from a time to come*, ſo that the ſame was void in law. The Court was aſſiſted with the Judges, and it appearing that the debt now in queſtion was taken up and employed for the uſe of the defendant, who created the truſt for the payment of her debts, and ſhe by virtue of the power reſerved to her before marriage received the profits of the premiſſes, and altho' the leaſe granted to J. S. may not in ſtrictneſs of law be a good leaſe, yet this Court was ſatisfied that the ſame doth amount to a good declaration of her power in equity to make a leaſe for 21 years in being. 1 Chan. R. 185, 186. 12 Car. 2. Pollard v. Lady Greenvill.

Chan. Caſes 10. Hill. 13 & 14 Car. 2. . C.— But where it is raiſed by a *voluntary conveyance*, it is without help in equity. Per opinionem Cur. but ordered to ſearch precedents, and thereupon a precedent was produc'd for the plaintiff, viz. 6 July, 40 Eliz. * PRICE AND UX v. GREEN. The father being ſeiſed in fee, ſettled the lands by a covenant to ſtand ſeiſed to the uſe of himſelf, remainder to his eldeſt ſon in tail, reſerving a power to himſelf to make leaſes of part of it for 10 years, who accordingly made a leaſe for the benefit of a younger child, which came by aſſignment to the plaintiff, and which the eldeſt ſon would have avoided, becauſe the power was not well raiſed by a covenant to ſtand ſeiſed. But it appearing to the Court, that the eldeſt ſon was greatly advanced by the father, and that the conveyance, which was by covenant to ſtand ſeiſed, was intended to be by livery; and being adviſed that it would be as well by covenant to ſtand ſeiſed, the Court did decree, that the plaintiff ſhould hold till the defendant evicted him by law; and did decree likewiſe, that the defendant ſhould admit the power to make the leaſe good in law, if he did not prove an entail paramount that ſettlement. Nelſ. Chan. Rep. 115, 116. 19 Car. 2 Miller v. Kendrick and Vylett. — Chan. Caſes 19. S. C. by name of Wilmer and Ux v. Kendrick and Vylett. —— Ibid. 161. * S. C. cited by name of Prince & Ux v. Green. — [But it does not appear in either of thoſe books what the Court decreed in the Caſe of Miller v. Kendrick.]

2. A man made a *voluntary ſettlement* on his ſon for life, and after to his firſt and other ſons in tail, with power for the ſon *to make a leaſe in poſſeſſion for 99 years, determinable on three lives, and alſo* to make leaſes *for 60 years to commence after his death, if he had iſſue male, to continue ſo long as he had iſſue male*; the *ſon makes a leaſe to his father in truſt for one of his younger children*: but the leaſe was *not purſuant to the power*; yet it was decreed good, and *taken to be as a leaſe made by the father* after a voluntary ſettlement. Abr. Equ. Caſes 342. Mich. 1698. Gooding v. Gooding.

(A. 11) *Defective Powers ſupplied* in Equity.

1. BEcauſe a *fine* was *not levied according to covenant*, a power became void to make leaſes; but decreed in May 13 Car. Toth. 166. Scambler v. . . . . .

2. If the *limiter's power* by the limitation be *defective*, *his intereſt ought to come in aid*, and ſupply it to make good ſuch limitation as he ſhall make after. Chan. Caſes 8, 9. Hill. 13 & 14 Car. 2. Goring v. Bickerſtaff.

3. A. grants a term in truſt to raiſe 1000l. Afterwards A. grants a 2d term in truſt to raiſe 1000l. more. The 2d term happens to be void. The truſt of the 2d term ſhall be *tranſlated on the firſt term* on which the grantor had power to charge it, ſubject to the payment of the other 1000l. firſt. Chan. Caſes 290. Mich. 28 Car. 2. Biſco v. the E. of Banbury.

(A. 12) What is a good Power *to charge Land.*

1. A Good execution will not profit where the *conſtitution* is *defective*; as A. reſerv'd a power to himſelf *to limit uſes to any body*. This limitation in general being utterly void, he could not limit any uſe to his daughter. Hob. 151. cites 1 Rep. 175. Mildmay's Caſe.

2. Deviſe *to A. for life*, and then *to be at her diſpoſal* to any of the children. This is a *collateral* power and ariſes after the eſtate, and has its effect on another intereſt, ſo that the eſtate for life is perfect without it, and not altered or affected by the execution of it; and it is not a *power appendant* or appurtenant or in the nature of an emolument to an eſtate, like a leaſe for life, with a power to make a leaſe for 21 years; for that affects the eſtate for life, and is concurrent with it, and has its being and continuance at leaſt for ſome part out of it. 1 Salk. 240. Paſch. 10 Ann. B. R. Thomlinſon v. Dighton.

(A. 13) *Extent* of Power to charge Land.

1. WHERE the teſtator gives a power to *ſell lands*, he may ſell his *inheritance*; becauſe he gives the ſame power he had himſelf, and in ſuch caſe the purchaſor ſhall be intitled by the will. 3 Salk. 277. pl. 7.

Lev. 151. Jenkins v. Keymis.

2. Power to charge lands with a ſum of money *imports intereſt alſo* for the ſum. 2 Salk. 538. In Canc. 12 Ann. Kilmurry v. Geery.

See (A).

3. A *general* power to raiſe daughters portions *reſtrained by a particular proviſo*. MS. Tab. tit. Power, February 16th, 1718. Fane v. Duke Devonſhire.

4. Whatever powers are *reſerved by the donor* (being part of the old dominion he had over his own eſtate) ought to receive a large

a large and *benign interpretation.* Arg. admitted. 10 Mod. 475. Paſch. 8 Geo. in Caſe of Coventry v. Coventry.

*(A. 14) Where it is *well executed as to the manner.*

See (A. 18) pl. 2.

1. REgularly it is true, that where a man *doth leſs than the authority* or commandment made to him the act is void. Co. Litt. 258. a. 2 Lev. 60. Trin 24 Car. 2. B. R. in Caſe of King v. Melling ——*But* where he *does that* which he is authoriſed to do *and more*, it is good for what is warranted, and void for the reſt; yet both theſe rules have diverſe exceptions and limitations. Co. Litt. 2 8. a. —— 2 Lev. 60.

2. In caſe of land ſettled with *proviſo to limit any part for payment of debts* and legacies, preferment of ſervants, *or other reaſonable conſideration* as to him ſhall ſeem good; in ſuch caſe a *demiſe for* 1000 *years* is not good, or a grant to a ſervant of 100l. per ann.; but a grant of 10l. per annum is good for his life, becauſe it is reaſonable, and not inconſiſtent with the advancement of his blood, according to the intent of the indenture. Cro. E. 34. Mich. 26 & 27 Eliz. B. R. Mildmay v. Standiſh.

3. Feoffment *to the uſe of his laſt will*; declaration *by deed* in writing that the feoffees ſhall ſtand ſeiſed ſo and ſo is not ſufficient. Mo. 515, 516. Mich. 37 & 38 Eliz. cites Ld. Audley's Caſe.

4. Lands were deviſed to A. for life, remainder *to B. for life*, remainder to C. in fee, *with power to B. to make his wife a jointure.* Afterwards *B. covenanted to ſtand ſeiſed for the jointure of his wife, reciting his power.* Tho' this could not make a legal jointure, yet it was reſolved to enure by virtue of his power. Quando non valet quod ago ut ago, valeat quantum valere poteſt; per Hale Ch. J. Vent. 228. in Caſe of King v. Melling.——cites Mich. 1651. B. R. Stapleton's Caſe. Raym. 239. Hale Ch. J. cites it as Dame Haſting's Caſe ——S. C. cited Arg. Wms's Rep. 166, 167.—S. C. cited Skin. 7[illegible]. ——

So where the conveyance was made by tenant for life with ſuch power *by leaſe and releaſe*; Holt Ch. J. held at an aſſiſe that it was a good execution of the power. Arg. 10 Mod. 24. cites it as the Caſe of Gier and Offiter. —— The words of the power were, that he might *appoint and ſettle a jointure*; and Holt Ch J. held it a good jointure, and the rather becauſe the word *ſettle* is a general word as to the manner of making the jointure. Wms's Rep. 165, 166. Arg. cites it as in 1700. Dyer v. Awſiter.

5. Power to charge lands with 2000l. a conveyance by *leaſe and releaſe* to A. and his heirs *upon condition to be void upon payment of* 160*l. (as intereſt)* at the end of the firſt year, and 160l. per ann. for 9 years afterwards, with the 2000l *or of* 2000*l. and intereſt at the end of any year* after the firſt year, was adjudged no good execution of the power. 1 Lev. 150. Mich. 16 Car. 2. B. R. in Scaccario. Jenkins v. Keymis. Hale ſaid, The power might have been better executed *by grant of the debt, till* [illegible]ol. be levied of the profits; or by *declaration of uſe till* 2000l. be rendered; or *by deed charging the land with* payment of 2000l. but doubts it cannot be good by feoffment, or leaſe and releaſe of the inheritance, till 2000l. and intereſt be paid. 1 Lev. 151. Jenkins v. Keymis.—— Ch. Caſes 10[illegible]. Paſch. 2[illegible] Car. 2. S. C. —— Ch. Rep. 275. S. C.—— S. C. cited by the Maſter of the Rolls. Hill. 17[illegible]. and that Ld. K. Bridgman

Bridgman held it to be only a common mortgage, and not binding on the iſſue, and ſo the money was loſt: and his Honour inferr'd, that hence it appears that Courts of Equity are not free in extending powers given to tenant for life to bind a remainder-man. 2 Wms's Rep. 599. in Caſe of Evelyn v. Evelyn.

She may give it by will in exemplification per Crew Ch. J. Lat. 139. Daniel v. Upley.

6. *Deviſe* to his wife for life, and power to diſpoſe of the lands *to ſuch of the children as ſhe ſhall think fit*. She diſpoſes of it thus, I diſpoſe (reciting firſt the clauſe in the will) the ſame in manner following, i. e. I diſpoſe it after my deceaſe to my ſon P. and his heirs for ever. Adjudged by 3 J. contra to Vaughan Ch. J. that P. took a fee. Mod. 189. Mich. 26 Car. 2. C. B. Liefe v. Saltingſtone.

[479] 7. A power to *charge lands for portions* of younger children may be executed *in part, and extinct in part*, and ſtand good for the reſt. But a purchaſor ſhall defend himſelf in ſuch caſe, tho' not executed according to the circumſtances, but with this difference, that if he has notice he purchaſeth at his own peril; per Finch K. Quære if he meant notice of the original conveyance only, or of the ill executed eſtate. Ch. Caſes 264. Mich. 27 Car. 2. in Caſe of Smith v. Aſhton.

1 Rep. 173. b. Diggs's Caſe — So where an eſtate was deviſed to A. for life, *with power to make a jointure of 100l. a year for every 1000l. which any wife ſhould bring as a marriage portion, and ſo for more &c. but not to exceed.* A. married M. with whom he received 800l. and ſettled 800l. a year; and afterwards he received 1500l. more, and made a further ſettlement of 150l a year. 2 Wms's Rep. 648. Mich. 1731. Holt v. Holt.

8. A power of *appointing a fee* may be executed at *ſeveral times*, viz. at one time to paſs an eſtate for life, and the fee at another. Vern. 85. Mich. 1682. Bovey v. Smith.

9. A. having 4 children, viz. 2 ſons and 2 daughters, ſettles his eſtate on truſtees, to the uſe of himſelf for life, remainder to his wife for life, and after their deceaſe *to the uſe and uſes of ſuch child and children, and in ſuch ſhares and proportions as he ſhould appoint by any writing* to be by him *ſigned in the preſence of* 2 *witneſſes*, and in default of ſuch appointment to his eldeſt ſon in tail. He by his will, by him ſigned, and atteſted by ſeveral witneſſes, *deviſes a rent-charge* out of thoſe lands to his youngeſt ſon for life, and to the firſt and other ſons of his body ſucceſſively in tail; and further wills, that in caſe his ſaid ſon die without iſſue male, ſo as the eſtate ſhould come to his eldeſt ſon, then he to pay 500l. a-piece to his daughters. The ſon dies without iſſue, the bill was brought by the daughters to have their 500l. a-piece according to the will. The defendant, who was the eldeſt ſon, by way of plea ſet forth the deed of ſettlement and power, prout, and inſiſted that the power was not well purſued nor executed by the will, (to wit) that the teſtator might have diſtributed the land amongſt his younger children in what proportions he thought fit, but had not power to grant or deviſe a rent-charge, or ſums of money, as he had taken upon him by his will to do. But the Court diſallowed the plea, and ordered the defendant to anſwer the bill. 2 Vern. 80. Trin. 1688. Thwaytes v. Dye.

10. Deviſe

10. Deviſe *to the wife for life*, and *then to be at her diſpoſal to ſome one of his the teſtator's children.* He left a ſon and a daughter; the wife married again, and ſhe [and her huſband] *by leaſe, releaſe and fine, covenanted to ſtand ſeiſed to* the uſe of *herſelf for life, without impeachment of waſt*, remainder *to the daughter in tail*, [remainder *to the ſon and his heirs*]. The power was held to be well executed. And the words (without impeachment of waſt) is void and *ſurpluſage*, becauſe it exceeds the power. 10 Mod. 31. 71. Trin. and Mich. 10 Ann. B. R. Thomlinſon v. Dighton.

1 Salk. 239. Paſch. 10 Annæ B. R. S. C. ſtated as in the addition. —— Wms's Rep. 149, to 171. Trin. 1711. S. C. ſtated as in Salk. & only Salk. ſeems to be miſprinted in the word (her) for (his) children; and the conveyance by leaſe and releaſe was held to be an effectual, though an improper execution of the power, and ſo a judgment in C. B. was affirmed.

11. A. had a power *to raiſe* 7000*l.* *for* younger children *by deed or will executed in the preſence of* 3 *witneſſes*; afterwards, by *will executed in the preſence of two* witneſſes, he *charged the premiſſes with* 8000*l.* for his younger children, and it was decreed good for the 7000l. G. Equ. R. 168. cites 13 June 1714. Parker v. Parker.

[But quære if a third perſon was not preſent, though he did not ſubſcribe as a witneſs; for I think I remember ſuch circumſtance mentioned ſomewhere.]—M. a feme before marriage, with conſent of her after baron, conveyed her eſtate to truſtees to ſuch uſes, and *for ſuch eſtates as ſhe ſhould by deed or will, or by any writing in nature of a will appoint.* Ld. C. Macclesfield much doubted if a will not duly executed purſuant to the ſtatute of frauds, but by two witneſſes only, would be a good appointment; becauſe in ſuch caſe being by will, *it muſt be intended* ſuch *a will* as is *proper for the diſpoſition of land*, and conſequently ſhould be ſubſcribed by three witneſſes, in preſence of teſtatrix; for this is within all the inconveniences intended to be prevented by the ſtatute of frauds, and the other words (in the nature of a will) mean the ſame as a will. Wms's Rep. 740. Mich. 1721. Longford v. Eyre.

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12. A. tenant for life, remainder in tail to B. eldeſt ſon of A. join'd in a ſettlement on B.'s marriage [* without ſuffering any common recovery. See Barn. Chan. Rep. 110.], by which *part of the lands were to be to the uſe of A. for life, and the other part to B. remainder in the whole to the firſt and every other ſon of B. in tail. Provided always, that if M. the wife of A. ſhould die, and A. marry any other wife*, then, and ſo often, *A. may ſettle ſo much of the ſaid premiſſes as ſhall be of the yearly value of* 600*l.* *for a jointure and proviſion of ſuch wife during her natural life.* M. died. A. intermarried with J. and previous to the marriage, in conſideration thereof, and of 2000l. portion, *conveyed to truſtees and their heirs all the lands in the firſt deed, to hold during the life of J. upon truſt, out of the rents and profits to raiſe* 100*l.* *a year for the ſeparate uſe of J. during the coverture, and after A.'s deceaſe to raiſe* 300*l.* *a-year for J. during her life for a jointure.* † *And* † *upon this further truſt, to permit the owner of the premiſſes to receive the reſidue of the profits.* After the marriage *A. made a third deed of the ſame premiſſes, and to the ſame truſtees in like manner during the life of J. to ſecure her another annuity of* 300*l.* *a-year.* Afterwards *A. made a fourth deed reciting the three former deeds, whereby the premiſſes were limited in truſt to raiſe* 100*l.* *a year for the ſeparate uſe of J. during the coverture, and an annuity of* 600*l.* *a year after A.'s deceaſe for her life, by way of jointure; and declared,*

*(A. 17).

†(A. 16).

declared, that the above recited indenture was made to ſecure the ſaid 100*l. a year during the coverture for her ſeparate maintenance, and after A.'s deceaſe to ſecure her a ſum not exceeding* 600*l. a year according to the power reſerved to A. by the deed of* 1715 [viz. the firſt deed]. A. died. J. ſurvived. Ld. Chancellor was of opinion, that the execution of the power by the firſt deed was void both in law and equity. The power was to ſettle (ſo much of the land as ſhould be of the value of 600l. a year); but by that deed lands of 900l a year were ſettled; ſo it was (to ſettle lands by way of jointure and proviſion for any ſuch after taken wife, whereas this is not a jointure, but a conveyance to truſtees in truſt for raiſing an annuity; and to make this a jointure in point of law, the lands ſhould be to the wife herſelf. And as to the annuity to be raiſed thereby of 300l. a year, nothing of this is mentioned in the power. And this was ſo far void in equity that the wife could not have the ſpecifick thing granted by the deed; but he ſaid he did not mean that in caſe ſhe ſhould be unprovided for, this Court would not ‡ ſupply the defect of this conveyance; under the firſt deed B. was to have a clear eſtate in the premiſſes over and above the 600l. a year, whereas by the ſecond deed an annuity is charged upon the whole eſtate. Neither J. nor her friends ſtipulated for an annuity of 300l. a year, and unleſs the wife would otherwiſe be unprovided for, this deed could by no means be made good. But that there are many caſes where wives and younger children having other proviſion, but not ſufficiently provided for, this Court will aſſiſt them; that it appears by the declaratory clauſe that it was A.'s intention to reduce thoſe incorrect deeds which had before been made to ſome kind of conſiſtency; that this was a clauſe which the Court might well lay hold of; and decreed, that it be referr'd to the *Maſter to ſet out ſo much of the lands in the firſt ſettlement as ſhould be ſufficient to make a jointure of lands of* 600*l. a year.* Barn. Chan. Rep. 103. Paſch. 1740. Harvey v. Harvey.—— The decree was affirmed upon a rehearing. Ibid. 109. S. C.

‡ (A. 17).

[481] (A. 15) To charge &c. Land &c. Well Executed; In reſpect of the *Perſon doing it. Feme Covert &c.*

Br. Coverture, pl. 42. cites S. C.—Br. Condition, pl. 117. cites S. C.

1. IN *aſſiſe*; a *feme ſole* ſeiſed in fee *enfeoff'd A. and B.* in fee, *upon condition to reinfeoff the feme when ſhe required it*; afterwards ſhe marries J. S. and after ſhe required them to make a re-feoffment to J. S. and *A. refuſed, but B. makes feoffment to the baron and feme of the whole*, and A. is ouſted, and they brought aſſiſe and recovered; for, for the one moiety *the feoffment of B. is good* as it ſeems there, and *for the other* moiety *the entry is good for the condition broken*, and ſo the requeſt of the feme covert is good. Br. Feoffment de Terre, pl. 31. cites 35 Aſſ. p. 11.

2. Where a man makes a *feme covert or a monk profeſſed his executor, and deviſes the reverſion of land to be ſold by them*, they cannot make a deed; and yet their ſale is good without deed without any attornment; nor can they levy a fine; the reaſon ſeems to be inaſmuch as *when the ſale is made it paſſes by the teſtament and not by the ſale*; but he, in whom it is veſted by the ſale, cannot grant it over without deed and attornment. So note a diverſity. Br. Deviſe, pl. 12. cites 19 H. 6. 23.

And Brook ſays the law ſeems to be *the ſame of an infant executor* as of a feme covert; and it ſeems that Newton delivered the reſolution of the Court; for this matter was alleged in arreſt of judgment, and yet the plaintiff recovered. Ibid.

3. The Lady Antrim, mother of the defendant, being a *feme ſole*, and ſeiſed of a reverſion after one life, ſettles the lands to the uſe of herſelf *for life, remainder in tail, with power for her, being ſole, to make leaſes for* 3 *lives in poſſeſſion*. The *feme marries*, and then *ſhe and her huſband make leaſes for* 21 *years* (in the life of tenant for life) to commence from the date, for payment of debts &c. as was alleged. Per Bridgman, the power is not purſued; for by the marriage ſhe has put herſelf in the power of her huſband, and it is the *deed of her huſband and not hers*. And he took a diverſity between a naked power and a power which flows from an intereſt; for when a bare power is given to a feme by will to ſell lands, although ſhe marry ſhe may ſell, and may ſell the lands to her huſband, becauſe it was not created by herſelf out of any intereſt of her own. But where a feme upon a ſettlement of her own eſtate, reſerves a power which flows from an intereſt, that power ought to be executed by the feme ſole; and if by baron and feme, it is not good. And yet, he ſaid, ſuch power ought to be taken liberally, tho' formerly they were taken ſtrictly. Ch. Caſes 17, 18. Hill. 14 & 15 Car. 2. The Lord Marquis of Antrim v. the Duke of Buckingham.

4. *Settlement* was made *by infant, with conſent of truſtees, and confirmed by act of parliament*, by which a *power* was reſerved *of charging* thoſe lands *at any time during his life with* 3000l. He borrowed 3000l. of J. S. and having *executed his power while an infant, he died ſoon after he came of age*. His heir brought a bill to redeem on payment of the principal borrowed; but the Court decreed a redemption on the common terms of payment of principal, intereſt and coſts, becauſe here was a power given him to raiſe money and immediately to give ſecurity, which was actually done. And tho' perhaps had he been of age at the time he ſhould have been obliged to *keep down the intereſt during his life*, yet being an infant at the time intended for executing this power, and ſo not capable of making his perſon liable to any part of the engagement, the land muſt, from the neceſſity of the thing, have ſtood engaged for intereſt as well as principal, or he could not during infancy have raiſed any money at all, which the nature of the tranſactions required. Per the Maſter of the Rolls. Hill. 1731. 2 Wms's Rep. 603. cites

cites 2 Salk. 538. Killmurry v. Dr. Gery.——But 2 Salk. 538. has no ſtate of the Caſe, and reports it, Paſch. 12 Annæ.

2 Vern. 723. S. C. by name of Hutton v. Simpſon.

5. A. *by will gives* his perſonal eſtate *to ſuch uſes as his wife ſhall direct with conſent of his truſtees*; a diſpoſition by his wife is not good. Chan. Prec. 452. Mich. 1716. Sympſon v. Hornſby.

See (A. 14) in pl. 12.—Portions (I) pl. 13.

(A. 16) *Suſpended*, determined *or extinguiſhed.*

1 Rep. 111. cites 15 H. 7. 1.

1. *Collateral* powers are not deſtroyed *by feoffment* &c. as power for executors or truſtees to ſell to J. S. and they enfeoff J. D. yet they may ſell to J. S. 2 Lev. 60. Arg cites 15 H. 7.

2. A *deed not purſuant* to the power of revocation is of no force to make an *interruption* of the power of revocation. Chan. R. 114. 13 Car. 1. Robſart v. Turton.

Lev. 105. S. C.

3. Power to charge lands with 2000 l. is not deſtroyed by a *mortgage by leaſe and releaſe*, but otherwiſe had it been by *fine or feoffment*. Ch. Caſes 105. Paſch. 20 Car. 2. Jenkins v. Kemis.

2 Lev. 61. S. C.

4. A. is tenant in tail with power *to make jointure*; he *ſuffers a recovery*. This is an extinguiſhment of the power. Vent. 226. Mich. 24 Car. 2. B. R. King v. Melling.

And there are *two ſorts of powers*; one *annexed to the eſtate*, as a power to make leaſes &c. which is deſtroyed by parting with the eſtate; another which may be termed *collateral to the eſtate*, as this power of charging it with money; and this laſt A. would have, tho' he had *ſurrendered the term of* 99 *years*; for ſtill he might have charged the premiſſes therewith, and ſo might he have done, tho' he had *aſſigned over the term*; per Ld. C. Macclesfield. Ibid. 778.

5. *A. by ſettlement was tenant for* 99 *years if he ſo long live*, remainder to truſtees during the life of A. remainder over, with a *power to charge* the lands with money. *A. and the truſtees and the remainder-man in tail, all join in a common recovery, and declare new uſes thereof*, viz. to the uſe *of A. for life, remainder over*. Ld. C. Macclesfield held, that this joining of A. without reſerving a power to charge the premiſſes with the ſaid money, has deſtroyed that power which A. had, and otherwiſe he might defeat his own grant. Hill. 1721. Wms's Rep. 777. Savil v. Blacket.

6. If a power reſerved over a legal eſtate is *executed defectively* at firſt, ſuch power *may be executed over again*, and the laſt execution ſhall ſtand, the firſt being a mere nullity. Per Ld. Chancellor. Barn. Chan. Rep. 111. Paſch. 1740. in Caſe of Harvey v. Harvey.

Ibid. 111. ſays that in the deed it was declared by A *that the proviſion thereby made for his wife, was to be in*

7. A had *power to ſettle ſo much as ſhould be of the yearly value of* 600 *l. a year (out of an eſtate of* 900 *l. a year*, the other 300 l. a year having been ſettled before by the ſame deed on B. his ſon). A. upon his marriage with M. *charged* the eſtate with 100 l. a year payable to M. during the coverture, and afterwards to raiſe 300 *l. a year for her jointure: and on this further truſt to permit the owner of the premiſſes to receive the reſidue.*

ſidue. It was urged, that this was allotting the profits over to another purpoſe, and that A. cannot undo what was done by that clauſe. But Ld. Chancellor contra, and that thoſe words are no more than what law and equity would have ſaid without them: that it is not ſaid that B. was to have any particular benefit from this, and he was to have no more benefit thence than any other remainder-man. Barn. Chan. Rep. 112. Paſch. 1740. Harvey v. Harvey.

recompence for her jointure, and in full bar of her dower, and that thence it was infer'd that that amounted to a releaſe by A. in

favour of B. that he would not make any other ſettlement of this eſtate in favour of his wife: But Ld. Chancellor ſaid, that thoſe words are only the common form inſerted in marriage ſettlements, and therefore from thoſe words there cannot be drawn any inference of that ſort.—Ibid. 112. He ſaid, that an objection had likewiſe been drawn to the ſame purpoſe from the whole eſtate of 900l. a year over which the power could be exerciſed, being veſted in truſtees, but that no inference of this kind could be drawn from that neither. [483]

(A. 17) *Defective Execution. Supplied in Equity.*

See (A. 14) in pl. 12.

1. A Jointure was decreed where the power was not purſu'd; yet *part only of the jointure depended on the queſtion.* Chan. Caſes 264. in Caſe of SMITH v. ASHTON, cites 17 June 8 Car. * Counteſs of Oxford's Caſe.

As where it was *miſtaken* or *mire-cited.* Toth. 229. cites Trin. 8 Car. Counteſs of Oxford v. Stanhope.——A power miſtaken was made good to the *leſſee.* Toth. 229. cites 20 June 16 Jac. Orrel v. Leeke.

* S. C. cited by Ld. Chancellor, who ſaid, he had indeed directed that decree to be ſearched for, but it could not be found. Barn. Chan. Rep. 113. in Caſe of Harvey v. Harvey.

2. A defective execution of a power raiſed by a *voluntary conveyance* is without help in equity. Chan. Caſes 160. Paſch. 22 Car. 2. Wilmer v. Kendrick.

Proviſion or no proviſion is fit to be regarded in voluntary

conveyances for the benefit of younger children &c. but never in conveyances founded on a *valuable conſideration.* Arg. 10 Mod. 467. Paſch. 8 Geo. in Caſe of Coventry v. Coventry.

3. A. by marriage ſettlement reſerves a *power by any writing under his hand and ſeal* to charge lands for payment of 500l. for daughters portions. He prepared *notes* in writing, which he declared ſhould be the effect of his laſt will, and *ſent* them *to counſel* to draw up his laſt will in form by; but before the blanks left by the council in his draught were filled up, and before any *execution* of it by A. he died. Decreed, for the daughters, tho' it was neither a deed, nor any truſtees named nor executed. Fin. R. 273. * Smith v. Aſhton.——S. C. cited per Ld. Rawlinſon. 2 Vern. 164.

* S. C. Chan. Caſes 263. Mich. 27 Car. 2. and ſays, The deed in which this power was, was a voluntary one, the conſideration was natural affection, and in

the execution of this power the circumſtance of a *ſeal was wanting*; yet this defect was aided; for *circumſtances are but cautions to prevent impoſitions*, the ſubſtantial part is to do the thing, and therefore when it is clear and indubitable that the thing was deſigned to be done, the neglect of circumſtances ſhall not avoid the act in equity; and the rather becauſe ſuch powers are not like conditions ſtrictly to be expounded, but favourably to be conſtrued for the benefit of children deviſees; and yet a purchaſor might defend himſelf againſt ſuch a power not well executed, eſpecially if he had no notice of it at the time of the purchaſe made.

But this was after an iſſue at law, whether ſuch notes in writing were part of the laſt will of Aſhton, and being found by the verdict to be his will, and in favour of younger children thus provided for, the Court decreed the power well executed. Ibid. 265.

S. C. cited Arg. 10 Mod. 467, 472, 477, 478.—S. P. 2 Vern. 164. Trin. 1690. in Caſe of Bradley v. Bradley.——S. P. 2 Chan. Rep. 71. in Caſe of a Purchaſor. 24 Car. 2. Thorn v. Newman.

Circumſtances in ſuch caſes are only put into ſuch powers, to the end that no fraud or fa[illegible]

ſhould be impoſed. 2 Chan. Caſes 30. Paſch. 32 Car. 2. in Caſe of Hele v. Hele.——Cites Earl of Oxford's Caſe.

4. Bill to ſupply a defective *execution of a power* to make leaſes &c. Defendant *pleaded a judgment on a ſpecial verdict* at law, that the leaſes were void, and that the Court of C. B. after ſeveral arguments at the bar thereupon delivered their opinion accordingly. The plea was allow'd and the bill diſmiſs'd with 5l. coſts. Fin. R. 275. Hill. 29 Car. 2. Temple v. Baltinglaſs.

S. C. cited Arg. 10 Mod. 479. Paſch. 8 Geo. 1. in Canc. in Caſe of Lady Coventry v. Ld Coventry.

5. A. was made *tenant for life* by marriage ſettlement of ſeveral manors and lands in Ireland, *with power to make a jointure not exceeding* 1000*l. a year*. Purſuant thereunto a *ſettlement was made*, and a particular of lands mentioned and ſet out for the jointure, and which in the particular given him were *computed at* 1000*l. a year, but in truth fell ſhort, and were not above* 600*l. a year*. It was inſiſted for the defendant, that he claimed under the marriage ſettlement as a purchaſor, and that A. had

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only a power to have charged with a 1000l. a year; and if he had not done it at all, but had died without executing this power, a Court of Equity could not have done it for him, and ſo have raiſed a jointure of 1000 l. a year upon the eſtate, tho' it had been reaſonable and juſt for him to have done it in his life-time. But the Court decreed the jointure to be made up 1000 l. a year againſt the iſſue in tail, who was not privy to the marriage treaty, nor guilty of any fraud. 2 Vern. 379. Trin. 1700. Lady Clifford v. E. of Burlington.

Abr. Equ. Caſes 222. pl. 9. Hill. 1701. S. C. but differing ſomewhat in the ſtate of it, yet decreed as here notwithſtanding A's being averſe (as there mentioned) to his ſon's marrying her, and having no intention his ſon ſhould provide for her, and notwithſtanding her neglect in not requeſting during the coverture to make the defect good; for the laches of a feme cannot be imputed to her.

6. A. ſeiſed of an eſtate in Y. and D. ſettled it to the uſe of *his ſon B. for life, remainder over, with power to B. to limit any part not exceeding* 100*l. a year for a jointure* for any wife he ſhould marry. The *lands in D. being* 180*l. a year, and charged with* 100*l. a year to A.'s widow for life, B. limited the* 100*l. out of the ſame eſtate* (which being charged with 100 l. a year before was not of value ſufficient), *and covenanted* in the deed, *that if the value ſhould be defective, it ſhould be made up out of the other eſtate*. B. being dead, his widow brought a bill to have it ſupply'd out of the eſtate in Y. And it was decreed accordingly, tho' B. was only tenant for life. 2 Freem. Rep. 256. pl. 323. Trin. 1702. Fothergill v. Fothergill.

* Chan. Caſes 264. S. P. in Caſe of Smith v. Allton.—So where a feme covert was impowered to declare uſes by any writing or laſt will attefted by three witneſſes, and ſhe while a feme covert appointed the premiſes by will to her daughter; and after her huſband dying, ſhe, on marriage of a ſecond huſband, by

7. A. having power to charge lands *for younger children by a writing* under his hand, *atteſted by three witneſſes, with* 7000*l.* did (in * fear of ſudden death, and being abſent from home, and ſo not being able to have a ſight of the deed where this power was contained) by a paper atteſted by *two witneſſes*, charge his eſtate with 8000*l.* inſtead of 7000*l.* for his children, and this defect was ſupply'd. See G. Equ. R. 163. Paſch. 8 Geo. & 10 Mod. 467. where this is cited as the Caſe of Parker v. Parker.

by deed attested by two witnesses, agreed and covenanted to surrender the premisses (being copyhold) to the use of her intended husband. Ld. C. King said, that the *articles* being *for a valuable consideration*, viz. that *of marriage*, he would supply the want of circumstances, but not if they had been voluntary. 2 Wms's Rep. 623. Trin. 1731. Cotter v. Layer.

8. A power was given to baron, tenant for life, *to make a jointure* on his wife *by deed under his hand and seal.* He having a wife, for whom he had made no provision, by his last *will under his hand and seal, devised part of the lands* within his power *to his wife for her life.* The Master of the Rolls held this a good provision, and decreed the trustees who had the legal estate to convey to her an estate for life. Mich. 1728. 2 Wms's Rep. 489. Tollet v. Tollet.

9. A power was reserved for the husband at any time during the joint lives of him and M. his wife, *by his last will, or any writing purporting to be his last will under his hand and seal attested by three or more credible witnesses, to charge the premisses* with any sum or sums not exceeding 2000 l. to be paid to such persons and in such proportions as he should think fit. The husband by his last *will attested by three witnesses, but not sealed*, reciting his power, disposed of the 2000l. *Nor* did the testator *sign* the will *in the presence of three witnesses, but only acknowledged it was his hand, and declared it to be his will, and the three witnesses subscribed their names in testator's presence.* Ld. C. King said, that tho' himself inclined to think the will good in respect of the acknowledgment and subscription, yet that point should be reserved to the defendant; and also that he took the will to be good, and so a good charge. But upon a reference to the Judges of B. they determined upon argument, as to the first point, that the will was void as a charge for want of being sealed. Hill. 1728. 2 Wms's Rep. 506. Dormer v. Thurland. [485]

10. In aiding defective executions of deeds *in favour of a wife or children it never was required that they be founded on a valuable consideration in the strict sense of the word*, but the deed's being in order to make a provision for a wife or children has been thought sufficient; and as this was the general doctrine, so, was it not for the prior deeds that have been in the present case [which see at (A. 14) to avoid the repetition of the state of it here], it is one of the strongest that can come before this Court for relief; because for *want of a common recovery to dock the entail* under the original settlement in 1679, the widow the plaintiff could have no title at law to have the benefit of a jointure, and so was absolutely forced to come into Chancery for relief; and where that is the case, that the *whole estate, over which the power is executed, is merely an equitable estate, the being an absolute voluntier is no objection to* the party's having the assistance of this Court to supply the defect of a deed; for its being merely an equitable estate obliges this Court to make a determination concerning it. And in such case, the being a mere voluntier is no objection to the having a defective execution of a power supplied, which is exercised over such equitable estate; per Ld. Chancellor. Barn. Ch. Rep. 110, 111. Pasch. 1740. upon a re-hearing of the cause of Harvey v. Harvey.

11. A *wife or a child who comes* into equity *to have the benefit of a defective execution* of a power, or a defective provision for them *need not be a wife or child totally unprovided for.* In Cases on this subject it has been rightly said by the *Court*, that the husband or father are the *proper judges whether* they are *sufficiently provided for or not*; and the Court will not examine whether the provision made was suitable or not, but will leave it to the husband or father to judge whether they shall be sufficiently provided for or not. And was the Court to enter into an inquiry of that sort, it must examine into such circumstances of families not fit for them to do. If the father or husband has said, that they are not sufficiently provided for, and has considered them as such, the Court has considered them in the like manner; but indeed it has considered whether totally unprovided for, or left in a condition not fit for their state or quality, and has relieved where a sufficient provision has not been made, but never by reason of the *excess of provision.* Per Ld. Chancellor. Barn. Chan. Rep. 113. Pasch. 1740. Harvey v. Harvey.

(A. 18) Decreed to be executed *pursuant to an Agreement.*

A tenant for life, remainder *to his first and other sons in tail*, remainder *to B. for life*, remainder *to his first and other sons in tail*, remainder *to C.* with a *power for B. after the death of A. without issue to make a jointure.*

1. TEnant for life by will with power *to make a jointure* covenants to make a jointure on A. his wife of 300 l. per annum; her fortune which he received being 3000 l. In about three quarters of a year after marriage the husband dies, the jointure not being made. Ld. Chancellor inclined strongly for the plaintiff in regard of the consideration, and because the tenant for life by the will had power to have done it; and was express, that if he had de facto done it, and *failed in time or other circumstance* to have done it well, the *defect* should have been *supply'd*; for circumstances in such cases are only put into such powers to the end that no fraud or falshood should be imposed, and cited the case of the COUNTESS OF OXFORD, so decreed by the Ld. Elsmere, and another Case. 2 Chan. Cases 30. Pasch. 32 Car. 2. Elliot and Hele v. Hele.

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B. marries in the life of A. and before marriage covenants to make a jointure, and to execute this power when he should come into possession. *A. dies* without issue male, and B. survives, but dies without making a jointure, or executing this power. The widow of B. brought a *bill against C. to have a jointure* made; because B. surviving A. he might have executed this power, and had *covenanted* so to do; and it was decreed accordingly. G. Equ. R. 167. cites it as decreed at the Rolls 1709. in Case of Alford v. Alford.——S. C. cited Arg. 2 Wms's Rep. 531. Pasch. 1724. in Case of Lady Coventry v. Ld. Coventry.

Note, The *covenant* in this case was looked upon as an execution of the appointment in pursuance

2. In a marriage settlement was a *proviso that the baron by deed or will might limit any of the lands (except those in jointure) to such person and for such estates as he should think fit for raising 500 l. a-piece for younger children*, to be paid at such times and in such manner as he by deed or will should declare, *and covenanted to do so accordingly.* The baron died leaving several younger children of the marriage, but made no appointment.

Tho' ſome lands not ſettled in jointure were limited to the baron for life, and after to the *iſſue male of his own body* with remainders over, yet it was decreed that it was a charge on the land, and bound the iſſue in tail, and ordered the 500 l. to be raiſed for each of the younger children immediately. G. Equ. R. 166. Paſch. 8 Geo. 1. cites Dr. Sarth v. Lady Blanfrey, 1695. of the powers. G. Equ. R. 167. Paſch. 8 Geo. 1.

3. A *deviſed* land to B. for life, with ſeveral remainders over, with a power *for the perſon in poſſeſſion to limit any part for a jointure not exceeding a moiety*. B. whilſt an *infant* marries M. and *with his mother enters into articles to ſettle* lands of 100 l. a year on M. the plaintiff for her jointure, but in the articles *no notice was taken of the power*, and before any ſettlement made purſuant to this power, B. dies. M. brought a bill againſt the remainder-man to have the jointure made good, and decreed accordingly. G. Equ. R. 167. Paſch. 8 Geo. 1. cites it to have been decreed per Ld. Cowper 1708. in Caſe of Holinſhead v. Holinſhead. S. C. cited Arg. 2. Wms's Rep. 229. in Caſe of Lady Coventry v Ld Coventry. This caſe was ſaid by the Maſter of the Rolls to be an idle caſe and not law, at the Rolls, 21 March 1738. in Caſe of Colton v. Hoſkins.

4. A. tenant for life, with power *to make a jointure of* 500 *l. per ann. out of certain lands, covenants* upon marriage *for himſelf and his heirs, that he or his heirs would in purſuance* of this power, *or otherwiſe, ſettle* 500 *l. a year*. After the marriage he *directs a ſettlement to be drawn* of ſuch lands as were compriſed within the power, but *dies before it is executed*. It was queſtioned, whether the remainder-man ſhould be bound by this intended conveyance, or whether the wife ſhould have ſatisfaction made her out of the perſonal eſtate? But Parker C. being aſſiſted by Judges, decreed upon a ſecond hearing, that the lands ſhould be ſettled 10 Mod. 463. Paſch. 8 Geo. Lady Coventry v. Ld. Coventry. G. Equ. R. 160. Paſch. 8 Geo. S. C.—Max. in Equ. at the end. S. C.—9 Mod. 12. S. C. Mich. 9 Geo.—— S. C. argued. 2 Wms's Rep. 222. and reported to be ſo decreed.—

S. C. cited per Cur. Hill. 1731. Ld C. King, being aſſiſted by Ld. Ch. J. Raymond, and the Maſter of the Rolls, that though this depended only on a covenant, yet the jointure being the chief thing in view, the decree was, that the land ſhould be ſettled, and the covenant not made good out of the perſonal eſtate. Wms's Rep. 597. in Caſe of Evelyn v. Evelyn.

S. C. cited by Ld. C. King, and ſaid it being adjudged upon ſolemn debate with aſſiſtance of Judges is a great authority, and to be obſerved by him, and that from thence it may be inferred, that whatever is in the power of the perſon covenanting to do, provided the *covenant* be *for a valuable conſideration*, equity ought to look upon as done, and ſupply the want of circumſtances againſt a remainder-man. 2 Wms's Rep. 625. Trin. 1731. in Caſe of Cotter v. Layer.

(A. 19) Where a *bad Execution* may *operate as a good Appointment*.

1. THAT ſhall not make a *good* appointment which was *intended to paſs an intereſt*. Arg. Hill. 1655. Hard. 48. cites 6 Rep. Sir M. FINCH's Caſe, and Co. Litt. 301. 302. that a conveyance ſhall not enure to a contrary end than it was deſign'd for.——But held that the grant of an office by a leaſe which was not good amounted to a good appointment. Ibid. 49. Jones v. Clerk.

S. P. per Holt Ch. J. 3 Ch. R. 128. cites 6 Rep.

2. What is *void as a will or deed* may be a good appointment or execution of a power; per Holt Ch. J. 2 Vern. 543. Paſch. 1706. cites Hob. 312. Kibbet v. Lee.

* 176. Sir Edward Cleer's Caſe.——* It ſhould be 17. b.——A *bad will* ſhall *amount* to an appointment by 43 *Eliz.* Arg. Hill. 1655. Hard. 48. cites Hob. Collison's Caſe, but ſays that that is by the help of an act of parliament.

3. A. deviſes lands to B. his ſon for life, and then deviſes *ſuch part of the ſaid lands as his ſaid ſon ſhall appoint, to ſuch wife as the ſon ſhall marry for her life for the jointure of ſuch wife*, with contingent remainders to the firſt and every other ſon of the eldeſt ſon in tail, remainder over. B. conveys to truſtees and their heirs part of the ſaid lands to the uſe of himſelf for life, then *to his intended wife for life*, and after to the uſe of the *heirs male of her body*; and dies. Per Eyre Ch. J. This power to B. is not to *limit the eſtate*, but to *appoint the land*, ſo that he is only to aſcertain her eſtate in what part of the land he will, and her eſtate is ſettled by the will, ſo that this cannot take effect as a conveyance, but it may as an appointment of the land which ſhe ſhall have. And tho' it had *limited an inferior intereſt*, yet ſhe ſhould have an eſtate for her life. And per Denton J. If this were conſidered as an execution it would not be good as *it exceeds the power*, but it is only an appointment of the lands; and her eſtate takes effect by the will and not by the deed. Forteſcue J. doubted, if the ſon had barely appointed the land without limiting any eſtate, whether it would be good? Judgment for the plaintiff. Gibb. 156. Mich. 4 Geo. 2. C. B. Peters v. Maſham.

(A. 20) Powers in general. *Conſtruction* thereof, and of the Execution thereof.

For when one has an authority, and *does an act* which can be *good no other way but by virtue and in purſuance of that authority*, it ſhall rather be underſtood to have been by force of his authority than void; though in doing the act he *takes no notice of his authority.*

1. C. Was *ſeiſed* in fee *of* 3 *acres* of land *in capite* of equal value, and made a *feoffment* in fee *of two* of them *to* the uſe of *his wife for life for her jointure*, and *of the third* acre *to* the uſe of *ſuch* perſon and perſons, and of ſuch eſtate and eſtates *as he ſhould deviſe* by his laſt will; and after by his will deviſes the ſaid third acre without any notice taken of his power reſerved upon the feoffment. Now if they had been three acres of land in ſocage, and he had made ſuch a feoffment, and after deviſed the third acre without reference to his power, it had paſſed by the will, becauſe then it might either paſs by virtue of his intereſt by the will, or his authority by the feoffment; but being capite lands, which could not paſs but by the authority, becauſe he had paſſed two parts by act executed; this deviſe was conſtrued to be an execution of his authority, becauſe otherwiſe the deviſe had been to no purpoſe. 12 Mod. 469. Paſch. 13 W. 3. in Caſe of Parker v. Kett.—cites 6 Rep. Clere's Caſe.

12 Mod. 469. in Caſe of Parker v. Kett.——*But* where one has an *intereſt and an authority* together,

together, and he does an act *generally*, it shall be construed in relation to his interest, and not to his authority. 12 Mod. 469.

* (B) *Of Revocation*, what shall be a *good* Power.

[1. IF a man makes *feoffment to the use of J. S. for life, with divers remainders over, with power of revocation of the estate for life only, and that then another shall have this estate, and that the remainder shall stand*, it seems this is a good power. Dubitatur. M. 8 Ja. B. between Thompson and Fretton.]

[2. If a man *suffers a recovery, and limits the uses* by indenture, *with power of revocation, and to limit new uses*, and after by indenture *he revokes and limits new uses, with like power* of revocation and to limit new uses; this second power of revocation and new limitation of uses is good; for all arises out of the recovery which is the foundation. P. 10 Ja. Scaccario among the reports of *B. Beckett's Case* per Curiam preter Snigg.] Lane 118. Pasch. 9 Jac. in the Exchequer, S. C. mentions a third indenture of revocation and limitation; and

Bromley and Altham barons held, that the declaration of the uses made by the indenture was good, and he having power by the first to declare new uses, may declare them with power of revocation; for it is not merely a power, but conjoined with an interest, and therefore may be executed with a power of revocation; and then when he by the third indenture revokes the former uses, now it is as if no uses had been declared, and then he may declare uses at any time after the fine, as it appears by 4 Mar. Dyer 136. and Coke lib. 9. Downham's Case, and in this case they did rely upon Diggs's Case, Cooke, lib. 1. where it is said, that upon such a power he can revoke but once for that part, unless he had a new power of revocation of uses newly to be limited, whereby it is implied, that if he had a new power to appoint new uses, he may revoke them also. Snig baron to the contrary, and said, that he had not power to declare three several uses by the first contract, which ought to authorise all the declarations upon that fine, and then the revocation by the third indenture is good, and the limitation void. And also he said, that such an indenture to declare uses upon uses, was never made, and it would be mischievous to declare infinite uses upon uses. Tanfield held, that the uses upon the second indenture stand unrevoked, and the new uses in the third indenture are void. The power in the second indenture is, that he may revoke and limit new uses, and that the fine shall be to those new uses, and no others; and then if there be a revocation, and no punctual limitation, he had not pursued his authority, for he ought to revoke and limit, and he cannot do the one without the other; also he said, that after such revocation and limitation, the fine shall be to such new uses and no other, so that if there be no new uses well limited in the third indenture, the former uses shall stand void.

Ibid. 119. There is a Nota [of the Reporter, that] it seems, that if a man make a feoffment and declare uses, and reserves a power to revoke them, without saying more, he cannot revoke them and limit new; for the use of the fine being once declared by the indenture, no other use can be averred or declared which is not warranted thereby, for he cannot declare the fine to be to new uses, when it was once declared before, Cook. lib. 2. 76. That no other use can be averred, than that in the conveyance, Cooke lib. 9, 10, 11. although that the first uses are determined, as if a man declare the use of a fine to be to one and his heirs, upon condition that he shall pay 40l. &c. or until he do such an act, if the first use be determined, the fine cannot be otherwise declared to be to new uses; and therefore it seems, that all the uses, which shall arise out of the fine, ought to spring from the first indenture, which testifies the certain intention of the parties in the limiting thereof, and then in the case above, the second indenture and the new uses thereby, are well warranted by the first indenture, and in respect that this is not a naked power only I conceive that they may be upon condition, or upon a power of revocation to determine them; but the power to limit the third uses by a third indenture, after revocation of the second uses in the second indenture has not any warrant from the first indenture, and without such warrant, there can be no declaration of such new uses, which were not declared or authorised by the first indenture, which note, for it seems to be good law.——S. C. cited Vent. 198, in Case of Sir S. Jones v. Lady Manchester.

[3. If *uses are limited* by an indenture of certain land, and there is a *power of revocation, and to limit new uses* in this manner, [*viz.*] It was found that he made a lease for

years, and the next day granted the reverſion in fee, to which the leſſee attorned; whereupon

[*viz.*] *And if the ſaid A. B. ſhall make any eſtate in fee ſimple or fee tail, then the uſe ſhall be &c.* Tho' it is not limited to be made of the land in the indenture, yet it ſhall be intended, and therefore the power good. Tr. 13 Car. B. R. between *Snape* and *Turton*, adjudged per Curiam upon a ſpecial verdict. Intratur. Tr. 11 Car. Rot. 1137.

it was reſolved, that altho' there be but one intire eſtate in fee conveyed, yet both being found, and that it was with an intent to make a fee to paſs, that this was a revocation within the proviſo.

[489] Cro. Car. 472. S. C.——The grant of the reverſion is a good revocation, notwithſtanding the leſſee for years attorned, and this ſhall enure not as an actual grant of the reverſion at the common law, but as a declaration of a new uſe by virtue of the proviſo, which determines the former uſes. Jo. 393. S. C.

4. A. made a *voluntary leaſe for 99 years in truſt for raiſing 6000l. for his children*, with a *power to revoke with conſent of his lady, and three more of her friends.* Afterwards having occaſion for money, he prevailed with her and the others to *conſent to a revocation ſo far as to charge it with* 2000 *l.* which he borrowed of H. and then to be ſubject to the firſt charge. She died. This being ſettled upon her for a jointure, the jointure ſettlement took notice of this power and the revocation, and the mortgage to H. but it *did not appear either by the mortgage to H. or by the jointure deed, whether this revocation was total or not.* Ld. Chancellor held, that this ſettlement ſhould not be held fraudulent within the ſtatute of 27 Eliz. becauſe it was not an abſolute power in A. but he muſt have the conſent of his lady and the other three. And it cannot be ſuppoſed that they would conſent but upon very good grounds, and therefore not fraudulent. *But* if a man reſerves a power to revoke, *with conſent of J. S. who is his own relation, or one that may be* ſuppoſed to be *at his command, it will be fraudulent within the ſtatute.* 2 Freem. Rep. 8. Mich. 1676. Ld. Banbury's Caſe.

5. A. on his marriage with B. conveys land to C. in *truſt* for himſelf for life, remainder to B. for life, remainder to the heirs of their two bodies, remainder to A. in fee, *proviſo that in default of iſſue of the marriage C. ſhall convey to ſuch uſes as the ſurviver ſhall appoint.* A. deviſed the land to D. and dies without iſſue. Per Ld. Wright, Ld. Dyer's ſcintilla juris remains in C. and tho' the proviſo be unſkilfully penn'd, yet it amounts to a power of revoking and limiting new uſes. 2 Vern. 377. Trin. 1700. Biſhop of Oxon v. Leighton & al.

6. 10 *Ann. cap.* 23. *ſ.* 1. enacts, That *all eſtates made to any perſon in any fraudulent manner, on purpoſe to qualify him to give his vote at elections of knights of the ſhire (ſubject to agreements to defeat ſuch eſtate or to reconvey the ſame), ſhall be, againſt thoſe who executed the ſame, free and abſolute, and all ſecurities or agreements for the redeeming or defeating ſuch eſtates, or the re-conveying thereof, ſhall be void.*

(C) What

(C) What ſhall be a *good Revocation* according to the Power.

[1. IF A. *covenants* by indenture *to ſtand ſeiſed* to the uſe of him and B. his wife, and of C. his daughter for their lives, and after to the uſe of C. in tail, with remainder over, with *proviſo that if A. after certain debts paid, *ſhall be diſpoſed or ſhall determine to diſannul, change,* alter, diminiſh, or make void *the uſes or eſtates of any* of them, of the premiſſes or any part thereof, that *then it ſhall be lawful to and for the ſaid Nicholas at all times at his pleaſure by his writing &c. to determine, diſannul &c. and alſo by the ſame writing at his will and pleaſure, or any other writing whatſoever ſigned &c. to limit, declare, and appoint the uſes of the ſame to the perſons aboveſaid, or to any other perſons &c.* and after B. dies; and after A. takes E. to wife, and *the debts being paid A. covenants to ſtand ſeiſed* of the ſame tenement, *to the uſe of himſelf and E.* for their lives, and after to the uſe of the right heirs of himſelf. Tho' here *is not any expreſs ſignification of his purpoſe*, or determination to determine, diſannul &c. yet by this laſt covenant to ſtand ſeiſed to other uſes he declares his purpoſe and determination to determine, diſannul &c. and by this *ipſo facto* the firſt uſes ceaſe, and the covenant in the ſame laſt indenture enures to *raiſe new uſes to A. and E.* his wife, and to the heirs of A. Becauſe *non refert an quis intentionem ſuam declaret verbis an rebus ipſis vel factis*; for when he limits new and other uſes, he by this ſignifies his purpoſe to determine and alter the uſes before. Co. 10. *Scroop's* Caſe 143. b. Reſolved by the 2 Chief Juſtices and Chief Baron in the Court of Wards, and there fol. 144. ſays, that it was ſo reſolved in B. R. Tr. 2 Ja. between Frampton and Frampton.]

S. C. cited Jo. 393.— S. C. cited by Jones J. * Fol. 263. Winch. 83. —S. C. cited Hob. 312, and 313. in Caſe of Kibbet v. Lee.— S. C. cited 2 Keb. 537. Mich. 27 Car. 2. B. R. in Caſe of Wigon v. Garret.

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6 Rep. 33. b.

[2. If a *feoffment* he made *to the uſe of A. for life, with diverſe remainders over, with a power to A. to revoke the uſes, and to limit new uſes in fee or in tail,* and after *A. bargains and ſells the land to B. for a month, and after grants the reverſion in fee to C. and B. attorns to it*: this is a good revocation and limitation of new uſes according to the power; for the making of the leaſe for a * month is not any ſuſpenſion of the power as to the fee; for † *he may revoke by parts*, as he may limit an eſtate for years, and it is good for the ſaid term, and after limit it in fee to another, but this ſhall not revoke the leaſe for years before made; for then he ſhall defeat it by his own act. Alſo in this caſe *this leaſe for a month and grant of the reverſion*, being a common aſſurance, *ſhall be taken as one act.* Tr. 13 Car. B. R. adjudged upon a ſpecial verdict, per tot. Curiam, between ‡ *Snape* and *Turton*. Intratur. Tr. 11 Car. Rot. 1137. And the Court vouch'd *Dame Ruſſel's* Caſe to be according to this judgment, which was between *Wood and Reynolds*. But the Court ſaid, that if he who has ſuch power to revoke and limit new uſes, makes a *leaſe for life*, this *ſuſpends his power as to*

* Orig (Ans) Mo. 612, 788.— † *Provided if he ſhall be minded to alter or revoke any of the uſes*, to the intent to alienate *any part or parcel* of the premiſſes, and declare his intent &c. he may revoke for *part at one time*, and for part at another. And. 67. Sir Richard Lee's Caſe.

—Mo. 604, 605. Digg's Caſe.—— Mo. 618. Bullock v. Standen. S. P.—† Jo. 392. S. C.—Cro. C. 472. S. C.——Mod. 114. cites S. C.—— Wms's Rep. 164. cites S. C.

to the fee. And ſo a diverſity between leaſe for years and for life, or eſtate of franktenement.]

Mo. 567. Parker v. Clere. S. P. Reſolved. — Mo. 611.

3. Power reſerved by deed in his life, or by his laſt will in writing, to alter, revoke, or determine the uſes and limit new uſes. He *deviſes the land to his wife for life* and dies, this enures as limitation of the uſe of the eſtate executed by the fine. Mo. 518, 519. 35 Eliz. cites the Caſe of Thomas v. Gwin.

4. Where a power is to revoke on the *tender* of money, at a *place certain*, in ſuch caſe, if *no notice of the time* be given to the bargainee, a tender at the place, the bargainee not being there, is no revocation. Mo. 602. 42 Eliz. in Canc. in Burgh's Caſe.

5. *Power to revoke after ſuch a day*; conveyance to a purchaſor is a revocation, tho' made before the day, by the Stat. 27 Eliz. 4. Mo. 618. Paſch. 42 Eliz. C. B. Bullock v. Thorn.

6. Conveyance by covenant to ſtand ſeiſed *for conſanguinity* is not ſuch a conveyance for valuable conſideration, as to *make void a former conveyance* containing power of revocation by 27 Eliz. 4. Mo. 602. Trin. 42 Eliz. in Canc. Lady Burgh's Caſe.

Cro. E. 856. Mich. 43 & 44 Eliz. C. B. S. C. that it is but an authority to revoke, and is to be done by the aſſent of the four, and ſo is determined by death of one.

7. A. makes *feoffment to four* to certain uſes, with power of revocation on tender of 3s. for a *reaſonable cauſe to be ſhewn by him and approved of by them. One dies.* A tender to the *ſurvivors*, and their approbation is not ſufficient to revoke &c. For *approbation* was a thing of conſent, which cannot ſurvive &c. cites D. 189. But per Popham it had been otherwiſe if A. had limited the tender only to be made to two. Noy. 38. Allwaters v. Bird.

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S. P. per Cur. As to the declaring an intention to revoke, tho' it has not all the formalities and circumſtances mentioned in the power of revocation, ſo as it appear to be a ſober ſolid act, and done animo revocandi. 2 Vern. 69, 70. Trin. 1688. Arundel v. Phillpott.

8. A. ſuffer'd a recovery to the uſe of himſelf and M. his wife for life, remainder to B. *Provided that A. and his wife by their joint deed &c. might revoke, alter &c.* and that *thenceforth the recovery ſhould be to the new* uſes. *A. and M. by deed declared, that it was their intent to revoke, alter, or avoid &c. all the former uſes to B.* and thereupon without more words limited new uſes. The queſtions were, 1ſt, If the power being by words copulative be purſued, the revocation &c. being by *diſjunctive words?* 2. If by ſaying it was their *intent* to alter * &c. without ſaying poſitively that they did alter &c. be a good revocation by implication? 3. If by the *ſame deed* the old uſes may be revok'd and new uſes limited *upon a recovery without more?* After ſeveral arguments, it was adjudged a good revocation of the old uſes, and a good limitation of new uſes. Mo. 681, 682. pl. 936. Hill. 45 Eliz. Fitzwilliams's Caſe.

9. A

9. A power was to revoke *by writing under hand and seal, and delivered in presence of three witnesses, and thenceforth the uses to cease.* A revocation *by will* is good, if all circumstances are comply'd with. Hob. 312. Kibbet v. Lee.

A settlement was made with power of revocation by will in writing, *executed in the presence of three witnesses.* The will was made in the presence of three, but *one did not subscribe* his name; yet it was decreed a sufficient revocation, and in strictness it was an execution. 2 Chan. Rep. 212. 32 Car. 2. Sale v. Freeland.—For this was a power to dispose of *his own estate*, which is to have all the favour imaginable. But where a power is *to charge a third person's estate*, such power is to have a rigid construction. 2 Vent. 350. S C. Hill. 32 Car. 2.——See (A. 14) pl. 11. the quære in margin.

10. A. levies *fine* to the use of *himself for life*, and after his decease to the use of *such person and his heirs as A. by his last will should appoint.* The fee is in A. and he may covenant *by deed* to stand seised to the use of a second son &c. Ley. 39. 9 Jac. Brand's Case.

11. *Lands settled*, with power of revocation on payment of 40 s. *Afterwards other lands are settled on the same trustees with like power.* Two several sums of 40 s. must be paid on revocation of the uses raised by both fines. 9 Rep. 106. b. Mich. 10 Jac. in Losield's Case.

12. Power of revocation was reserved *on tender of* 1 *s. to B.* to whom the remainder was limited; *B. dies;* a *tender to the heir of B.* tho' *an infant* 2 *years old* is good. Ley. 55. Trin. 15 Jac. Allen's Case.

13. A. seised in fee, covenanted to levy a *fine* to the use of *himself in tail, remainder to such persons, and for such uses as he should limit by indenture*, and for *want of such limitation*, remainder to B. for life, remainder to B.'s eldest and 10th son in tail, remainder to C. and his sons in like manner, remainder *to the right heirs of A.* with a *proviso, that upon tender of* 5 *s. &c. he might revoke* those uses and limit others. A fine was levy'd accordingly. Afterwards, by another indenture reciting the uses of the first indenture, and the proviso in it, A. made a *new limitation* to the use of himself in tail, remainder to B. for life, with like remainders as before to B.'s sons, remainder to C. for life, with like remainders to his sons, remainder *to D.* the plaintiff *in tail &c. according to his power and the clause in the said indentures*; and dy'd without issue. This is a good execution of the power, tho' 5 s. *was not tender'd.* For A. had a *double power by the first indenture;* the one to limit other uses to such persons, and for such estates as he pleased; the other to revoke the uses limited by the first indenture, and to limit new uses. And when he limits new uses, which cannot stand by the power reserved by the proviso, for lack of tender, the law will *refer the limitation to the power* he had to limit other uses &c. And 2dly, because the 2d limitation is expressly made *according to his power*, which refers to that power which he pursued. Allen. 83. Mich. 24 Car. B. R. Udal v. Udal.

It was touch'd whether the uses limited according to that power were revocable by the proviso. And Maynard who argued with the judgment said it might be a question. Ibid.

14. Power to revoke by indenture sealed in presence of three witnesses. He by indenture sealed in the presence of three witnesses *covenants to levy a fine*, and levies it. The deed and the fine

Vent. 278. E. of Leicester's

Cafe. S. C. ——Wms's Rep. 169. Arg. cites S. C.

fine together make a good revocation. 2 Lev. 149. Mich. 27 Car. 2. B. R. Wigſon v. Garret.

See the State of the Caſe at (B).—— And Ld. Chancellor ſaid, it was held in Ld. CRAWLEY's Caſe, that where there is *notice of a power to revoke*, the parties at their peril muſt look to the execution of it. Ibid. 9.

15. If A. in a voluntary ſettlement reſerves a power to revoke with conſent of three or more, and he afterwards *revokes with conſent* of thoſe perſons as to one third part, and afterwards a *conveyance is made, mentioning the revocation, but without reciting it in hæc verba*, this *is notice of a revocation, and the parties at their peril muſt inquire into the execution of it.* Per Ld. Chancellor. 2 Freem. Rep. Mich. 1676. Ld. Banbury's Caſe.

Tenant for life of lands in D. with power of revocation *by any* inſtrument in *writing atteſted by two or more credible witneſſes*, by will atteſted by three witneſſes expreſsly deviſed all his lands in D. to J. S. and W. R. He had no other lands in D. Upon reference to the Judges of C. B. they determined that the will operated as a revocation, though the will made no mention of the power. 2 Wms's Rep. 414, 415. Trin. 1727. Deg v. Deg.

16. Deed of feoffment to uſes, with power of revocation *in expreſs words*. A diſpoſal *by will* is a revocation, without taking notice of the deed or the power in it. Raym. 295. Trin. 31 Car. 2. Guy v. Dormer.

Vern. 182. S. C. Trin. 1683.—— The condition of the redemption was, that on payment at the day, the mortgagor ſhould have the lands in his former eſtate. 2 Vern. 141. Thorne v. Thorne.

17. A feoffment was made with power of a revocation; a *ſubſequent mortgage to one of the feoffees* is a revocation pro tanto only. Vern. 141. Hill. 1682. Thorne v. Thorne.

Carth. 292. S. C.—— For words ſufficient to deſcribe an eſtate tail to be revoked, muſt of neceſſity have the ſame import in the limitation. Skin. 325. S. C. and judgment affirmed in B. R.

18. A. ſettles land to the uſe of himſelf for life, remainder *to B. and the heirs males of his body*, remainder in tail to C. &c. with power of revocation as to B.'s remainder only. A. *reciting* the ſettlement to be to B. and his heirs males, omitting the words *of his body*, revokes and limits new uſes *to B. and his heirs males*, but the date of the firſt deed was recited right, and ſo are the parties. Reſolved that this is a good revocation, and a good appointment of a new eſtate tail, by his directing the ſaid eſtate, in the ſaid deed named, to be to the uſe of B. and his heirs males; which ſaid eſtate ſo named was an eſtate tail. 3 Lev. 213. Trin. 1 Jac. 2. B. R. Gilmore v. Harris.

19. A *deviſe of lands not now in ſettlement* will not paſs lands ſettled with a power of revocation. 2 Vern. 621. Mich. 1708. Litton alias Strode v. Falkland.

S. C. Gibb. 207 to 214. And as to the *interlineation*, Ld. Chancellor ſaid (pag. 213) that

20. A. ſeiſed in fee ſettled his eſtate in 1712 by leaſe and releaſe, to the uſes therein after ſpecified; with *liberty at his will and pleaſure to diſpoſe of, change, or alienate the ſame eſtate, or any part thereof, for any eſtate or eſtates whatſoever as he ſhould think fit, and to revoke all and every the uſes thereby limited.* And declares the uſes *to himſelf for life*, with ſeveral other remainders, and a

remainder

remainder to F. in tail. The ſaid deed contains the following powers. 1. A *power for A. by any deed or writing ſigned, ſealed and delivered in the preſence of two &c. witneſſes, to demiſe, leaſe, limit or appoint the ſaid premiſſes to any perſon whatſoever* &c. *for ſo much yearly rent as he ſhould think fit.* And that it ſhall and may be *lawful to and for the ſaid A. at any time during his natural life at his will and pleaſure to grant, ſell or demiſe the premiſſes or any part thereof, or by any deed &c. or by his laſt will &c. in writing, ſigned, ſealed, delivered and publiſhed in the preſence of three or more witneſſes, to revoke, repeal and make void all and every, or any the uſe and uſes, eſtate and eſtates, truſts and limitations &c. and to declare &c. the ſame, or ſuch other new uſes as ſhould ſeem moſt meet to him, and thenceforth the eſtates before limited &c. to ceaſe &c. and that the ſaid A. may diſpoſe of the ſame premiſſes, and every part &c. thereof to ſuch other perſon and uſes as he ſhall think fit, any thing before mentioned to the contrary in any ways notwithſtanding.* The firſt part of this laſt proviſo, viz. to grant, ſell or demiſe, appears inſerted by interlineation.——In 1715 A. by *leaſe and releaſe, reciting that he was indebted* as ſpecified in a ſchedule annexed, *conveyed his eſtate to W. R. and W. S. and their heirs, in truſt to pay the ſaid debts by the annual profits or mortgage or ſale, and after payment thereof to pay the overplus, if any, and reconvey ſuch parts of the premiſſes as are unſold to the ſaid A. or to ſuch perſon &c. and to ſuch uſe &c. as A. by any deed or writing under his hand and ſeal, atteſted by two or more credible witneſſes, ſhould limit &c.* This releaſe was atteſted by two witneſſes only.—A. died without iſſue. Lord Chancellor, aſſiſted by Lord Ch. B. Reynolds and the Maſter of the Rolls, was of opinion that A. intended to reſerve an abſolute power over this eſtate, and either to revoke it by an expreſs revocation, or by a conveyance to different uſes, which are the two kinds of revocation, as is evident as well from the preamble which is interwoven with the conſideration of the deed, as from the proviſo; and in conſequence of that intention, it is reaſonable to ſuppoſe he meant to have a power to defeat it without taking any notice of it; and if no power had been reſerved in the body of the deed, then would the preamble have given a general power, that a conveyance to different uſes would have been as effectual a revocation as if expreſsly made; and that he thought any other conſtruction would be forc'd and unnatural: that if A. had ſtopp'd with the firſt words, viz. *(to grant, ſell or demiſe)* he had reſerved an abſolute power. Then came the words *(or by any deed or writing &c.) Or* is plainly a disjunctive introductive of a different ſentence and a different power, as is plain from the words immediately following, viz. *and then the uſes [eſtates] ſo revoked* &c. refer to the expreſs power of revocation. That if the ſecond part of the clauſe, viz. *or by any deed or writing* &c. had been [*omitted* or] dropp'd, and it had been *(or to repeal* &c.) it is plain they would be diſtinct powers, and aſk'd why thoſe words ſhould alter the caſe? That the circumſtance of *three witneſſes are only applicable to the expreſs revocation*, but neither goes to the firſt power,

whenever it was, the party that put it in thought it would be of ſome uſe or other; and it could be of uſe but to give A. an unlimited power over [493] the eſtate; and as A.'s intention was to reſerve ſuch a power, his Lordſhip ſaid he would not abridge it.

power, nor to the general power of diſpoſing at the end of the clauſe, viz. *(And that the ſaid A. ſhall and may diſpoſe* &c.) which is as much a diſtinct power as may be, and is larger than the firſt; for by this he might give his eſtate tail by will: that the expreſs power of revocation could not by this conſtruction be thought nugatory; for within the firſt power he could not be re-inſtated in his former eſtate without a conveyance and re-conveyance; nor could he have deviſed it: but admitting it to be ſo, he thought that a man's general intention is not to be ſuperſeded, becauſe a ſubſequent part of the deed is ſurpluſage. And that the whole legal eſtate paſs'd to the truſtees by the deed of 1715. L. P. Conv 390. 400. 12 June 1730. Fitzgerald v. Lord Fauconberge.—This decree was affirm'd in the Houſe of Lords 27 Feb. 1730.

(D) Power of Revocation *ſuſpended.*

If one who has power to revoke an uſe *makes a leaſe for years*, and [494] levies *fine ſur conuſance* of the leaſe without expreſs uſe; the power of revocation is not extinguiſh'd by the fine, but ſuſpended for the term. Mo. 616. Paſch. 42 Eliz. C. B. Bullock v. Thorne and Standen.—* A leaſe for years ſuſpends *quoad the term*, but after it is good. Per Hales. 1 Mod. 114.

1. A. Covenanted to ſtand ſeiſed to the uſe of himſelf for life, with divers remainders over to others, ſome for life and ſome in tail, with the reverſion in fee to himſelf, with *general power of revocation* of all uſes in remainder; and after he *made a leaſe for years* to a ſtranger, *and* after, *during the term*, he *revoked it*. The queſtion was, whether he may revoke, or whether he has ſuſpended his power of revocation by his leaſe during the term? Coke Ch. J. ſaid, he may revoke for all except the term. But the doubt here is where he makes a leaſe without any power reſerved to do ſo. Court divided. Mo. 788. Mich. 2 Jac. Yelland v. Fielis.

2. If a deed of revocation be made, and the party had *declared that it ſhould not take place till* 100 *l. paid*, there the operation of it would be in ſuſpence till the 100 l. paid, and then it would be ſufficient. Per Hale Ch. J. Vent. 280. cites Hob. 312. in Caſe of Kibbet v. Lee.

(E) Power of Revocation extinguiſhed or *determined by what Act.*

1. WHEN one has power of revocation, if he *ſuffer any thing to be lawfully executed* by force of it, he cannot afterwards make revocation. 5 Rep. 90. b. Trin. 42 Eliz. in Hoe's Caſe.

Mo. 607. Hill. 42 Eliz. Hoe's Caſe contra, that fine or feoffment of part of the land is an extinguiſhment of the power as to that part only, and the power remains as to the reſidue.—1 Rep. 175. S. C.—S. P. Hob. 313. in Caſe of Kibbet v. Lee.—* And.

2. A. makes a feoffment *of two acres to uſes*, with power of revocation. If he *afterwards makes a feoffment of one of the acres*, the power to revoke as to the other is extinguiſhed. 1 Rep. 110. b. Hill. 28 Eliz. B. R. Grendon v. Albany.

And. 67. Sir Richard Lee's Caſe.—If it be by *uſe*. But not ſo of a *condition annexed* to the land. Mo. 618. Paſch. 42 Eliz. Bullock v. Thorne.

So if one makes a conveyance with power to make leaſes, and with power of revocation, if he makes a *leaſe* [of part] he may revoke for the reſidue. Per Coke Ch. J. Mo. 783. Mich. 2 Jac. C. B. in Caſe of Yelland v. Fiſlis.

3. Power of revocation is extinct by *feoffment*; ſo by †*fine* or *releaſe*. Arg. 2 Roll. R. 337. cites 1 Rep. Diggs's Caſe. A. enfeoffs B. with a *proviſo* in the deed that A. *may reveke* the feoffment. A. levies a *fine* to B. of the ſame land. This is an *extinguiſhment* of the proviſo of revocation. Per Roll. Ch. J. Sti. 389. Mich. 1653. Bird v. Chriſtopher.—1 Rep. 112. b. Albany's Caſe. cited 174. in Diggs's Caſe.

He that has only a *bare power* to revoke eſtates, and has no eſtate himſelf in the land, cannot by *fine* or *feoffment* or *releaſe* or *extinguiſh* this power; becauſe it is only an authority, and no intereſt. As if A. deviſes that B. ſhall ſell his land, tho' B. levies a fine, or makes a feoffment, or releaſes all his right, yet he may ſell the land. Mo. 605. Hill. 42 Eliz. Digges's Caſe.

But a power of revocation not in eſſe, but in *futuro* on a contingent, may be extinguiſhed by a *fine*, or *feoffment* of the land, before the contingency happened. Mo. 605. cites the Caſe of Albany v. Grendon.——1 Rep. 110. b. S. C.——4 Le. 133.——Raym. 239. cites Ingram v. Parker.

† A. ſeiſed in fee, makes a voluntary conveyance of an undivided moiety of a manor *to the uſe of himſelf for life*, then *to firſt, ſecond &c. ſon in tail*, remainder *to Sir M. W. in tail*, remainder *to his own right heirs*; with a *proviſo* that it ſhall be lawful by deed ſealed in the preſence of 2 witneſſes, *to revoke* theſe uſes, *and to limit new ones*. After this A. *levies a fine, and a week after the fine levied, by deed declares*, that the intent of the parties at the time of levying the fine was, and now is, *that the fine ſhall be to the uſe of A. and his heirs*, and to no other uſe, intent or purpoſe whatſoever, and whether this fine hath extinguiſhed the power of revocation, ſo that the declaration of uſes comes too late, is the queſtion. Adjudged that the power of revocation was extinct; but this judgment in C. B. was * reverſed in the Exchequer Chamber by ſix Judges againſt two. Skin. 35, 53, 71, 187. Herring v. Brown.—* S. P. the fine and deed being by him, who being ſeiſed in fee, limited the eſtate with a reſervation of ſuch power, tho' he only limited an eſtate to himſelf for his life. Carth. 23. S. C.—S. C. cited Arg. Wms's Rep. 168, 169.—2 Show. 185. S. C. debated.——Adjudged. Vent. 368, 371. Paſch. 1 & 2 Jac. 2.—S. C. adjudged Comb. 11.

4. If A. makes feoffment in fee to diverſe uſes, with proviſo *that J. S. may revoke*, and then the uſes ſhall ceaſe.—J. S. can't *releaſe* this power; and *fine* or feoffment by J. S. ſhall not *extinguiſh* it; for the power is meerly *collateral*. Per Popham Ch. J. 1 Rep. 174. Trin. 42 Eliz. Diggs's Caſe. Mo. 605. S. C. ſays it was ſo adjudged, be- [495] cauſe it is only authority, and no intereſt.

5. Whether *releaſe* of a power of revocation *in part* be good or not, dubitatur. Mo. 605. Hill. 42 Eliz. in Diggs's Caſe.

6. Power of revocation by writing ſealed and delivered &c. A revocation by a *will ſealed* is a ſufficient revocation; for the intent was ſatisfied. Per Jones J. Winch. 83. Trin. 22 Jac. C. B. ſays it was reſolved in Caſe of Kennet v. Lee. S. C. Hob. 312. by the name of KIBBET v. LEE. Trin. 17 Jac. And the power of revocation and limitation of new uſes was limited to be done by him, *being in perfect health and memory*. But tho' the verdict did not find his being in perfect health and memory, yet it was well enough; for that ſhall be preſumed unleſs the contrary be proved; and tho' revocations muſt obſerve the circumſtances which the owner impoſes on himſelf, yet no more ſhall be impoſed upon him, but his power ſhall be taken favourably as agreeable to nature, that every man have free power over his own, which is the reaſon that the latter act, which cannot ſtand with the former uſes, is conſtrued a revocation; tho' according to the expreſs words and vulgar ſenſe it is none.—So where the power was, that he might by any writing ſeal'd &c. in preſence of two or more credible witneſſes, *in expreſs words ſignify and declare his intention to revoke* &c. that then, and from thenceforth &c. the uſe &c. ſhould ceaſe; and tho' it was objected that the will is no revocation, becauſe the words (in expreſs words) exclude all implicit revocations, it was anſwered, that powers of revocation are favourably interpreted, becauſe eſtates of inheritance depend upon them; that here the will is a revocation; becauſe when *two acts are not conſiſtent*, the latter is a revocation to the former; that in ſome things the donor &c. ſhall bind a power to *circumſtances*, as for a deed to be executed before three witneſſes &c. *But where there is only a general expreſſion*, the latter act ſhall ſatisfy thoſe general words. Judgment was afterwards given, that the power was well executed. Raym. 295. Trin. 34 Car. 2. in Scace. Guy v. Dormer.

7. Power

7. Power reſerved to revoke on condition the ſon marries without conſent, may *by ſubſequent agreement* by deed be defeated, and the conditional deed be determined. Jo. 411. Mich. 14 Car. B. R. Leigh v. Winter.

8. Power given by fine to tenant for life to *make a jointure and leaſes for* 31 *years* to raiſe portions for daughters, and that in ſuch caſe the cognizees to ſtand ſeiſed to ſuch uſes. Per Hale Ch. B. The power ſeems to be well raiſed; but a *bargain and ſale in fee* by tenant for life to raiſe the portions is not a good execution, nor does the bargain and ſale in fee, or re-conveyance in fee by the bargainee deſtroy the power which is *collateral*, and the eſtate to be limited does not ariſe out of the tenancy for life, but out of the original eſtate; and in Noy's Report it is held, that a *covenant to ſtand ſeiſed in fee* does not deſtroy ſuch a power, tho' he ſays that may be queſtionable, becauſe the whole eſtate is there diſturb'd, whereas the bargain and ſale here diſplaces nothing; and if the bargainor had a power of revocation, he might well execute it after executing this conveyance. Hard. 413. 17 Car. 2. Edwards v. Slater.

9. If he that has a power of revocation *makes a leaſe for life*, quære whether this *ſuſpends* the power only as a leaſe for years would do, *or extinguiſhes* it as a feoffment? Keyling and Twiſden were of different opinions. Vent. 42. Mich. 21 Car. 2. B. R. Clerk v. Philips.

10. A ſettlement was made with power *to raiſe* 2000 *l.* portions, and after another ſettlement is made, by which all the portions in the former are *releaſed, except the power to charge* the lands with the 2000 l. Now by this exception the power is continued, and in full force, and the operation is not to be abridged by any *general expreſſions* in the laſt ſettlement. Arg. Fin. R. 287. Hill. 29 Car. 2. in Caſe of Shipton v. Tyrrel.

Vern. 182. S. C. Trin. 1683.

11. Settlement on three, with power of revocation; afterwards the grantor made a *mortgage in fee* to one of the three. Per North K. This is a revocation *pro tanto* only. Hill. 1682. Vern. 141. Thorn v. Thorn.

12. If a power of revocation is *annexed to an eſtate for life, and that eſtate determines before the power is executed*, the power is by
[496] that means extinguiſhed. Per Lutwitch J. Carth. 24. Hill. 3 & 4 Jac. 2. B. R. in Caſe of Herring v. Brown.—But ſee ſupra, pl. 3. in notis S. C. adjudged contra, and the reaſon.

See (B) pl. 2. and the notes there.

13. A man makes a ſettlement, wherein was a power that he might *from time to time by deed* or writing under his hand and ſeal *revoke the uſes* thereof, *and by the ſame or any other deed, limit and declare new* uſes: in purſuance of this power, *he revokes* the old uſes, *and* by the ſame deed *limits new* uſes, *without annexing any new power of revocation to thoſe new uſes*: afterwards, thinking he had, by virtue of the firſt ſettlement, a power of revocation toties quoties, he by another deed revokes the laſt uſes, and again declares other uſes of the ſame lands; and if he had ſuch power was the queſtion? It was agreed he might in the deed of revocation have annexed a power of revoking the uſes thereby declared,

declared, and might afterwards have executed that power accordingly; but in this caſe there being no ſuch new power of revocation annexed to the new uſes, it was decreed that his power of revocation by the firſt deed was executed, and at an end, and by conſequence that the revocation afterwards was without any warrant, and ſo the uſes limited upon the firſt revocation muſt ſtand; and this decree was affirm'd in the Houſe of Peers. Abr. Equ. Caſes 342. Trin. 1717. between Hele and Bond.

14. A term was created in a marriage ſettlement *for raiſing* 3000 *l. portions for daughters, payable at* 18 *or marriage, on default of iſſue male*, with a *power for the father to revoke with conſent of truſtees*. The wife died, leaving only one child, which was a daughter, who afterwards married. It was inſiſted that the daughter being 18 and married, the portion was become veſted, and could not now be diveſted by the power of revocation. But Lord C. Macclesfield held the power of revocation to be ſtill ſubſiſting, and that the father with the conſent of the truſtees may yet revoke, and may do ſo at any time before the portion is paid. Hill. 1722. 2 Wms's Rep. 93. to 101. Rereſby v. Newland.

This decree was afterwards affirm'd in the Houſe of Lords. Ibid. 102.

(F) Determined *in what Caſes.*

1. A Conveyance of lands was made with a proviſo of revocation *upon an act done by the two grantors with conſent of their wives, viz. if they or either of them be living then to revoke.* It was reſolved that tho' *one of the wives died*, yet the ſurvivors may revoke the conveyance, for the conſent is conſtrained by this word (*then*); ſo that thoſe words (if they or either of them) being coupled and joined with the word (then) explains the intent and meaning of the deed to be, that it is not neceſſary that both ſhould join in the revocation, one being dead. 2 Roll R. 178. Trin. 18 Jac. B. R. Gardiner v. Savill.

(G) Revocation *decreed, tho' not ſtrictly purſued.*

1. A *Tender* of the revocation-money was made *at a different place* than expreſs'd in the deed, yet it was held good in favour of a purchaſor. 2 Chan. Rep. 71. 24 Car. 2. Thorne v. Newman.

Fin. R. 38. S. C. Mich. 25 Car. 2. See Mortgage (X).

2. A. ſeiſed in fee made a *ſettlement in tail, with power of revocation by any writing under his hand and ſeal, in the preſence of three witneſſes.* He made his *will* under his hand and ſeal, reciting his power, and declared that he revoked the ſettlement, but the will *had but* * *two witneſſes* who *ſubſcribed*, tho' a *third was preſent; and died.* The lands deſcended to B. his ſon, who mort-

2 Freem. Rep. 63. pl. 72. Anon. [497] ſeems to be S. C. and Lord Chancellor

decreed it to be good enough; for the appointing three witneſſes, was only that there might be clear proof that it was done; and here it was clear enough that it was done, tho' here were only two witneſſes.—See (A. 14.) pl. 11. the quare in the margin.

mortgaged the ſame. Lord Chancellor decreed payment of the mortgage-money, and ſaid that here was an execution of the power in ſtrictneſs, tho' the third witneſs did not ſubſcribe. But if there had not, equity would help in ſuch a little circumſtance, where the *owner of the eſtate had fully declared his intent.* And tho' he ſaid he would not ſuperſede fines and recoveries, yet where a man was only tenant in tail in equity, this Court ſhould decree ſuch diſpoſition good; for a truſt and equitable intereſt is a creature of their own, and therefore diſpoſable by their rule. Otherwiſe where the entail was of an eſtate in the land. 2 Vent. 350. Hill. 32 and 33 Car. 2. in Canc. Sayle v. Freeland.

The proof of the tender was, that *A. being in a paſſion with the defendant*, to whom the tender was to be made, *high words paſs'd between them, and ſhe told him ſhe would undo the ſettlement*, and in her anger *threw a guinea upon the ground.*

3. A. makes a voluntary ſettlement with power of revocation *on tender of a guinea.* A. never tender'd the guinea, or ever declared ſhe intended to revoke the former ſettlement (which had A. done (as it ſeems) and it had been a ſober ſolid act, and done animo revocandi, it would in equity have been ſufficient, tho' it had not all the formalities mentioned in the power) but afterwards *ſettled the ſame lands to different uſes.* It was not allowed to be a ſufficient revocation. Per Cur. This Court may *ſupply* an informal or *defective* revocation, but cannot make a revocation where there is *no revocation.* Per Jefferies C. Tr. 1688. 2 Vern. 69. Arundell v. Philpot.

But Lord Chancellor held that this did *not amount to a revocation in equity; but had it been* proved that a guinea had been *deliberately tender'd, and declared at the ſame time* that ſhe did it with *an intent to revoke* the ſettlement, *tho' the deed had never been ſealed, or if* the deed had been *ſealed* to revoke it, *and no guinea tendered*, this Court would have ſupplied the defect of one particular circumſtance, where it appeared that the party did deliberately and adviſedly intend the thing; but what was ſaid in a paſſion the Court will not regard. 2 Freem. Rep. Trin. 1688. Arundel v. Philpot. S. C.——S. C. cited by Mr. Talbot. Arg. 10 Mod. 476. Paſch. 8 Geo. 1. in Caſe of Lady Coventry v. Lord Coventry, ſays it was ſent to law to have it tried, Revoked or Not revoked; and that at law the party was ſo fortunate as to prove the tender.—S. C. cited by Mr. Baron Powell. 3 Chan. Caſes 70. in Caſe of Lord Mountague v. E. of Bath.——S. C. cited Ibid. 108. per Holt Ch. J.

S. C. cited Arg. Ch. Prec. 472. ——S. C. cited Arg. 10 Mod. 408. Paſch. 8 Geo. accordingly.

4. By a power reſerved in a deed, the revocation was to be *in preſence of three Privy Counſellors;* the reſervor did by will revoke the deed, but being then Governor of Jamaica, this was held a good revocation, becauſe *he could not have three* Privy Counſellors there. 9 Mod. 14 Mich. 9 Geo. 1. Arg. cited as the Caſe of Mountague and Bath.

3 Chan. Caſes 55. to 128. S. C. and decreed contra in Chancery, and there ſee the arguments of the Judges aſſiſtants, and Lord Keeper Somers.—2 Freem. Rep. 121 & 193. S. C. by the name of Dutcheſs of Albemare Monk v. Earl of Bath.

5. *Since* the ſtatute 27 *H.* 8. *of uſes*, the courts of common law held that powers of revocation of eſtates executed were to be taken ſtrictly, and ſo, if not purſued, they would not impeach or deſtroy an eſtate already executed by legal conveyances; but in the

the Courts of Equity they ſoon found that the conſtruction was too artificial, and not according to natural equity; and ſo they conſtrued thoſe powers, *as a reſervation of ſo much of the ancient dominion of the eſtate*, to be under the controul of the tenant for life, & *cujus eſt dare illius eſt diſponere*: and as often as any ſuch dominion is reſerved, the tenant for life may contract about it; and when a marriage &c. contract is made in *contemplation of the execution of ſuch a power*, it was a real lien upon the eſtate. G. Equ. R. 165. Paſch. 8 Geo. in Caſe of Lady Coventry v. Coventry.

(H) Revocation. Decreed, *tho' not executed.* [498]

See (G) pl. 5.

1. A Woman made a ſettlement of lands in favour of her husband, with power to revoke; ſhe afterwards ſent ſeveral *letters to her lawyer to prepare a deed to revoke* it, and to give the eſtate to the heir, but never executed ſuch deed. The Court would not make a decree on her intention only. Arg. 9 Mod. 15. Mich. 9 Geo. 1. In the Lady Coventry's Caſe. S. P. Decreed, per Ld. Cowper. Ch. Prec. 471. Paſch. 1715. Piggot v. Penrice.—But had ſhe been hindered from the exerciſe of this power by the *act of her huſband*, then the Court ſaid they would have interpoſed. Arg. 10 Mod. 473. Paſch. 8 Geo. S. C. cited.——But where a *power was bound by articles* preceding, and for a *valuable conſideration*, there a draught of a ſettlement was ordered to be ſpecifically performed. 9 Mod. 19. Mich. 9 Geo. Lady Coventry's Caſe.

(I) In what Caſes *new Uſes* may be limited; and how.

See (C).

1. A Man may *revoke* the old uſes and *declare new by the ſame deed.* 1 Rep. 174. Trin. 42 Eliz. B. R. Digges's Caſe. S. P. Mo. 682. Hill. 45 Eliz. B. R. Fitzwilliam's Caſe.——The very making a *new conveyance without words of revocation* is ſufficient, if all other circumſtances required in the firſt deed are obſerved in the ſecond. 10 Rep. 144. Mich. 10 Jac. Scroope's Caſe.—S. C. cited Winch. 83. per Jones J.—A conveyance to different and *inconſiſtent uſes*, is an effectual revocation. Gibb. 215. Fitzgerald v. Ld. Fauconberge.——Ibid. 221.

2. *Settlement by fine* with power of revocation, and to limit new uſes; after there is a *ſecond indenture* with ſuch power of revocation, but *no power to limit new uſes*; then a *third* indenture of *revocation*, and alſo declared *new uſes*, by not reſerving expreſsly power in the ſecond deed to limit new uſes. He can only revoke, and cannot limit new uſes by virtue of the eſtate raiſed by the firſt fine; but the eſtate limited by the third indenture, may be well raiſed by a fine ſubſequent, tho' not by the former fine. Sid. 343. Mich. 19 Car. 2. B. R. Ward v. Lenthall. Where a man makes a *feoffment &c. to uſes with power of revocation*, when he hath *executed that power* he cannot limit new uſes, but if it had been with a *power to revoke and limit new*, then he may revoke and limit new, with a *power of revocation annexed to the new*, which if he doth afterwards revoke, he may again limit new uſes, according to the firſt power, and ſo *in infinitum*; but always *the new uſes muſt correſpond to thoſe circumſtances &c.*

&c. which the first power appoints; for that is the foundation. Vent. 198. Pasch. 24 Car. 2. B. R. Sir S. Jones v. Lady Mancheste..—See (B) pl. 2. and the Notes there.

He that has power to revoke has also power (tho' not expressed) to make a new limitation.

3. A. on conveyance of lands, reserves power to revoke, *without saying any thing of limiting new uses*; yet A. may limit *new* uses. Per Lord Finch. Chan. Cases 242. Mich. 26 Car. 2. Anon.

Hill. 32 and 33 Car. 2. 2 Chan. Cases 46.—For otherwise the feoffees would be seised to their own use. Mod. 40. Per Twisden J. cites Lat. ..... Sir William Shelly's Case.

A conveyance was *to such uses as E. should direct, limit and appoint. E.* voluntarily, by writing under her hand and seal, *limited the uses to A. and B. and* being a feme covert, *kept the deed in her own or her husband's hands*. Afterwards *E. destroyed this deed, and limited the uses to C.* and there *was a power of revocation reserved in the first deed*. Ld. Chancellor held the last limitation void, and that the first can never be altered, being made by deed. *But* in such case a limitation *by will* may be altered as the party pleases, a will being in its own nature revocable and alterable, and the last shall take place. For trusts are governed by the rules of law, tho' the execution of them is compellable only in equity. *But* if the *power, reserved* to limit by deed, *be from time to time*, then he may limit and revoke *toties quoties*. 2 Freem. Rep. 61. Mich. 1680. Hatcher v. Curtis and Sir Richard Anderson.

A. settled land with power *from time to time* by deed &c. *to revoke, and by the same or any other deed to limit new uses*. A. by deed revokes the old uses, and by the same deed limits new uses, but *does not annex any new power* to revoke these new uses, and afterwards *declares other uses*. It was agreed, that upon the first revocation he might have annexed a power to revoke the uses in that deed; but not having so done, his power of revocation was gone, and those uses must stand. Decreed and affirmed in the House of Lords. Pasch. 1717. Ch. Prec. 474. Heir v. Bond.

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[For more of Powers in general, see Authority, Fraud, Revocation, Uses, and other proper Titles.]

Prebend and Prebendary.

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1. A *Layman* may be presented to a prebend; for *non habet curam animarum*. And per Coke, all the possessions of prebends were at first the bishops. 7 E. 3. 5. 30 E. 3. 26. and de mero jure do pertain to the bishops. Cro. E. 79. Bland v. Madox.

Nor can they charge the church without the patron and ordinary; quod nota. Ibid.

2. *Parson nor prebendary cannot have writ of right*, but juris utrum. Br. Prebend, pl. 2. cites 11 H. 6. 9.

——*But* a prebendary shall have *writ of ingressu sine assensu capituli*; and there it was said that he *has fee-simple*, and yet *if he aliens and dies, or resigns*, the *successor may enter*; and therefore he has not fee-simple otherwise than a parson has. Br. Prebend, pl. 3. cites F. N. B. 194.

3. In

3. In juris utrum the allegation was, that the parſon of D. *was ſeiſed in his demeſne as of fee in right of the church* aforeſaid, tempore pacis &c. Br. Prebend. pl. 4 cites Book of Entries.

[For more of Prebend and Prebendary, ſee Confirmation, Eſtates, Succeſſor, and other proper Titles.]

Precedents.

(A) *Good.* What are *in general.*

1. PRecedents of Courts, as well as laws, are built upon reaſon and juſtice, and *tantum habent de lege quantum habent de juſtitia.* Hob. 270. Courteen's Caſe.

2. Precedents which paſs *without challenge* of the party *or debate* of the Juſtices are not regarded as law. 4 Rep. 94. Trin. 44 Eliz. in Slade's Caſe. Arg. S. C. cited Hard. 98.—Arg. S. C. cited 2 Roll. R. 373.—It is a rule that precedents which paſs *ſub ſilentio* are of little or no authority; but that is to be underſtood of caſes *where there are judicial precedents to the contrary*; per Parker Ch. J. Mich. 1712. B. R. Wms's Rep. 223. in Caſe of the Queen v. Bewdly Corporation.——* S. P. Vaugh. 399. in Caſe of Proceſs into Wales.

3. The pretended *cuſtom of foreign attachment* in London by the ordinary before adminiſtration granted, is unreaſonable and void, tho' the defendant produced ſeveral records of the uſage for above 100 years, but none were *controverted*; per Cur. Carth. 345, 346. Mich. 7 W. 3. Maſters v. Lewis. [500]

(B) *Eſtabliſhed by long Uſage*, tho' otherwiſe not good.

1. THE ſheriff returned, Quod *mandavi A. B. ballivo libertatis ducatus Lanc.* &c. *qui habet retorna omnium brevium infra libertatem predict. qui ſic reſpond. quod ſcire feci prefato R. C. &c. quod ſint* &c. Billing. The return is not good; for it ſhould be ballivo libertatis *ducis Lanc.* for the dutchy has no capacity to have a liberty; and yet becauſe *precedents were ſhewn*, Mandavi ballivo libertatis as above, and Mandavi ballivo libertatis Sancti Edmundi de Bury, & Mandavi ballivo libertatis de Alta Pecco, & Man- In an action upon the Caſe the plaintiff had judgment by nihil dicit, and thereupon had a *writ of enquiry of damages*

to the ſheriff to make return, who returned, *Quod mandavit J. G. ballivo libertatis Rad. Hare Mil. Hundredi de B. cui execut. præd. brev. totaliter reſtat. fiend. & quod alibi infra com. præd. per ſe fieri non potuit, qui quidem ballivus ſic ſibi reſpondit*, and ſo ſets down an inquiſition before the bailiff, and 40 l. damages; and upon error brought it was agreed by all the Judges, that the return was inſufficient; but yet they would not reverſe the judgment, becauſe there were divers precedents accordingly, both in B. R. and C. B. Hob. 83. pl. 109. Virely v. Gunſtone.

& Mandavi ballivo libertatis ducis Lanc. and ſuch like, it was awarded a good return. Br. Retorn de Briefs, pl. 11. cites 33 H. 6. 20.

Fin. Law 8vo. 41. cites S. C. —S. P. per omnes Juſticiarios Angliæ. Jenk. 162, 163. pl. 9. The mayor and commonalty are one indiviſible body; the mayor, as mayor, can do nothing regularly, for he is the head of the corporation aggregate, and is only a part of it; but uſage and precedents are not to be neglected in things indifferent, or which are not mala in ſe. Jenk. 162, 163. pl. 9.

2. The ſum of 100 *l. per ann. is due to the Mayor and Commonalty of Southampton out of the King's cuſtoms. Acquittance by the Mayor only* is not good; by all the Juſtices. And yet becauſe he is the *head of the corporation*, and there were 100 precedents ſhewn thereof in like manner in time paſt, therefore the acquittance of the Mayor was allowed; quod nota. Br. Corporations, pl. 87. cites 2 R. 3. 7.

Ibid. cites S. P. allowed in B. R. Paſch 17 Eliz. Symons's Caſe.

3. The *informer's name* was *omitted in the proceedings on the ſtatute of uſury*, and the whole proceedings after were in the name of the Queen only; yet it was held not erroneous, becauſe this manner of proceeding had been uſed in the Exchequer in the time of H. 8. and at all times after as appears by the precedents. But if the precedents had not ruled it, the *law* had been *clear contrary*. And. 49. pl. 123. Emmot v. Fulwood.

4. *Indictments of felonies done in the county of Glouceſter*, taken and *tried in the city of Glouceſter, ſince it was made a town and county* by R. 3. were held to be good. And. 292. pl. 3. Hill. Vac. 35 Eliz.

5. In debt upon the ſtatute of E. 6. of tithes, the *ſtatute* was *miſrecited*; for it is recited as beginning November 4, 2 E. 6. where it began the firſt E. 6. and continued by prorogation till November 4. 2 E. 6. But not allowed, becauſe there are 1000 precedents to the contrary. And the altering it would diſturb all the judgments that ever were given in this Court. Yelv. 126. Paſch. 6 Jac. B. R. Oliver v. Collins.

6. Tho' the eccleſiaſtical commiſſioners had *uſed to impriſon by 20 years without exception in certain caſes*, yet when this comes before the Court judicially, they ought to judge according to law. 12 Rep. 83. Paſch. 9 Jac. in Sir Wm. Chancey's Caſe.

Hob. 84. pl. 122. S. C. by name of Skeat v. Oxenbridge.

7. In waſt the plaintiff *made title, becauſe one ſuch enfeoff'd another to the uſe of the plaintiff and his heirs*, and omitted that he infeoffed the other and his heirs. And upon view of precedents, the writ was awarded good. Mo. 871. Trin. 12 Jac. Rot. 1349. in C. B. Sceal v. Oxenbridge.

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8. *Ded. poteſtatem* of a fine bears *date before the writ of covenant* bears date, this is communis error; and becauſe it is a common aſſurance, it is not now to be diſallowed; per Coke and

and Dod. Roll. R. 223. Trin 13 Jac. B. R. Herbert v. Binion.

9. Error was aſſigned, for that the *venire facias* in C. B. was 12 *liberos & legales homines quorum quilibet habeat quatuor librat.* where the new ſtatute is *quatuor libras*; for it was ſaid, that libratus is a pound weight. But becauſe it was a general caſe, the Juſtices would view how the Parliament Rolls was, and it was found to be libras. And then it was mov'd again, and Popham ſaid, that the intent of the ſtatute was only to have ſufficient jurors. Gawdy agreed to that, and that the *ſtatute is to be expounded, as the uſage has been ever after the making of it*; and the form of the writ is not upon any demand upon title. Fenner agreed ſaying the ſtatute de mercatoribus is, that the manner of the recognizance ſhall be of money ſterling, but it is ſufficient if it be lawful money. To which Clench agreed; for it was ſaid, that if that ſhould be reverſed, a 1000 *judgments* in C. B. would be reverſed upon the ſame point. Noy. 172. Biſſe v. Wills.

10. Error of a judgment in Cornwall in debt upon an obligation. The error aſſigned was, becauſe the *trial of the iſſue* joined there was *by* 6 *jurates only*. Rolls for the defendant moved, that it is not error; for it is returned, that he tried it there by 6 ſecundum conſuetudinem ibidem a tempore &c. before uſed; and the Court being by preſcription, the trial then, by cuſtom, may be by ſix; and there by multitudes of records in 20 ſeveral courts in Cornwall where trials may be by ſix by cuſtoms there uſed; wherefore, if it ſhould be reverſed, many others ſhould be reverſed. But all the Court held that ſuch a cuſtom is void, and againſt the common law, and there cannot be an exemption of perſons from being jurors, unleſs there be ſufficient jurors beſides the perſons exempted to make trials; and Jones ſaid, Although in ſome parts * of Wales there be ſuch trials by ſix only, it is by reaſon of an act of parliament of 34 H. 8. which appoints that ſuch trials may be by ſix only, where the cuſtom hath been ſo, which proves that when they were united to England, and to be governed by the laws here, ſuch trials could not be, unleſs they had been ſo provided for by parliament; whereupon the judgment was here reverſed. Cro. C. 259, 260. Trin. 8 Car. B. R. Tredymmock v. Perryman.

* S. P. 4 Le. 155. Arg.

11. The conſtant practice and received opinion ſince Sir Moyle Finch's Case, 6 Rep. has been, that which was *parcel of a manor in reputation only* ſhall paſs by a common recovery of a manor. But Twiſden J. ſaid, that Sir Moyle Finch's Case, reported by Ld. Coke, differs from the judgment then given, and that Serjeant Finch who was then concerned went to the Ld. Coke, and told him that he was diſſatisfied, and would have it in judgment again, but Ld. Coke diſſuaded him, and afterwards almoſt all the Juſtices gave under their hands to the ſerjeant, that the manor there mentioned did not paſs. But inaſmuch

as the conſtant practice had been otherwiſe in ſettlements ſince that time, they thought it would be *very dangerous to queſtion it.* Sid. 190, 191. Paſch. 16 Car 2. B. R. in Caſe of Thin v. Thin.

12. In many places, by preſcription, *Leets* are *held at other times than within a month after Eaſter or Michaelmas.* In all Leets they only ſay, *Ad cur.* &c. *tent. ſuch a day, without ſhewing their * authority*; it had been a good objection not to ſhew authority, if conſtant practice had not been otherwiſe. 12 Mod. 4. Paſch. 3 W. & M. The King v. Gilbert.

* The *not ſhewing* in the caption of an indictment at a *leet, whether* the Court were *holden by charter or preſcription*, is helped by the multitude of precedents. 2 Hawk. Pl. C. Abr. 235. ſ. 77.

[502] 13. *Debt* was brought *upon a judgment in B. R.* The defendant pleaded in *abatement*, that a *writ of error in Cam. Scacc.* was then pending upon this judgment; to which the plaintiff demurred, and it was adjudged for the plaintiff, being argued by Serjeant Levinz for the plaintiff. And Sid. 236. 4 H. 6. 31. and 18 E. 4. 6. were cited by him to be reſolv'd, and a Caſe was cited by Dolben to be adjudged accordingly in the time of Roll, and after affirmed in parliament before all the Judges in England between LIMERICK AND . . . . . and tho' it had been ſtuck at, and Vaughan queſtioned it, yet it had been oftentimes ſo ruled. And it was held in the Caſe of DANVERS AND SMITH, in the Exchequer Chamber, that ſuch plea is not good in bar, but good in abatement. But this difference was not thought reaſonable. And Holt Ch. J. ſaid, if it was not for the current of authorities e contra, it ſeemed hard to him that ſuch an action lies. For the writ of error is a ſuperſedeas to an execution, and therefore pari ratione it ought to be a ſuperſedeas to all the ways to come at an execution; and he cited the Caſe of READ AND BEARBLOCK, where a man pays a ſecurity of an inferior nature pending a writ of error upon a judgment on a ſecurity of an higher nature; this was not a devaſtavit; which ſhews that the writ of error had ſo totally ſuſpended the effect of the judgment, that it ſhall not have any regard or eſſence; but this notwithſtanding it was, tho' with ſome reluctance, adjudged by him and all the Court ut ſupra. Skin. 388. Mich. 5 W. & M. B. R. Grandvill v. Dighton.

14. An *elegit was not taken out within a year and a day after the judgment, but continuances were entered on the roll.* And after the year and the day an elegit was taken out without a ſcire facias, whereupon it was moved to ſet aſide the execution. And per Cur. unleſs a writ of elegit was actually taken out within the year and a day, the award thereof afterwards would be to no purpoſe; and therefore this elegit was irregular without a ſcire facias firſt ſued out. But upon examination of ſeveral of the ancient practiſing clerks then in Court, it appeared that it had been in the conſtant practice amongſt them for many years, only to award an elegit with continuances on the roll, and to take out that writ at any time afterwards, without ſuing out any ſcire facias;

facias; therefore the Court (conſidering the inconveniency of opening a gap to deſtroy ſo many executions for this irregularity, and becauſe the practice had prevailed ſo long that it was now become the law of the Court) ordered that the execution ſhould ſtand good. Carth. 284. Mich. 5 W. & M. B. R. in Caſe of Seymour v. Greenvill.

15. Tho' there are no precedents of ſuch or ſuch *proceedings* but ſince the time of H. 7. yet if the *current of precedents* have been ſo ever ſince, we ought rather to run with the tide than to reverſe all the judgments that have been given ſince; for in ſome caſes communis error facit jus; per Powell J. and judgment accordingly. Farr. 93. Mich. 1 Ann. B. R. in Grips v. Ingledew. S. P. per Holt Ch. J. Farr. 115. in Caſe of Taylor v. Griffith.—Bridgm. 21. cites Pl. C. 163, 320. 39 H. 6. 30.

4 E. 4. 19.—Le. 9. in Cater's Caſe. S. P.——Jo. 417, 418. in Caſe of Mounſon v. Bourne.—— A *multitude of judicial* precedents in Court make a law, as the caſe of concurrent leaſes. Hard. 68. Trin. 1656. in Caſe of Vaughan v. Manſel.—*But two or three* precedents ought not to prevail againſt the *fundamental rules of law*. Hard. 52. Hill. 1655. Walſingham v. Baker.

(C) *Of what Regard* Precedents are *in Law.*

1. IF we ſhall adjudge *contrary to received precedents*, it will be *of evil example* to the young apprentices and ſtudents of the Law, inſomuch that they will not know what to give credence to; whether old books or new judgments. 1 Show. 124. Arg. cites 33 H. 6. 41. per Priſot.

2. *Two or three* precedents will *not make a law*, and eſpecially [503] where there are 40 to the contrary. Br. Retorn de Brief, pl. 93. cites 5 E. 4, 109.

3. In *venire facias* the *ſheriff returned the names of twelve only upon the back of the writ, and not in a ſchedule as is uſual, and* he returned *Venire feci*, and not *Executio iſtius brevis*. And all the Juſtices of both Benches agreed, that they would not change the ancient courſe for miſchief which might happen; for *if twelve only ſhould be return'd, none can have jury without a tales, if any be challenged*; by which they cauſed the ſheriff to amend the return in pain of amercement; and yet the writ is, Venire facias 12 liberos & legales homines &c. Br. Retorn de Briefs, pl. 84. cites 2 H. 7. 8. Jenk. 172. pl. 38. cites S. C. and ſays the ſheriff returned 12 only, according to the words of the writ, where he ought to have returned 24, according to conſtant uſage, for ſpeeding the trial in caſe of challenge, death, ſickneſs, or delay of the tales; the ſheriff ſhall be amerced for this return. And adds, Note the care of the law in preſerving ancient forms, and yet upon experiment of a miſchief, although the forms of a writ are not to be altered, yet precedents and conſtant uſage muſt be obſerved.——S. P. Mo. 218. cites S. C.——S. P. Sav. 124. Mich. 32 & 33 Eliz. Mathew v. Harecourt.

4. A counſellor ought not to be heard to ſpeak againſt common precedents. 1 Show. 124. cites 13 H. 7. 23.

5. A *will*, whereby the heir was diſinherited, and the eſtates given to 2 infants, ſtrangers, tho' obtained by great fraud and circumvention of the father of one of the infants, was denied to be In the Caſe of FRY v. PORTER, Mod. 307.

Paſch. 22 Car. 2. in Canc. Vaughan Ch. J. ſaid, He wondered to hear of citing of precedents in matter of equity; for if there be equity in a caſe, that equity is an univerſal truth, and there can be no precedent in it; ſo that in any precedent that can be produced, if it be the ſame with this caſe, the reaſon and equity is the ſame in itſelf; and if the precedent be not the ſame caſe with this, it is not to be cited, being not to that purpoſe. But Bridgman Ld. Keeper ſaid, Certainly precedents are very neceſſary and uſeful to us; for in them we may find the reaſons of the equity to guide us; and beſide, the authority of thoſe who made them is much to be regarded. We ſhall ſuppoſe they did it upon great conſideration and weighing of the matter, and it would be very ſtrange and very ill, if we ſhould diſturb and ſet aſide what has been the courſe for a long ſeries of time and ages.—Hale Ch. B. ſaid, He knew there is no intrinſical difference in caſes by precedents; but there is a great difference in a caſe, wherein a man is to make, and where a man ſees, (and is to follow) a precedent; in the one caſe a man is more ſtrictly bound up, but in the other he may take a greater liberty and latitude; for if a man be in doubt in æquilibrio concerning a caſe, whether it be equitable or no, in prudence he will determine according as the precedents have been, eſpecially if they have been made by men of good authority for learning &c. and have been continued or purſued.

be ſet aſide for *want of a precedent*, tho' the Ld. Chancellor declared his reſolution to do all that he could; and tho' he had directions from the Houſe of Lords to decree according to juſtice and equity tho' no precedent could be found. 2 Ch. R. 236. 15 Car. 2. Roberts v. Wynne.

6. Precedents *in actions for words* are not of equal authority as in other actions; becauſe norma loquendi is the rule for the interpretation of them, and this rule is different in one age from what it is in another. Per Cur. 10 Mod. 197. Hill. 12 Ann. B. R. Harriſon v. Thornborough.

7. In the caſe of a laps'd deviſe by the deviſee's dying in the teſtator's life-time, Ld. Ch. J. Parker, in delivering the reſolution of the Court, ſaid, that he muſt have thought himſelf obliged to have ſubmitted to the number and weight of authorities in that caſe, tho' he had not been ſatisfied with the reaſon upon which they were eſtabliſhed; that to ſhake the law, when firmly eſtabliſhed, is not to be done without the greateſt danger to the eſtates and properties of the ſubject. 10 Mod. 375. Hill. 3 Geo. 1. B. R. in the Caſe of Goodright v. Wright.

8. The altering *ſettled rules concerning property*, is the moſt *dangerous* way of removing land-marks; per Parker Ch. J. Wms's Rep. 399. Hill. 1717. in the Caſe of Goodright v. Wright.

9. Where things are ſettled and *rendred certain*, it will not be ſo material, how, as long as they are ſo, and that all people
[504] know how to act; per Ld. C. Parker. Wms's Rep. 452. Trin. 1718. in Caſe of Butler v. Duncomb.

10. Ld. C. Talbot ſaid, he thought it much *better to ſtick to the known general rules than to follow any one particular precedent* which may be founded on reaſons unknown to us. Such a proceeding would *confound all property*. And then citing the Caſe of Lady Lanesborough v. Fox, as of the ſtrongeſt authority to the Caſe in point, his Lordſhip ſaid, that tho' it had not been in the Houſe of Lords, he ſhould have thought himſelf bound to go according to the general and known rules of law. Caſes in Chan. in Ld. Talbot's time, 26, 27.

11. It is *dangerous to alter old eſtabliſh'd forms*. Per Ld. C. Talbot. Caſes in Chan. in Ld. Talbot's time 196. Paſch. 1736.

in

in the Caſe of a Ne exeas regnum to Scotland ſince the Union. Hunter v. Maccray.

[For more of Precedents in general, ſee Ne Exeas Regnum (B) pl. 13, and other proper Titles.]

Præcipe quod reddat.

(A) *Lies againſt whom, and in what Caſes.*

1. PRæcipe quod reddat of *paſture for two oxen* lies againſt him who is *not tenant of the ſoil*. Br. Precipe quod reddat, pl. 39. cites 4 E. 2. and Fitzh. Breve 793.

But it does not lie againſt tenant of the ſoil. Br. Præcipe quod reddat, pl. 29. cites 4 E. 2. and Fitzh. Breve 792, 793.—*For againſt tenant of the ſoil* lies always *quod permittat*, and not præcipe quod reddat. Br. Præcipe quod reddat, pl. 1. cites 17 H. 8. 12.

2. *Præcipe quod reddat* lies *againſt a parſon*, but *not againſt a vicar*; for the franktenement is only in the parſon. Br. Dean and Chapter, pl. 34. cites 15 Aſſ. 14.

3. If *feme inheritrix takes baron*, and they have iſſue, and the feme dies, there the *law adjudges the franktenement in the baron, as tenant by the curteſy immediately without entry*, and precipe quod reddat lies *againſt him*. Br. Precipe quod reddat, pl. 38. cites 21 E. 3. 49. and Doct. & Stud. lib. 2.

4. Præcipe quod reddat does not lie *againſt the heir within age*, while he is within age. Br. Precipe quod reddat, pl. 29. cites Fitzh. Breve 897. 26 E. 3. 57.

5. In caſe of *rent ſervice*, a man ſhall have præcipe quod reddat or aſſiſe *againſt other than tenant of the land where there is a pernour*. Br. Precipe quod reddat, pl. 9. cites 31 Aſſ. 31. per Thorp.

And where there is *lord, meſne and tenant* &c. and the *tenant holds by* 2*d.* and the *meſne over by* 10*s.* if the 10*s.* be deny'd, the lord has not any againſt whom to bring his writ to recover the rent of 10*s.* but *againſt the meſne*, who is *his very tenant*; for in law there is no other who can be adjudged his receiver or pernour. Ibid.

6. In præcipe quod reddat, it was agreed for law, that if a *villein purchaſes, and the lord does not enter*, yet præcipe quod reddat may be *brought againſt both*; for if the lord enters pending

So between mortgagee and mortgagor; and

yet the *contrary* is said elſewhere, *between diſſeiſor and diſſeiſee*; and if the villein or *mortgagee takes the entire tenancy*, and pleads to the writ, the *demandant by the ſpecial matter ſhall maintain his writ*; quod nota. Ibid.

ing the writ, it ſhall abate the writ. Br. Brief, pl. 48. cites 41 E. 3. 16.

[505] 7. Præcipe quod reddat, aſſiſe &c. lies againſt the *Queen*. Br. Precipe quod reddat, pl. 32. cites 11 H. 4. 67.

8. If *a man has common certain in jure uxoris, or in tail*, and *grants* it *over*, and dies, the heir or feme may have *cui in vita* &c. againſt the pernour of the common, but not againſt the tenant of the ſoil. Per Shelley, which Fitzherbert utterly denied, and ſaid that no præcipe lies in this caſe. Br. Precipe quod reddat, pl. 1. cites 27 H. 8. 12.

Writ of *dower* lies *againſt guardian*, and yet he is not tenant of the franktenement. Br. Precipe quod reddat, pl. 35. cites F. N. B. Writ of Dower.——*And* writ of ingreſſu ad terminum qui preteriit lies againſt *tenant, pur auter vie after the death of ceſty que vie*. Ibid.——And writ of *dower* lies againſt *guardian in fact, and* againſt the *grantee of his intereſt*, but *not* againſt *his leſſee for years*. Ibid.——*And* lies againſt the *committee of the King*. Ibid.

9. Præcipe quod reddat *does not lie but againſt tenant of the franktenement*. Br. Eſtates, pl. 46.

See Prerogative, (Q 4.) pl. 7.

(B) Lies *for whom*, in reſpect of Eſtate, and *what amounts to it*.

1. *WRIT of entry in nature of aſſiſe* is a præcipe quod reddat. Br. Precipe quod reddat, pl. 13. cites 4 H. 4. 1.

2. *So writ of eſcheat* is a præcipe quod reddat. Br. Prerogative, pl. 119. cites Regiſt fol. 165.

S. P. But he who has ſeigniory for life may have ceſſavit. Br. Ceſſavit, pl. 40. cites S. C.

3. Termor of a ſeigniory ſhall not have *ceſſavit*, if the term ceaſes; for this is præcipe quod reddat, which none can have but he who demands franktenement. Br. Precipe quod reddat, pl. 24. cites 9 H. 7. 16. per Wood; quod non negatur.

4. If *tenant for life ſurrenders to him in reverſion out of the land*, to which *he agrees*, the franktenement by this is in him immediately, and he is tenant without entry, as to the bringing of an action by precipe quod reddat, but he ſhall not have treſpaſs without entry. Br. Surrender, pl. 50. cites 21 H. 7. 7.

(C) *Of what* it lies.

And ſo præcipe quod reddat of *profit apprender*, but of common of paſture lies quod permittat. Ibid.—* S. P. Br. Precipe quod reddat, pl. 30. cites F. N. B. 217.——S. P. Ibid.

1 PRæcipe quod reddat *of * paſture for two oxen*, and well. And ſo ſee that in ſuch ſpecial caſe, precipe quod reddat lies of common of paſture, *but it is not by name of common of paſture*. Br. Demand, pl. 42. cites 4 E. 2. and Fitzh. Brief 792, 793.

Ibid. pl. 31. cites F. N. B. 212.——S. P. or the like &c. Br. Precipe quod reddat, pl. 1. cites 27 H. 8. 12. Per Fitzherbert and Shelly J.—*So of common for two oxen*, per Shelley; but contra Fitzherbert clearly; for there is a *diverſity between paſture and common*; for if I grant you paſture for 20 beaſts in my manor, I ſhall appoint you where you ſhall have the paſture; but if I grant to you common for 20 beaſts in my manor, you ſhall have it per my and per tout; note the diverſity. —Ibid. Præcipe quod reddat lies *of paſture for two cows, but not of common of paſture for two cows*; per Aſheton; but the other Juſtices held it to be *all one*. Br. Precipe quod reddat, pl. 13. cites 4 E. 4, 1.—Br. Common, pl. 45. cites 4 E. 4, 1. 2.

2. Mortdanceſter does not lie of *homage* nor of *fealty*, but writ of cuſtoms and ſervices, becauſe they are not annual; and ſo it ſeems of precipe quod reddat. Br. Precipe quod reddat, pl. 40. cites 6 E. 2.

3. Cui in vita of *three houſes and two rodd of land, and of paſture for* 200 *ſheep cum pertinentiis in D.* And well by the opinion of the Court. Br. Precipe quod reddat, pl. 41. cites 6 E. 2. [506]

4. It does not lie of an *advowſon*. Br. Brief, pl. 359. cites 4 E. 3. 47. S. P. Br. Brief, pl. 421. cites the Regiſter, fol. 229.—S. P. Br. Precipe quod reddat, pl. 30. cites F. N. B. 217.—— S. P. Ibid. pl. 31. cites Fitzh. Formedon 92. M. 16 E. 3. and 34. M. 14. E. 3.—S. P. Br. Demand, pl. 53. cites 9 H. 6. —S. P. Br. Precipe quod reddat, pl. 10. cites 5 H. 7. 38. per Kebill, which Brook ſays ſeems good law; for the right of advowſon lies of it, and yet in common recoveries for aſſurance of lands and tenements, it is uſed to put advowſons in thoſe præcipes, viz. *in writs of entry in the poſt*.——But ibid. pl. 15. cites 20 E. 3, 15. contra, that it does lie of an advowſon; per Fairfax, quod non negatur. But quære inde.

5. *Nor* of a *market*. Br. Precipe quod reddat, pl. 31. cites Fitzh. Fine. 68. T. 13. E. 3.

6. If a man grants *piſchary*, and the grantee has it *in ſeveralty*, and is diſſeiſed and dies, the heir or ſucceſſor ſhall have *writ of entry ſur diſſeiſin*. Br. Precipe quod reddat, pl. 33. cites 13 E. 3. But Brooke ſays this ſeems not to be law.

7. Writ of entry ad terminum qui præteriit was admitted to lie of the *bedelary of the ſoke of Wincheſter*. Br. Precipe quod reddat, pl. 32. cites 19 E. 3. & Fitzh. View 77.

8. *Writ of ayel* was abated, becauſe it was *bovat' mariſci*; for this does not lie in tillage. Br. Precipe quod reddat, pl. 33.

9. Præcipe quod reddat was brought of the *office of ſerjeanty in the abbey of the borough of St. Peter*. Br. Precipe quod reddat, pl. 3. cites the Regiſter. Writ of *coſinage* was brought againſt J. N. *of three meſuages and the office of ſerjeant within the abbey of Weſtminſter*; and by the beſt opinion the action does not lie of the office *of another's poſſeſſion*; for the ſtatute of *Weſtminſter* 2, *cap.* 23. gives aſſiſe of eſtovers, wood, and office of fee &c. of his own poſſeſſion; but does not give action of another's poſſeſſion by præcipe quod reddat. Br. Precipe quod reddat, pl. 4. cites 7 H. 6. 8.

10. In debt it was ſaid, and not denied but that a man ſhall have præcipe quod reddat of a *portion of land*; quod quære, unleſs he *ſhews the quantity*. Br. Brief, pl. 424. cites 11 H. 4. 40. S. P. Br. Precipe, pl. 3. cites S. C. —Br. Demand, pl. 52. cites 11 H. 4. per Hill and Hank.—Br. Precipe quod reddat, pl. 21. cites S. C. per Skrene; quod Hill. J. conceſſit. But Brook ſays, *Quære* legem at this day; for uncertain.

Præcipe quod reddat lies of a portion of land *cum pertinentiis*; per Hill and Hank. and not deny'd; quod nota bene. Br. Demand, pl. 24. cites S. C.

It

It lies of a *parcel of land containing ſo many feet.* Br. Demand, pl. 20. cites 5 H. 7. 9.——Br. Precipe quod reddat, pl. 23. cites S. C.

* *Garden* is a good demand in præcipe quod reddat. Br. Demand, pl. 39. cites 5 E. 2. and Fitzh. Brief. 797.—It does not lie of a garden: nor of a *croft* nor *cottage*. Br. Precipe quod reddat, pl. 18. cites 8 H. 6. 3. per Babbington.—S. P. but Strange ſaid he had ſeen a garden demanded by proper name. Br. Demand, pl. 8. cites 8 H. 6. 3.

11. A man may have præcipe quod reddat of a *tenement and garden*, per Jenney; but per Huſſey Ch. J. a man ſhall *not* have precipe quod reddat *of a* * *garden only*, but may have plaint in *aſſiſe* of a garden and of a toft. Br. Precipe quod reddat, pl. 16. cites 22 E. 4. 13.

Br. Demand, pl. 20. cites S. C. And per Huſſey and Fairfax, the chamber paſſes by grant without livery of ſeiſin; for no franktenement is in it, any more than in trees growing.

12. It lies of an *upper-chamber;* per Rede; and it was ſaid that 21 H. 6. is contrary, and that it is not franktenement; for it cannot continue; for if the foundation periſhes, the chamber is gone: and Huſſey and Fairfax agreed to it. Br. Precipe quod reddat, pl. 23. cites 5 H. 7. 9.

13. In treſpaſs it was admitted that a *vill* may be recovered by præcipe quod reddat; and ſo ſee that vill is a good demand. Br. Demand, pl. 20. cites 5 H. 7. 9.

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* S. P. ibid. pl. 31. cites M. 13 E. 3. 57. and F. N. B. 12.—† *So* of a paſſage *ultra aquam*. Br. Precipe quod reddat, pl. 41. cites 6 E. 2.—‡ It does not lie of *common*, but quod permittat; and the like of other *profits apprender* which lie in prender and *not in render*; for *at common law no action lies* of profit apprender *but a quod permittat*; and *by the ſtatute of Weſtminſter, aſſiſe is given*; but by this, *writ of entry in nature of aſſiſe is not* given of it; for this is precipe quod reddat; but aſſiſe lies by the common law of *rent-charge and feck*; for thoſe lie in *render*. Br. Precipe quod reddat, pl. 13. cites 4 Ed. 4. 1. per tot. Cur. except Aſheton.

14. It lies of a * *gorce*, † *paſſage*, and ‡ *common*. Br. Precipe quod reddat, pl. 30. cites F. N. B. 191 & 217.

* S. P. Br. Precipe quod reddat, pl. 31. cites F. N. B. 212.

15. *So* of the * *profits of a mill.* Br. Precipe quod reddat, pl. 30. cites F. N. B. 217.

So of the † *bailywick* of the cuſtody of the park of B. Br. Precipe quod reddat, pl. 31. cites 7 E. 3. 63. and Fitzh. Entre 1.——† S. P. and yet properly a quod permittat lies of ſuch thing. Br. Demand, pl. 43. cites 34 E. 1. and Fitzh. Brief. 855.

16. *So* it lies well *of the cuſtody of a foreſt.* Br. Precipe quod reddat, pl. 1. cites 27 H. 8. 12. per Fitzherbert and Shelley J.

(D) Place. *In what Place* it ſhall be *brought.*

S. P. Br. Precipe quod reddat, pl. 22. cites 8 E. 4. 6. per Cur.—* S. P. Br. Precipe quod reddat, pl. 27. cites 34 H. 6. 18. per Laken; but per Moyle, aſſiſe, *dower* and *treſpaſs* may be brought *in a hamlet*. And Danby Juſtice agreed with Laken clearly.—Precipe quod reddat does *not* lie *in a hamlet*, but only in a vill; per tot. Cur. But note, where the

1. PRæcipe quod reddat ſhall be brought *in a* * *vill or place known*, and not in a hamlet. Br. Precipe quod reddat, pl. 2. cites 34 H. 6. 1, 18.

the land lies *in the foreſt of Sherwood*, or the like, which is out of any vill, quære tunc. Br. Precipe quod reddat, pl. 7. cites 9 E. 4, 36.

(E) *Seiſin.* What is *ſufficient* Seiſin.

1. *Seiſin in law* is ſufficient to ouſt action if none abates. * *As* if my *father dies ſeiſed, and none enters*; quod nota. Br. Precipe quod reddat, pl. 5. cites 21 H. 6. 8. and F. N. B. tit. Dote unde nihil habet accordingly.

S. P. per Yelverton; for there is ſeiſin in law in me, and precipe quod reddat may well be brought againſt me; *but* he ſaid, *if one abates*, the writ ſhall be brought againſt him; for thereby he is tenant of the franktenement in fact. Br. Seiſin, pl. 13. cites S. C.

2. *Leaſe for years* by A. to B. *on condition to have fee*; a precipe quod reddat was brought againſt A. and B. and held good, and not abateable for the doubt whether the condition ſhould be performed. Pl. C. 482. b. in Caſe of Nichols v. Nichols.——cites 12 E. 2. Fitzh. Voucher 205.

(F) Where *Joint or Several. And Pleadings.*

1. IF a man *gives land in tail or for life rendring rent*, and the *donee or leſſee leaſes or diſcontinues to divers* perſons, the donor ſhall demand the rent by ſeveral præcipes quod reddat againſt them; per Thorp and Baſſet J. But per Herle anno 3, it ſhall be demanded againſt them in common; but per Baſſet and Thorp he may demand the whole rent againſt every tenant, or in proportion at his will, and he ſhall have ſeveral actions of waſt againſt them. Br. Several Precipe, pl. 13. cites 22 Aſſ. 52.

Br. Demand, pl. 57. cites S. C.

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2. If 2 ſons are *co-heirs in gavelkind*, and *are diſſeiſed*, and *the one dies without iſſue*, the *other who ſurvives ſhall have ſeveral actions*, and not joint action. Br. Several Precipe, pl. 9. cites 24 E. 3.

And the *aunt and niece, of diſſeiſin done to the aunt* and ſiſter, ought to ſever in action. Br. Several Precipe, pl. 9. cites 24 E. 3.

3. *Mortdanceſtor againſt B. and his feme and one A.* of a houſe in one ſummons, and of other tenements in another ſummons; the *baron and feme ſaid that they were tenants, and that A. had no king, and vouch'd*; and *A. ſaid, that he was ſole tenant, and vouch'd*; and the *demandant as to the baron and feme ſtood the voucher*; and *as to A. where he had ſaid that he was ſole tenant, Priſt, that he was not*; and the Court would not ſuffer him to have other anſwer; by which in right of this ſummons the writ was abated and ſtood for the remnant. Quod nota. Br. Several Precipe, pl. 2. cites 28 Aſſ. 25.

4. *Attaint againſt B. and K. his feme and A. founded upon aſſiſe of novel diſſeiſin.* Finch. demanded judgment of the writ; for the *ſummons* is, *Summoneas B. and K. his feme and A. as tenants in common*, and *B. and A. made default*, and *K. is received*; he *ſaid, that thoſe lands and others deſcended to K. and A. who made partition, and*

and this land was allotted to K. &c. *and ſo they are ſeveral tenants*; judgment of the writ, and therefore there ought to be ſeveral ſummons's, as in mortdanceſtor juris utrum &c. & non allocatur; for this is *founded upon aſſiſe, in which writ ſeveral tenancy is no plea*, nor here; but *otherwiſe it would be if one who was not party to the aſſiſe had been tenant*. Br. Several Precipe, pl. 3. cites 50 Aſſ. 4.

5. *Debt againſt three by joint præcipe* and *proceſs iſſued* till the *one was outlaw'd, and after got pardon* and demanded judgment of the writ, inaſmuch as *five were bound by obligation and two were left out*. Norton ſaid, the five are bound and every one in the whole, by which the writ was abated; the reaſon ſeems to be inaſmuch as *all ought to be ſued if he will have joint precipe, and every one by himſelf may be ſued by ſeveral præcipes*. Br. Several Precipe, pl. 7. cites 12 H. 4. 18.

Br. Several Precipe, pl. 18. cites 4 H. 6. 14.

6. *Præcipe quod* reddat *againſt two by ſeveral præcipes of ſeveral lands*, the one *appear'd and ſaid that the one land and the other is all one land, and pleaded jointure*, and the *other for his part ſimiliter*; the *demandant ſaid, proteſtando, that the one land and the other are not one, but divers, and maintained his writ, that the one is ſole tenant of the one land, and the other ſole tenant of the other land*, and well; for the matter above pleaded by the tenant is not double; for the firſt matter is void, viz. to ſay that the one land and the other is all one; for the one is a ſtranger to the ſeveral demand againſt the other; for it is by ſeveral præcipes, which are in nature of 2 writs; quod nota, per Cur. Br. Double &c. pl. 137. cites 4 H. 6. 15.

7. A man brought *two formedons upon one and the ſame gift, as ſon and heir to one anceſtor, and as coſin and heir to another anceſtor, of moieties*, and this ſeems to be *by ſeveral præcipes in one and the ſame writ againſt one and the ſame tenant*; and the tenant was at iſſue upon the gift for both, and the jury came and were choſe, ſworn, and try'd upon the one, and were alſo choſe, try'd, and ſworn upon the other, becauſe there *are two divers originals*, quod nota. Br. Several Precipe, pl. 4. cites 21 E. 4. 25.

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(G) *Pleadings.*

1. IF a *nief purchaſes land and marries the villein of another lord*, and a *ſtranger will purchaſe precipe quod reddat againſt the nief and her baron*, he need not to *name the lord of the villein but* the lord *of the nief*; for the villein is not ſeiſed in jure proprio, but in jure uxoris. Br. Precipe quod reddat, pl. 37. cites 15 E. 3.

Aſſiſe, and made *plaint of a piece of land, containing* 40 *foot in length, and* 28 *in breadth*

2. In aſſiſe of mortdanceſtor, the writ was, Si obiit ſeiſitus *of eight feet of land in length, and ſix in breadth*, and *did not ſay the place or piece of land containing* &c. and yet well. Quære in præcipe quod reddat. Br. Precipe quod reddat, pl. 36. cites 16 E. 3.

and the aſſiſe was taken by default; therefore quere. Br. Ibid. pl. 20. cites 14 Aſſ. 13.

3. The *leſſee for life of the leaſe of the King granted his eſtate to A.* againſt whom *N. brought precipe* quod reddat, and the *firſt leſſee dy'd pending the writ*, and the *tenant pleaded this matter*, and ſo his eſtate determin'd, and franktenement devolv'd to the King; and the demandant could not deny it, by which the writ abated. Br. Precipe quod reddat, pl. 6. cites 24 E. 3. 5. in the old Report.

4. If a man *pending a præcipe* quod reddat *takes parcel of the land in leaſe for years, or* takes *execution of it by elegit* &c. this is a good bar, during the term or execution. Br. Execution, pl. 57. cites 24 E. 3. 39.

Quære, of taking of parcel *in exchange or partition.* Ibid.

5. Præcipe quod reddat *againſt two who vouch'd*, and the *vouchee enter'd into the warranty and pleaded*, and after Belknap came and ſaid that *one of the firſt tenants who vouch'd was dead.* Judgment of the writ, and therefore the writ was abated by award, notwithſtanding the voucher. Br. Brief, pl. 60. cites 43 E. 3. 16.

6. Præcipe quod reddat, the *tenant ſaid, that there is another præcipe quod reddat pending by the ſame demandant of the ſame land*; to which the * defendant *appeared, and after was eſſoign'd*, and therefore the writ was abated by award; quod nota. Br. Brief, pl. 42. cites 40 E. 3. 35.

*Orig. (demandant.)

7. Note per Paſton, that if the *defendant in præcipe* quod reddat *pleads a ſufficient plea in bar, and traverſes the title of the demandant*, this plea is not double; for *by the traverſe the plea in bar is waived.* Br. Double &c. pl. 11. cites 9 H. 6. 26.

8. *Præcipe* quod reddat *of land in D. S. and W.* the tenant demanded judgment of the writ; for *all the lands are in D. abſque hoc*, that any part of it is in S. or W. and the demandant ſaid that 100 acres are in D. and 100 acres in S. and the reſt in W. and ſo to iſſue. Br. Brief, pl. 32. cites 34 H. 6. 45.

It was ſaid, that if *a manor extends into four vills*, and affiſe or *præcipe quod reddat is brought of the manor in A. B. and C.* it is a good *plea that part extends into D.* Judgment of the writ, becauſe the demandant has not made foreprite; quære inde; for it ſeems, that he by this ſhall not recover, but only that which is in the three vills; and ſuch gift by feoffment or fine ſhall give but only that which is in the three vills. Br. Precipe quod reddat, pl. 12. cites 5 E. 4. 103.

In *præcipe* quod reddat *of land in D.* it is no *plea that the land is in S. without traverſe that it is in D.* Br. Brief, pl. 216. cites 9 E. 4. 6.

9. It is a good *plea in præcipe* quod reddat *in D. that there are two D.'s, ſcilicet, Over D. and Nether D.* and none without addition. Judgment of the writ, by reaſon of the viſne; per Brian and Vaviſor. Br. Brief, Brian and Vaviſor, pl. 324. cites 9 H. 7. 21.

10. A man may have præcipe quod reddat *of one acre cover'd with water, or* precipe quod reddat *generally of one acre of land*, and each is good. Br. Precipe quod reddat, pl. 11. cites 12 H. 7. 4. per Vaviſor.

Br. Precipe quod reddat, pl. 25. cites S. C.

Fol. 56.

* Prerogative of the King.

* V. The King's rights, or the King's rights of his Crown, or the rights of the Crown; for ſo theſe which ſince are called prerogatives, before this time were called jura regia, or jura regia coronæ, or jura coronæ. Bracton calls them privilegia regis; and Britton, droit le roy. But ſince the act of jus regni &c. has been commonly called prerogativa regis, which is all one with that which the act calls droit le roy. 2 Inſt. 263. cap. 50.

The King's prerogative is part of the law of England, and comprehended within the ſame. 2 Inſt. 496.

(A) Prerogative of the King. *What Act will make a Man Debtor to the King.*

[1. IF the *Chancellor of the augmentation takes an obligation to the uſe of the King*, and *delivers it to his ſervant* to deliver it to his Clerk, who ought to have the cuſtody, and *the ſervant cancels it*, the Maſter ſhall be charged for the obligation, becauſe he had it to the uſe of the King, and therefore ſhall be bound to render it either to the King or to him who has the charge of it. ‡D. 4 & 5 Ma. 161. 45.]

‡ Ibid. Trin. 4 & 5 P. & M. the Queen v. Ld. North.——Jenk. 216. pl. 60. S. C. and ſays, The ſervant of the Chancellor is anſwerable to the King for this debt; and ſo is the Chancellor, for he was obliged to keep it ſafely.—2 Roll. R. 300. S. C. cited in Sir Edward Coke's Caſe.——S. C. cited by Hobart Ch. J. Godb. 295. in Sir Edward Coke's Caſe as in Dyer 161. the Lord North's Caſe.

2. If *a man has a receiver* who receives his rents, and after the *lord is attainted of felony*, and this receipt and attainder is found by office, the King ſhall have *ſcire facias againſt the receiver to have the receipts*; Brooke ſays, quære if the ſame law be not againſt *tertenants*, and if the ſame law be not *upon outlawries in treſpaſs*. Br. Prerogative, pl. 136. cites 50 Aſſ. 5.

It was found by office returnable in the Chancery, that *R. received certain money of H. who was attainted* &c. by which the money belonged to the King, and that the ſaid R. *was ſeiſed of* certain *land after* that he was debtor to the King, *part in fee ſimple, and part for* 20 *years*, and ſhewed who was tenant of the one, and who of the other; by which ſcire facias iſſued againſt the tertenants, and the King had execution; and ſo ſee a *choſe en action* forfeited to the King. Br. Choſe en Action, pl. 10. cites 50 Aſſ. 5. Sir Hugh Spencer's Caſe, alias Green's Caſe.—Br. Charge, pl. 34. cites S. C.—Br. Prerogative, pl. 54. cites S. C.

3. *Executor* was charged in account for monies *received by teſtator out of the Exchequer by an inſufficient warrant from the Lord Treaſurer*. Cro. E. 545. Hill. 39 Eliz. B. R. Dodington's Caſe.

4. C. being committed by the Court of Exchequer for non-performance of a *decree*, by which he was decreed *to pay* 32*l.* 15*s. to a new corporation made by the Protector for the propagation of the goſpel in New-England*, which corporation had power to make collections for it; and *having collected ſuch ſums* of money

now

now in the cuſtody of ſuch perſons, they now came here by habeas corpus, and prayed to be diſcharged, becauſe the *corporation is diſſolved*, and they know not to whom to pay the money, and alſo becauſe by the *general act of pardon* all contempts &c. are pardoned: but the Court held, that this *collection being for a public uſe*, the money belonged to the King, and that the King is now entitled to it, as well as to the money collected for the buying of impropriations, as was lately adjudged; and they doubted whether a perſon committed for not obeying a decree were pardoned; for the commitment of the party is the execution of the decree; and there is no other way of executing it. Et adjournatur. Hard. 192. Paſch. 13 Car. 2. in Scacc. Chillenden's Caſe. [511]

(B) *Execution. To what Time* it ſhall *relate for Franktenement.*

[1. IF a man becomes debtor to the King, being ſeiſed of land in fee, and after aliens this land, yet this land may be afterwards put in execution, tho' the *alienation* was *before any action* commenced; for it relates to the time that he became indebted to the King and after. 50 Aſſ. 5. adjudged. Co. 8. *Sir Ger. Fleetwood*, 171. 22 E. 1. Rot. Clauſo Memb. 13.] 12 Rep. 3. cites Trin. 24 E. 3. Rot. 11. Thomas Favel's Caſe. S. P. See (D) pl. 1, 2. S. C.

—If the King's debt be *prior on record*, it binds the lands of the debtor into whoſe hands ſoever they come; becauſe it *is in nature of an original feudal charge on the land* itſelf, and therefore muſt ſubject every body that claims under it. Hiſt. View of the Court of Exchequer. 114.

[2. If an officer accomptant to the King *purchaſe land originally to him and his wife for her jointure, and to his own heirs*, this land ſhall not be charged during the life of the feme, nor the feme for the land. D. 5 El. 225. 33. adjudged.] Ibid. The Reporter makes a nota hoc; for the debt accrued after the ſaid jointure made. Trin. 5 Eliz. Sir William Sayntloo, alias Sir William Cavendiſh's Caſe. —Pl. C. 321. 9 & 10 Eliz. in the Caſe of Mines, cites S. C. but that for other lands of the ſaid officer which he purchaſed at the ſame time after his being indebted, and which he did not take to himſelf and his wife, but let remain in the hands of others, the ſeiſure of them was lawful by the common law; and ſays, that there were very many precedents in the Exchequer produced, that if any be accomptant to the King, or if any money, or goods, or chattels perſonal of the King, come to the hands of a ſubject by matter of record or in fact, the land of ſuch ſubject is charged for it, and ſubject to the ſeiſure of the King, in whatſoever hands it after comes, be it by deſcent, purchaſe, or otherwiſe.—S. C. cited by Doderidge J. Godb. 292. in Sir Edward Coke's Caſe.——Jenk. 220. pl. 89. cites S. C. that the wife's jointure is not liable to this debt at common law; but by the ſtatute of * 13 Eliz. cap. 4. in the Caſes of all the King's officers by receipt, as this treaſurer was, all their lands are liable to the King's debts from the day on which they became ſuch officers.——— * S. P. Jenk. 286. pl. 19.

[3. If a man *ſeiſed in fee, upon his marriage, conveys it to* the uſe of *himſelf and his wife* and to his heirs, and this is for the *jointure* of his wife, *and after he becomes officer and accomptant to the King*, and dies in arrear to the King, the feme ſhall not be charged for this land, in which ſhe was jointly ſeiſed with her If the lands were *aliened in whole or in part*, as by granting a jointure *before the*

debt contracted, such alienee claims prior

her baron before he became officer to the King, with the ſaid arrear. D. 5 El. 225. 32, 33.]

to the charge, and therefore is not ſubject to it. Hiſt. View of the Court of Exchequer. 114.—— See Pl. 2. and the Notes.

[4. If the *plaintiff in an aſſiſe finds pledges*, and after is *amerced for his nonſuit*, the land which he had the day of the pledges found ſhall be put in execution. 22 Aſſ. 32.]

Godb. 293. cites 24 E. 3 Rot. 4. Walter de Chirton's Caſe.

5. Debtor of the King *purchaſes*, but the *eſtate is conveyed to another*, but himſelf took the profits. The lands were ſeiſed. 11 Rep. 92. b. 93. Hill. 4 Jac. in the Earl of Devonſhire's Caſe.

6. When lands are once *liable* to the payment of the King's debt, they are liable into whoſe hands ſoever they come. Godb. 297. cites D. 224, 225. Cavendiſh's Caſe.

2 Roll. R. 294. S. C. —S.C. cited Hob. 339. and ſays, [512] that it was reſolved to be ſubject to the debt by the common law, without averment of fraud under the inquiſition, quæ terras & tenementa habuit.

7. The *office* of remembrancer and collector of the firſt fruits was *granted to A. for life*. Afterwards a grant was made *to B. habend. to him after the death or ſurrender of A.*—B. during the life of A. being ſeiſed of the lands in queſtion, *covenanted to ſtand ſeiſed* thereof *to the uſe of himſelf for life*, and afterwards *for 10 years to the covenantees for payment of his debts*, and after *to his firſt iſſue in tail male*, and ſo to the 2d, 3d, &c. the reverſion *to his daughter and her heirs*, with *power of revocation*. After this ſettlement A. dies, and B. exerciſes the office and dies, and upon account made with B.'s executors, it was found that he was in arrear 40,000 l. It was agreed by Doderidge J. Tanfield Ld. Ch. B. Hobart Ld. Ch. J. of C. B. and Ley Ld. Ch. J. of B. R. and decreed by Cranfield Maſter of the Court of Wards, and the whole Court, that the lands were liable to an extent, notwithſtanding the power of revocation reſerved in the ſaid conveyance. Godb. 289. Paſch. 21 Jac. in the Court of Wards, Sir Edw. Coke's Caſe, als. Sir Chriſtopher Hatton's Caſe.

(C) Debt of the King executed. *To what Time it ſhall relate.*

This was the Caſe of Walter de Chirton. Trin. 24 E. 3. Rot. 4. in Scacc. and alſo of Favel.

[1. IF a *collector* of a 15th *alien his land, and dies without heir*, proceſs ſhall be made againſt *tertenants* to render debt to the King. D. 4. 5. Ma. 160. 41.]

[2. The *ſame law*, if he alien *his goods and dies without executor*, proceſs ſhall be made againſt *poſſeſſors* of the goods, to render the debt. D. 4. 5. Ma. 160. 41.]

Trin. 24 E. 3. Rot. 11. in Scac.—Same Caſes cited by Doderidge J. by the name of Favel's Caſe. Godb. 292. 293. in Sir Edward Coke's Caſe.

Same Caſes cited 12 Rep. 2. 3. in Caſe of Ford v. Sheldon.—Same Caſes cited by Doderidge J. the name of Thomas Savell's Caſe, and Walter de Chilton's Caſe. 2 Roll. R. 296. in Sir Edward Coke's Caſe.

[3. If

[3. If a *farmer of the King* doth not pay his farm, and the *King recovers it in debt, his land* which he had the *day of the writ* brought, and after into whoſe ſoever hands it comes, ſhall be put in execution. 19 H. 6. 38. b.] Fol. 157.

(D) Debt of the King. Execution. To what Time it ſhall relate *for Chattels perſonal.*

See Forfeiture (R)—Utlawry.

[1. IF the *King has execution* againſt another *upon his chattels*, this ſhall *not* have relation for chattels perſonal to the time of the *becoming indebted* to the King. Co. 8. 171. *Sir Ger. Fleetwood.*] Paſch. 8 Jac.

[2. *Nor* to the time of the *writ brought* by the King. Co. 8. 171. Contra 19 H. 6. 38. b.]

[3. *And* the execution ſhall *not* have relation to the time of *the judgment given* for the King as to the putting in execution of chattels perſonal. For if they are *ſold bona fide before* execution, they ſhall not be put in execution. Co. 8. 171.]

[4. *But* the execution of the King ſhall have relation *to the execution awarded* for the King for chattels perſonal; for by the award of the execution the goods are bound into whatſoever hands they ſhall come. Co. 8. 171.]

(E) Debt of the King. Execution. To what Time it ſhall relate *for Chattels real.* [513]

[1. THE execution ſhall *not* relate to the *becoming indebted* to the King as to the putting in execution chattels real. Co. 8. 171. *Sir Ger. Fleetwood.*]

[2. *Nor* to the *writ purchaſed.* Co. 8. 171.]

[3. *Nor* to the *judgment* given. Co. 8. 171.]

[4. *But* it ſhall relate to the *award of the execution*; for all chattels real which he had at the time of the execution awarded, ſhall be put in execution into whoſoever hands they ſhall come. Co. 8. 171.]

[5. If *baron and feme purchaſe land to them for years, and the baron is indebted to the King, and dies*; this term ſhall be put in execution againſt the feme, becauſe the baron had power to diſpoſe of the term. 50 Aſſ. 5. adjudged. Co. 8. 171. (Quere this, for I do not ſee how this can be law, inaſmuch as the execution does not relate.)]

6. A. had a *term in groſs, and then purchaſed the inheritance*, and the term is declared *to attend* the inheritance; then A. becomes receiver of the King. A. is liable from the time of his becoming receiver, and the King ſhall have the benefit of the term; but if the term had been *mortgaged to one that had no notice*

of its attending the inheritance, he ſhould hold it againſt the King. Mich. 1700. Chan. Prec. 125. How v. Nichol.

(F) Debt of the King. Execution. *Who may be charg'd for it.*

[1. THE *iſſue* ſhall not be charg'd for the *debt of tenant by the curteſy*, he having the land by his mother. 46 E. 3. 18. One *jointenant*, if he be debtor to the King, ſhall not charge the poſſeſſion of *the other*. 40 Aſſ. 36.]

[2. The *ſame law, tho' he has nothing* who is the debtor. 40 Aſſ. 36. contra.]

Cited Comb. 470. Hill. 10 W. 3. B. R. in Caſe of Britton v. Cole.

[3. If the *lord of a manor loſe iſſues*, being ſummoned upon a jury, proceſs ſhall iſſue out of the Exchequer, to levy them *upon the lands of the copyholders and leſſees for life and years, parcel of the manor*; for the loſs of iſſues lies upon the land, as inherent ſervitude by the law, into whoſoever hands it comes. M. 12 Ja. B. per Cur. agreed, and that it is the common practice of the Exchequer.]

[4. If the *King grants a manor in which there are copyholders in fee farm*, the lands or goods of the copyholders are not liable to the fee farm rent, tho' the franktenement is, becauſe the *copyholders are more ancient than the rent*, being by preſcription. 12 Ja. B. per Curiam.

* Fol. 158.

[5. If the *King has a rent by preſcription out of a manor* in which there are copyholders, if the *King has not uſed to levy it upon the copyholds*,* it ſeems that he cannot charge them, in as much as they are in by preſcription alſo. Ma. 12 Ja. B.]

So for his fee farm. Ibid.—S. P. But this muſt be un-

6. If a man holds of the King, and his *rent* is arrear, the *King may diſtrain in his other lands* and tenements *held of others* as well as of himſelf. Br. Prerogative, pl. 77. cites 44 E. 3. 45.

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derſtood in ſuch other lands as his tenant has in his own actual poſſeſſion, and manured with his own beaſts; and not in the poſſeſſion of his leſſee for life, years, or at will, for their beaſts are not ſubject to ſuch diſtreſs. 2 Inſt. 132.—S. P. 4 Inſt. 119.

S. P. *But* if the tenant aliens, deviſes or *leaſes at will* only his other lands, this *prevents* the Crown diſtraining on thoſe lands. Hill. 1715. 2 Vern. 714. Attorney Genaral v. Mayor of Coventry.

And the King may diſtrain in all the lands of his tenant *for his ſervice*; but his grantee ſhall not do ſo.

7. Note, that it was held that if the *King has a rent-charge out of my land*, he *may diſtrain* for it *in all my land* by his prerogative; but his grantee ſhall not do ſo. Br. Prerogative, pl. 68. cites 13 E. 4. 5 & 6.

And ſo ſee that in ſuch caſes the patentee of the King ſhall not enjoy the prerogative of the King, becauſe he is a ſubject &c. Br. Prerogative, pl. 68. cites 13 E. 4. 5 & 6.

8. The *iſſue in tail* ſhall not be charged for the debt of his father to the King; by the beſt opinion. Br. Prerogative, pl. 106. cites F. N. B. fol. 217.

9. The

9. The courſe of the Exchequer is, that if a man be in debt to the King by recognizance or otherwiſe, his *heir* ſhall not be charged if the *executor has aſſets*, and a *feoffee that comes in by purchaſe* ſhall not be charged, if the heir or executor has aſſets; for the heir and executor come in gratis. Per Manwood Ch. B. D. 67. b. pl. 20. Marg. 24 Eliz. Anon.

A. was *leſſee for years of the King* rendring rent, and he *aſſign'd his term to J. S. in truſt* for payment of the debts of the ſaid A. and after the debts were paid, J. S. reſign'd it; but in the interim, between the aſſignment and the reſignation, divers *rents incurr'd* to the King; and the Barons agreed, that theſe arrearages in law *may be levied upon the lands of J. S.* notwithſtanding the truſt; *but* becauſe the Court was informed that the *executor* of A. *had aſſets*, and continued farmer of the farm at that time, they compelled him to pay it; and being preſent in Court, they impriſoned him until payment made, and allowed him his remedy by Engliſh bill againſt J. S. becauſe by the agreement J. S. was to have paid the rents to the King. Lane. 39 Paſch. 7 Jac. in the Exchequer.

10. After death of any debtor of the Queen, proceſs ſhall iſſue againſt the *executors*, the *heir* and the *tertenants* all together at one time; per Fanſhaw remembrancer of the Queen, who ſaid it was the courſe of the Court. Sav. 53. pl. 11. Paſch. 25 Eliz. in the Exchequer. Anon.

10. *Ceſty que truſt* being indebted to the King, this truſt ſhall be liable to the King's execution; and in the Caſe of Sir Edward Coke, the intereſt of the King's debt did attach upon the *power* of the King's debtor *to revoke a ſettlement* by him made of the eſtate, and P. 4 Jac. 1. Ford's Case, certain terms were taken in truſt for a recuſant, and held liable to the King's debt of 20l. per month; ſo that where the King's debtor hath the profitable part of the eſtate, the King ſhall not loſe his debt by any *fiction*. 3 Ch. R. 35. 21 Car. 2. in Caſe of Att. Gen. v. Sir George Sands.

11. *Lands of a jointreſs* of the value of 500l. per ann. were extended for a debt prior to the jointure; and upon the *inquiſition* taken were delivered in execution *at a 5th part of the value*; but decreed that the intrinſick value of the premiſſes by the year ſhall be accounted for ſince the death of the huſband, and be applied to the payment of the principal, intereſt and coſts; and if not ſufficient, the jointreſs to make it good; but if more than ſufficient, then to repay to the jointreſs ſo much thereof as has been received ſince the death of her huſband. Fin. R. 197. Hill. 27 Car. 2. Jacob v. Thaſker.

But tenant in dower ſhall not be diſtrained for debt due to the King by the huſband in his life-time, in the lands which ſhe held in dower. 3 R. S. L. 13.

(G) Execution for Debt of the King. *At what Time* it may be, in what Caſes *when Common Perſon is to have him in Execution alſo.*

[515] See (M. 2) pl. 5.

[1. IF *a man recovers in an action in which defendant is fined*, if he be afterwards taken in execution for the fine, he ought firſt to be in execution to the party, if he will, before he ſhall be in execution to the King, becauſe the King comes to the fine by the ſuit of the party. 7 H. 6. 7.]

The *damages and coſts for the party* ſhall be levied before the fine for the King only in decrees and popular actions; becauſe here the proſecution of the party is the means by which

which the King comes to the fine; but let the profecutor take care that he does not delay the levying of his coſts &c. to the King's prejudice; for if he does, the *execution of the King ſhall not wait.* Jenk. 241. pl. 23.

The party grieved by ſuppreſſing a will was preferred in his remedy for his *damages on an information* in the Star-Chamber before the King for his fine. Noy. 104. Brereton v. Townſend.

S. P. D. 67. b. pl. 20. marg.—— S. P. Becauſe the King's debt is in nature of a *feudal charge*, which if it comes on the land before the property of them is altered, it ſeizes them as it might for the original ſervice at firſt impoſed; but if there had been a lawful *alienation* of them before ſuch debt, there it *is not the feud of the tenant*; and therefore ſuch charge cannot affect it. Therefore if there were a *precedent judgment or ſtatute ſtaple & liberate* purſuant, before the King's extent comes down, it cannot charge the lands, becauſe the *property is altered* by the extent of the ſubject which relates to the time of the judgment given. Hiſt. View of the Court of Exch. 115.

[2. If *upon an extent upon a ſtatute ſtaple* againſt B. at the ſuit of A. *the ſheriff extends* the lands, and takes the goods, and ſeiſes them into the hands of the King, according to the writ, *but he does not make livery, and after a writ of prerogative iſſues* out of the Exchequer, rehearſing the prerogative of the King to be firſt ſatisfied of his debt, and commands the ſheriff to levy the debt of the King which B. owed him viz. 100l. of the goods of the debtor, and if he has not ſufficient, then to extend his land; and this writ *is delivered to the ſheriff after the return of the firſt writ of extent, but it was not return'd at the day.* In this caſe the ſheriff ought to execute the extent for the debt of the King, becauſe the property of the goods and land was not in A. before they were delivered to him by a writ of *liberate*, and * therefore liable to the extent of the King. D. 3. E. 6. 67. 20. *Stringfellow's Caſe.*]

Note alſo, that the *lien on the lands for the ſubject's debts is by ſtat. W.* 2. for before that the judgment did not bind the land; but the *King's debt bound the land before* the ſtatute. But the ſtatute does not touch the King's prerogative. Hiſt. View of the Court of Exch. 116. 117.—— * But when they were actually delivered out to the officer by the liberate, they then no longer belong to the debtor, ſince the King's writ had delivered them over for ſatisfaction of a debt that was precedent to the King's; for the creditor did not take them under the burden of the King's debt, becauſe his lien was antecedent to the King's debt; and it were repugnant to conſtrue him to take the land ſub onere of the King's debt, when he took it in ſatisfaction of a debt precedent. Hiſt. View of the Court of Exch. 117.

D. 197. pl. 44. Paſch. 3 Eliz. Laſſell's Caſe.

[3. If *A. recovers debt* againſt B. in B. and upon this *a capias is directed to* the ſheriff to *take B. in execution, and the ſheriff takes him*, and after, *before the day of the return of the capias, a writ of prerogative iſſues* out of the Exchequer againſt B. for 100l. debt due to the King, and this writ *bears teſte a day before B. was taken* upon the capias ad ſatisfaciendum; in this caſe B. ſhall be in execution for the debt of the King, and alſo upon the ſaid judgment of A. D. 3 El. 197. 44.]

For by the execution of lands or goods, the King may [516] be prejudiced. Hob. 115. pl. 139.

[4. Tho' *the debtor of the King* be *in execution* by his body or his land *for the King, yet the ſubject may alſo* put or *take him in execution by his body*; for the ſtatute of 25 E. 3. * 13. (where it is ſaid *that the ſubject's execution ſhall ceaſe till the King be ſatisfied,*) is to be intended of execution by which the King ſeiſes land or goods; but the body is all to all. Hob. R. Sherley's Caſe 160.]

S. C.—* It ſhould be (19) and is 25 E. 3. St. 5. cap. 19.

S. C. cited Cro. 290. per Doderidge J. in

5. *Two ſued* to have *execution of a ſtatute* merchant, and the *ſheriff return'd* that the *one of them was dead*; and the Court awarded that *the other* be received to ſue alone, and he *ſued* till

now,

now, when the *ſheriff returned that he had extended the lands, but* did *not* return *that he has delivered* it to the plaintiff; by which Belk. prayed that the ſheriff be amerced; upon which came one for him who made the recognizance, and ſaid that he was debtor of the King, and had writ out of the Chancery, rehearſing that he was debtor in the Exchequer, and prayed that execution ceaſe till the debt of the King be levied. Belk. confeſs'd it, and prayed that proceſs be continued in the roll till the debt of the King be levied; and ſo it was, and no capias iſſued &c. Fitzh. Execution, pl. 38. cites P. 41 E. 3.

Sir Edward Coke's Caſe. —Ibid. cites Paſch. 3 Eliz. D. 197. in Lord Dacres and Laſſel's Caſe.—— Ibid. cites D. 328. where the words of the writ of privilege ſhew that the King is to be preferr'd.

6. A. being *indebted* to B. *in* 40*l.* to be paid by equal payments at two ſeveral days, and being *bound for the payment* thereof *with two ſureties*, bargains and *ſells by indenture certain cattel, and* for 40 l. præ manibus ſolut. certain cattle &c. In the indenture, it was *covenanted that if A. ſaved harmleſs the ſureties* from the penalty of the ſaid obligation, then *the bargain and ſale ſhould be void.* Afterwards *it was agreed that A. ſhould uſe the cattle at the will of the ſureties.* Before the ſecond day of payment *A. kills himſelf, he not having paid any of the money*, and the cattle being in his poſſeſſion, it was adjudged that the almoner ſhould have the beaſts, or the money for which they were ſold, but ſhould diſcharge the ſureties againſt the debt; per tot. Cur. contra Dyer. D. 160. b. Paſch. 4 & 5 Ph. & M. in the Star-Chamber. Anon.

7. A. *acknowledged a ſtatute to B.* and afterwards *A. acknowledged another to C.* and afterwards *C. aſſigned to J. S. who aſſigned to the Queen.* After B. ſued out execution of the land of A. and he has it extended and a liberate of it. It was agreed by all the Barons, that B. having execution before the Queen, his execution ſhall ſtand, and the Queen cannot put him out. 3 Le. 239. Curſon's Caſe.

For theſe lands were never the lands of the Queen's debtor or aſſignor. Hiſt. View of the Court of Exchequer 118.——*But* if land had been *extended at the ſuit of the Queen*, then the Queen ſhould hold place, although it were a ſtatute of a puiſne date. 3 Le. 240. Trin. 30 Eliz. S. C. by name of Hungate v. Hall.

(H) Execution for Debt of the King. The *Prerogative* of the King *in Executions.*

See Diſtreſs (K).

[1. 27 E. 1. Rot. Fin. Memb. 18. *WRIT to the archbiſhop to ſequeſter bona eccleſiaſtica &c.* who died, and this *donec ſuffic. ſecurit. de debitis regis &c.*]

[2. If a man *dies indebted* to the King, the King may ſend to *ſeiſe the goods of the deceaſed till ſatisfaction.* 6 E. 1. Rot. Fin. Memb. 4. Command to *ſeiſe a depoſitum in cuſtody of* the friars minors. 27 E. 1. Memb. 7. Writ to ſeiſe the *goods of a ſheriff upon his death*, becauſe indebted to the King. Memb. 4, 5. Upon death of any other being in debt to the King. 11 E. 1. Rot.

Rot. Fin. Memb. 5. *Accepta ſecuritate* of the executors for the debts of the King *then licence to adminiſter &c.*]

*[3. 34 E. 1. Rot. Fin. Memb. 12. *de catallis archiepiſcopi Cant. captis in manum regis quia* indebted to the King, et *catalla venditioni exponit unde rex de facili* defrauded &c.]

All debts to the King bind from the time the ſame are contracted; for the debts that were of record, always bound the lands and tenements, and the debts not of record, by the 33 H. 8. 39. bind as a ſtatute ſtaple; for all lands being held mediately or immediately from the King, when therefore any debt was recorded of any perſon, it laid the eſtate as liable to ſuch debt as if it had been a reſervation on the firſt patent; and therefore as the King could ſeize for the non-payment of the reſerved rents, ſo he could ſeize the lands for any debt with which the lands were charged; but the Lord giving out any tenure for knight's ſervice, or other ſervice, could not ſeize for the non-performance of ſuch ſervice, as they did amongſt foreign feudiſts, becauſe the King had an intereſt in ſuch ſervice; for ſince the Baron was to come attended with ſo many knights, the King had an intereſt in the vaſſals who were to attend him; and therefore Lords are not permitted to ſeize the feuds of their tenants, but to diſtrain them for the ſervice reſerved. In the ſame manner, if a debt was recovered by the Lord in his Court-Baron, he could only order the bailiff to levy that debt by diſtreſs; but he had not the ſame remedy for the debt recovered in his Court, as he had for the rent annexed to the land; and therefore as the King, who had the eminent dominion, could ſeize for the non-performance of the tenure, as the Lord of the feud had by the feudal law; ſo whenever he had charged a debt on his tenant, he had the ſame remedy as on an original reſervation; and therefore the King, having a right to ſeize for the reſervation, had likewiſe a right to ſeize for the debt; but the Lords having no more than a right to levy on the goods, and not a right to ſeize the land itſelf, the debt to the Lord did not bind the land as the debt of the King did, which ſubjected the lands to a ſeiſure from the time it was on record; but goods were bound at common law from the teſte of the writ, whether it was a levari or a fieri facias, becauſe otherwiſe the debtors by alienation of the chattels might diſappoint the executions of their Lords, who having by their proceſs a right to diſtrain goods, there aroſe a lien on the goods from the time the levari was taken out; and the King's prerogative could not be leſs than the right of the ſubject, and therefore bound the goods from the teſte of the writ; but this was found inconvenient; and therefore by the 29 Car. 2. cap. 3. no execution ſhall bind the property of goods, but from the time of the delivery of the writ to the ſheriff; vide tit. * Execution, fol. 99. cap. 4. But this act ſeems not to extend to the King, for an extent of a later teſte ſuperſedes an execution of the goods by a former writ; becauſe by the King's prerogative at common law, if there had been an execution at the ſubjects ſuit, and afterwards an extent, the execution was ſuperſeded till the extent was executed; becauſe the publick ought to be preferred to the private property; and the rather, becauſe the King is ſuppoſed by publick buſineſs not to be able to take care of every private affair relating to his revenue, and therefore no time occurs to the King; and if he was to be prevented of his execution by another perſon coming in before him, laches muſt be imputed to him, which the law does not allow, and ſince the King's debt is preferred in the execution, therefore an executor is obliged by the law to pay the King's debt on record, before debt on record to a ſubject. Hiſt. View of the Exch. 110, 111, 112, 113, 114. cap. 6.—* This ſeems to refer to a MS. of the author's, and you may ſee S. P. at 2 New Abr. (publiſhed by Mr. Bacon) 363. tit. Execution (I).

[5. E. 1. Rot. Patent. Memb. 20. The *King granted to a biſhop, quod poſſit condere teſtamentum of all his goods quæ non ſunt epiſcopatus;** *& quod executores liberam habere poſſint adminiſtrationem &c.*]

* Fol. 159.

[6. 8 E. 1. Rot. Patent. Memb. 27. The *King granted to J. B. quod quandocunque moreretur executores ſui poſſint habere liberam adminiſtrationem de bonis ſuis ad debita ipſius Johannis ſolvend' & executionem teſtamenti faciendam, & quod de debitis, in quibus idem Johannes, nobis tenetur, ad heredes ipſius Johannis nos capiemus & non executores ſuos.*]

[7. If *a receiver* of the King be *impleaded in* * *B. a writ of privilege may be granted out of the Exchequer*, in which ſhall be recited the prerogative of the King, *quod a quibuſcunque debitoribus noſtris ſunt debita noſtra levan. & de bonis eorum ſolvend' priuſquam creditores ſatisfac. &c.* and after a command [was] not to proceed in

* Viz. C.B. —But the writ was diſallowed. Ibid.—And 3 Le. 223.

in the plea, but that the plaintiff ſhall proceed againſt him in the Exchequer if he will &c. D. 15. 16 El. 328. 9.]

[8. If *a man has judgment upon an obligation againſt A.* who dies, *and after another obligee of A. aſſigns his obligation to the King*, the executor of A. may after ſatisfy the judgment before the debt of the King, inaſmuch as the debt now due to the King *was not of record before the death of the teſtator*. Trin. 8 Ja. Scacc. per Curiam.]

9. The *King's debtor brought* a *quo minus* in the Exchequer againſt his debtor: the defendant appeared, and the plaintiff afterwards would have been nonſuit, but the Court would not ſuffer him ſo to be: and it was there ſaid, that a *releaſe by the King's debtor unto his debtor would not diſcharge* the King's debtor as to that debt; per Doderidge J. Godb. 291. cites Hill. 20 E. 3. [518]

In a *quo minus* in the Exchequer upon a debt *upon a ſimple contract*, the *defendant cannot wage his law*; becauſe the King is to have a benefit by the ſuit, although the King be no party to the ſuit. Godb. 291. per Doderidge J.—4 Rep. 95. b. in a Nota of the Reporter, and cites 8 H. 5. Ley. 66. 20 E. 3. Ley. 52. 10 H. 7. 6.

10. Where the *baron is indebted to the King*, and *he and his feme purchaſe* land *for* 60 *years*, and *he dies*, the feme ſhall be charged. Br. Jointenants, pl. 30. cites 50 Aſſ. 5.

And yet if A. be indebted to the King, *and A. and B. purchaſe jointly in fee*, and *A. dies*, and B. ſurvives, he ſhall not be charged; note the diverſity; for the other is only a *chattel*, all which the baron may alien without his feme. Br. Jointenants, pl. 30. cites 50 Aſſ. 5.

11. If a man is *bound to two* by an obligation, and the *one is outlaw'd*, and the King gets the obligation, he ſhall have action alone; for of an *entire chattle* the King ſhall not have a partner. Br. Forfeiture de terres, pl. 16. cites 19 H. 6. 47.

And if *one* of them *is felo de ſe*, the obligation is forfeited to the King after office thereof found. Ibid. pl. 58. cites 8 E. 4. 4.

12. If a *bond* be enter'd into *to the Queen for payment of money, but not inroll'd in any Court*, this debt ſhall be paid preferably to any debt due to a ſubject. And. 129, 130. pl. 176. Trin. 26 Eliz. Skroggs v. Greſham.

13. If *A. recovers a debt in C. B.* ſo as he has title to ſue execution by elegit, and the *defendant ſells his lands*, and afterwards *A. aſſigns his execution to the Queen*, ſhe ſhall not have prerogative againſt the feoffee to have *execution of the whole land but of a moiety only*. Agreed per all the Barons. 3 Le. 239. in Curſon's Caſe.

3 Le. 240. Trin. 32 Eliz. contra per Clark Baron, That *all the lands ſhould be extended*

S. C. by name of Hungate v. Hall.—The prerogative of the Queen which makes it a *feudal charge* never affected theſe lands; for they became the lands of the feoffee before the defendant was indebted to the Queen, and ſo are *ſubject to the ſame lien only as they were when it was only the debt of the defendant*. Hiſt. View of the Court of Exch. 118.

A. *confeſſed two judgments in debt upon bond to B. and was bound to J. S. in a bond bearing date before the judgments. J. S. aſſigned his debt to the King*; afterwards B. ſued out two elegits; by one he has the one moiety, and by the other the other moiety of A.'s lands extended; then proceſs iſſued out of the Exchequer for the debt aſſigned by J. S. to the King. The queſtions were, 1ſt. If the King's debt ſhould be preferred? And it was held that it ſhould not; becauſe here the ſubject's title is prior to the King's; otherwiſe where the King's debt is in equal degree; for there it ſhall be preferred, but not otherwiſe. Second queſtion was, whether any of the lands are liable to the King's debt,

debt, in as much as B. had extended all the lands, whereas by his ſecond elegit he ought to have taken but a moiety of a moiety? But this was held to be well, becauſe the judgments being of the ſame term were of equal date, the term being but as one day in law; and judgment accordingly. Hard. 23. Mich. 1655. in the Exchequer. Attorney General v. Andrew.

14. Lands worth 40 l. per ann. were extended by conuſee of a ſtatute at 20 l. per ann. Afterwards the Queen, who was *aſſignee of another conuſee*, by means of his being *outlawed*, ſued out an extent of the *over-value*, which was found; and upon a ſcire facias to anſwer the ſurpluſage to her, it was adjudged that the Queen has no ſuch prerogative; and judgment was given for the firſt conuſee. Cro. E. 265. Mich. 33 & 34 Eliz. B. R. The Queen v. Wall and Green.

The King by his prerogative regularly is to be preferred in payment

15. If A. is *indebted to the King and alſo to B.* the King may protect A. from the execution (but not from the ſuit) of B. until the King's debt be ſatisfied, unleſs B. gives ſecurity to the King to pay him the debt of A. Jenk. 213. pl. 52.

of his duty or debt by his debtor, before any ſubject, *although the King's debt or duty be the later*; and the reaſon hereof is, *becauſe theſaurus regis eſt fundamentum belli, & firmamentum pacis*; and thereupon the law gave the King remedy by writ of protection, to protect his debtor that he ſhould not be ſued or attached until he paid the King's debt; *but hereof grew ſome inconvenience*; for to delay other men of their ſuits, the King's debts were more ſlowly paid; and for remedy *thereof it was enacted by the ſtatute* 25 *E.* 3. *that the other creditors may have their actions againſt the King's debtor, and proceed to judgment, but not to execution, unleſs he will take upon him to pay the King's debt, and then he ſhall have execution againſt the King's debtor for both the debts.* Co. Litt. 131. b.——*But* in ſome caſes the ſubject ſhall be ſatisfied before the King; for regularly whenever the King is intitled to any * *fine or duty by the ſuit of the party, the party ſhall be firſt ſatisfied*, as in a decies tantum; and ſo if in an action of debt the defendant denies his deed, and it is found againſt him, he ſhall pay a fine to the King, but the plaintiff ſhall be firſt ſatisfied, and ſo in all other like caſes. And ſo it is in bills preferred by ſubjects in the Star-Chamber, their *coſts and damages* (if any be) ſhall be anſwered before the King's fine, as it is daily in experience. Co. Litt. 131. b.

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* A. *forged a cuſtomary* of the ſervices and cuſtoms of a manor to the prejudice of the Lord; this is a forgery of an intereſt within the ſtatute 5 Eliz. 14. the *party grieved* ſhall have double coſts and double *damages*, and upon judgment in this caſe in the Star-Chamber, theſe damages and coſts ſhall be levied of the goods, chattels, and lands of the offender; and the *fine* laid on the offender *for the King* in this caſe ſhall wait till the damages and coſts are levied for the party grieved. By all the Judges of England. Jenk. 241. pl. 23. cites 15 Eliz. D. 323.

See (F).

(I) Execution for the King. *The Goods of whom* ſhall be put in Execution.

[1. IF a *corporation be fined*, the fine ſhall not be levied of the goods which every one has in ſpecial by himſelf, but of the goods which they have in right of the corporation. 9 H. 6. 36. b.]

Cro. E. 431. S. C.

[2. The King may diſtrain the *beaſts of a ſtranger levant and couchant upon the land of his debtor*, upon writ of *levari facias*. M. 37. 38 El. B. R. between *Stafford* and *Bateman*; per Popham. Hill. 8 Ja. Scacc. Richardſon's Caſe.]

Cro. E. 431. S. C.—This muſt be a *miſtake* in the printer, or in thoſe who

[3. *But he cannot ſell* thoſe beaſts of the ſtranger taken upon this writ as he may the beaſts of the debtor himſelf. M. 37. 38 El. B. R. between *Stafford* and *Bateman*; per Popham. Hill. 8 Ja. Scacc. *Richardſon's* Caſe, per Curiam. 1 Car. at Reading Term, between *Dillon* and *Derby*, adjudged upon demurrer.

murrer. But it was not averr'd (as I believe) that the beaſts were levant and couchant.] had the management of Roll's manuſcript.

For the end of a levari facias is to have a ſale; and therefore to allow they may be taken on a levari facias and not ſold is a contradiction. 12 Mod. 178. Hill. 9 W. 3. in Caſe of Britton and Cole.—Skin. 619. S. C. and P.

[4. If *two tenants in common* are, and the *one is indebted to the King, the King* can *not* take the *beaſts of the other* tenant in common *going upon the land*, and ſell them for the debt; inaſmuch as their going was lawful upon all the land. Hill. 8 Ja. Scacc. per Cur. Richardſon's Caſe.] S. P. and ſo is 2 Roll. Ab. 457. but, ſays the book, it will be otherwiſe *for cattle that come in by wrong* on the land of the King's debtor, and are there levant and couchant. 12 Mod. 178. Britton and Cole.

[5. If the *debtor* of the King *ſuffers A. to manure his land, the goods of A. may be ſeiſed* by the King for the debt. M. 8 Ja. Scac. per Curiam. Brackenbury's Caſe.] Lane 91. S. C. by name of Brockenbury's Caſe.

6. If *tenant of the King* by rent &c. ſuffers arrears to incur, and after *leaſes* the land *to another*, the King may diſtrain the goods of the leſſee in any place out of the land charged. But he cannot ſell the diſtreſs; becauſe non conſtat, whether the rent be due or not. M. 17 Ja. B. per Hub.]

[7. If the *conuſee of a ſtatute dies inteſtate, and adminiſtration is granted to his feme who takes J. S. to baron, who becomes a debtor to the King*, the chattles which J. S. has in right of his wife as adminiſtratrix, ſhall not be extended for this debt of the King; becauſe thoſe chattles are to pay debts &c. Paſ. 20 Jac. Scac. between *Buckler* and *Rogers*, adjudged per Curiam, and ſuch an extent quaſh'd for the cauſe aforeſaid; and the Barons * ſaid, that it is the common courſe, and it was then ſaid by Mr. Weſton that ſuch recognizance is not aſſignable to the King, and that this has been ſo ruled.] [520] * Fol. 160.

[8. *All the goods of the debtor ought to be ſold* for the debt of the King, *deductis neceſſariis ſumptibus debitoris ad ſola victualia hoc eſt neceſſitati non ſuperfluitati & ut naturæ ſatisfaciat, non crapulæ nec ſoli debitori ſed uxori ejus & filiis & familiæ, qui prius exhibuerit dum ſibi viveret & exceptis equis & armis* of a knight; becauſe it is not for his dignity to go on foot, and *exceptis bobus & aſris carucæ*. All this is in Ger. de Tilburie. 57. b. 58. See this at large and well explained there.]

[9. See Regiſter Original, fo. 100. b. that it is not lawful to diſtrain *propriam equitaturam*, hoc eſt, the palfry of a man, *where he has other ſufficient chattels* to diſtrain. But it does not appear there for whom the diſtreſs was. Vide Selden, tit. of Honour, 321. ſays that this *equitatura, is* a horſe which a man keeps for his journeying.]

10. A prior alien was indebted to the King for his farm-rent: and being ſued for the ſame, he ſhewed, that there was a *parſon*, who *held a certain portion of tithes* from him, which were part of the poſſeſſions of the ſame priory, which he kept in his hands, ſo

as he could not pay the King his farm-rent, unleſs he might have thoſe tithes which were in the parſon's hands. Wherefore a writ was awarded againſt the parſon to appear in the Exchequer, and to ſhew cauſe why he ſhould not pay the ſame to the King for the ſatisfying of the King's rent. And there Skipwith Juſtice ſaid, that for any thing which toucheth the King, and may turn to his advantage to haſten the King's buſineſs, that the Exchequer had juriſdiction of it, were it a thing ſpiritual or temporal. Godb. 291. per Doderidge J. cites 38 Aſſ. 20. and cites 12 E. 3. SWALD's Caſe to the ſame purpoſe.

The King ſhall have the *debt of the debtor to the King's debtor* paid unto him; per Doderidge J.

11. The King may *diſtrain* for his debt due to him; *and if a man* be indebted to him who *has tenants who owe him rent*, he may make levy upon them, and this ſhall be a good bar for them againſt their Lord, who is debtor to the King, that they have paid it to the King by levy &c. And this levy is by prerogative. Br. Prerogative, pl. 39. cites 21 H. 7. 12.

Godb. 290, 291. cites 21 H. 7. 12. the Abbot of RAMSEY's Caſe.—As the Prior of Ramſay was indebted to the King, and another Prior was indebted to the Prior of Ramſey, and then it was pleaded in bar, that he had paid the ſame debt to the King, and the plea holden for a good plea. Godb. 290, 291. Paſch. 21 Jac. in Sir Edward Coke's Caſe.—S. C. cited by Doderidge J. 2 Roll. R. 295. in Sir Edward Coke's Caſe.—And 2 Roll. R. 297. in S. C. Tanfield Ch. B. agreed the Caſe of the Prior of Ramſey. 21 H. 7. 12 & 16. and ſaid, that when he was a ſtudent, Dyer called for the record thereof in the Common Pleas, and the record is according to the book.

And if *rent* be due and *payable* unto me *by my leſſee for years*, the ſame may be taken for the King's debt, and the ſpecial matter ſhall be a good bar in an avowry for the rent. Godb. 291. cited by Doderidge J. as 38 E. 3. 28.

[521] (I. 2) *Lands of whom* ſhall be put in Execution, *Jointenants* &c.

Br. Execution, pl. 148. cites S. C. ——*But* where a *leaſe* is made

1. IT is agreed, that if *A. is indebted to the King, and he and J. N. purchaſe jointly*, and *A. dies* and J. N. ſurvives, J. N. nor his lands ſhall not be charged to the debt of the King; quod nota. Br. Charge, pl. 34. cites 50 Aſſ. 5.

to the baron and feme for forty years, and the *baron is indebted to the King, and dies* within the term, the feme *ſurvives*, and has the term; and the feme was charged by award notwithſtanding the ſurvivor, becauſe it was only a chattel in the baron, and *purchaſed to them before the coverture*, and therefore execution was awarded againſt the feme by all the Juſtices. Quod quære if law. Br. Charge, pl. 34. cites 50 Aſſ. 5.—Br. Execution, pl. 148. cites S. C.

Vide (I) pl. 8. 9.—(M. 2) pl. 1. 4. 7.

(K) *What Things* ſhall be put in Execution for the Debt of the King.

Ibid. cites Trin. 24 E. 3. Rot. 4. in the Exchequer. * Walter de Chirton's Caſe. ——

[1. IF a cuſtomer be indebted to the King, and *has purchaſed with the King's money certain land, and by covin* to defraud the King, *cauſed the feoffor to enfeoff his friends* in fee, and notwithſtanding he *himſelf takes the profits*, this land ſhall be ſeiſed for this debt until &c. D. 4. 5. Ma. 160. 41.]

S. C. cited by Doderidge J. Godb. 293. in Sir Edward Coke's Caſe.——S. C. cited 12 Rep. 2, 3. in

in Case of Ford v. Sheldon.——* S. C. that his friends were infeoffed *not to his use, but upon confidence* between him and his friends *so that he might dispose thereof*, and therefore this land was extended; cited by Doderidge J. 2 Roll. R. 296. in Sir Edward Coke's Case as Walter de Chilton's Case.—S. C. cited by Tanfield Ch. B. 2 Roll. R. 297. as 24 E. 3. and says the reason is, because he might make disposition thereof; and when writ issues to the sheriff, it is to enquire of what lands habuit vel seisitus fuit, not quas terras habuit & seisitus fuit; for if he has to dispose, habuit, and then liable to the King.—S. P. Godb. 295. cited per Tanfield Ch. B. as adjudged 24 Eliz. in Morgan's Case.—S. C. cited by Tanfield Ch. B. 2 Roll. R. 298. in Sir Edward Coke's Case.

2. A clerk of the Court was assign'd to receive monies for the King, who had *feoffees* of lands *to his use*: and the lands were found and seised for the King's monies, by force of the word (*habuit.*) Cited per Tanfield Ch. B. Godb. 294. Pasch. 21 Jac. in Sir Edward Coke's Case, as Mich. 30 H. 6. Rot.

S. C. cited by Tanfield Ch. B. 2 Roll. R. 297. in Sir Edward Coke's Case. ——*So* the *Sheriff* of a county being *indebted* to the King, his feoffees were chargeable to the King's debt by force of the word (habuit) for habuit the lands in his power. Cited per Tanfield Ch. B. Godb. 294. Pasch. 21 Jac. in Sir Edward Coke's Case as 32 H. 6. Philip Butler's Case.—And 6 E. 4. Bowes Case accordingly.—S. C. cited per Tanfield Ch. B. 2 Roll. R. 297. in Sir Edward Coke's Case.—*So* a *widow* being *indebted* to the King, her feoffees were chargeable to pay the King's debt; because she had power of the land, it being found by inquisition that habuit. Cited per Tanfield Ch. B. Godb. 295. in Sir Edward Coke's Case as 34 H. 6. and cites 1 R. 3. accordingly.

3. B. an *officer of the Exchequer* had lands in the hands of feoffees upon trust, and a writ issued out, and the lands were extended for the debt of B. in the hands of his feoffees. Godb. 299. in Sir Edward Coke's Case, cited by Hobart Ch. J. as Babington's Case.

S. C. cited by Hobart Ch. J. 2 Roll. R. 304. in Sir Edward Coke's Case.——So the *King's farmer* had *feoffees* to his use, and died indebted to the King; and upon an inquisition it was found that (habuit); for he had them in his possession, by compelling his feoffees by equity in Chancery; and therefore it was adjudg'd that the King should have the lands in the feoffee's hands in extent. Godb. 294. in Sir Edward Coke's Case, cited by Tanfield Ch. B. as 7 H. 6. in the Exchequer.——2 Roll. Rep. 297. in Sir Edward Coke's Case. S. C. cited by Tanfield Ch. B. as 17 H. 6.

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4. D. having lands in other men's hands upon trusts, the lands were seised into the King's hands for a contempt (and not for debt or damages to the King). Cited per Hobart Ch. J. Godb. 299. in Sir Edward Coke's Case, as Sir Robert Dudley's Case.

S. C. Cited per Hobart Ch. J. 2 Roll. R. 304. in Sir Edward Coke's Case, as 7 Jac.

5. *Money* was *levied by Sheriff* upon a debt recovered by A. against B. which the sheriff did not deliver, but was ordered to be *brought into Court till* a difference that arose about it was determined. B. was indebted to the King, and a writ issued to inquire what goods &c. he had. The Court conceived that the money being but as a *depositum* there, they might find it; and the Court did not protect it from the inquisition, but would make no direction for the finding it. Vent. 221. Monk's Case.

6. A *copyhold* estate is not to be seised upon a recognizance. Per Holt Ch. J. Trin. 1 Ann. B. R. Farr. 38. Anon.

Vide (M. 2) pl. 3. par. 1. f. 30. 31. & pl. 6.

(L) *What* Thing *will be a Diſcharge of Land* of the Debt of the King.

Hob. 45. S. C. ſays, My Lord Ch. Baron [Tanfield] made a doubt of this, in reſpect (as he ſaid) that he took the uſe of the Exchequer to be otherwiſe, except the King's patentee had the ordinary

[1. IF a *receiver* be indebted to the King for arrears of his receipts, and being *ſeiſed of land in fee, conveys it in fee to J. S. who conveys it to the King in fee, and immediately retakes it of the King in fee, rendring a rent to the King in fee pro omnibus redditibus & ſervitiis, & omnibus clameis quibuſcunque.* In this caſe this land is not liable or extendible for this debt; for the land is not chargeable itſelf, but in reſpect of the perſon who is the debtor, as in caſe of a ſtatute; ſo that when the King takes the land, the debt is not by this diſcharged, but may be recovered againſt the debtor himſelf. But the land in the hands of the King is not chargeable, and then when the King conveys it over, he cannot againſt his own conveyance charge the land. Hub. 63. *Sir William Fleetwood and Sir Roger Aſhton's Caſe.*]

clauſe of covenant and grant to be diſcharged of all duties, debts and demands. And that therefore they all agreed, that their opinion in this caſe ſhould be made up in the decree for the diſcharge of this land, without prejudice to the uſe of the Exchequer for the King's debt there.——S. C. Ley. 50. Paſch. 13 Jac. That it was reſolved by the Lords Ch. J. Coke and Hobart, and the Lord Ch. B. Tanfield, that the land was not extendible, but diſcharged in law by the poſſeſſion of the King; and decreed accordingly.

* Hob. 46. in S. C. of Fleetwood v. Sir Roger Aſhton.

[2. If a *receiver* be in debt to the King, and *the King releaſes to the tenant of the land, which the receiver had after he was debtor to the King,* [* *all rights and titles,*] this does not diſcharge the land; for the land is not charged but in reſpect of the perſon. for the debt does not give any right in the land. Hub. 63.]

3. By 27 *Eliz. cap.* 3. *ſ.* 8. *If the accountant or debtor had a* quietus *eſt* in his life-time, *that* ſhall diſcharge the heir *of the debt.*

(M) Debt of the King. *How Execution may be.*

Prynne's Cott. Rec. Abr. 40. No. 45.

[1. Rot. Parl. 17 E. 3. N. 45. THE Commons pray, that in caſe a man be found in the Exchequer debtor to the King, *in caſe the King be in his debt,* that by uſe of equity if he pleaſe that *the one debt may be rebated in the other,* as heretofore has been uſed, and is contained in the ſtatute of the ſaid Exchequer, and that due allowances of ancient debts pardoned be allowed. Anſwer of the King, The King will be adviſed * to eaſe his people in the beſt manner that he can.]

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* Orig. is, De faire leaſe a ſon people que il purra bonement.

It was reſolved per Cur. that this branch extends to

2. 33 *H.* 8. *cap.* 39. *ſ.* 32. enacts, That *if any manors, lands &c. ſhall be chargeable with the payment of ſuch debts, and ſhall be in the ſeiſin and poſſeſſion of divers perſons other than the obligators, then all the ſaid manors, lands &c. and every parcel ſhall be wholly and*

and intirely, and in no wise severally liable and chargeable with payment of the said debts.

all executions for debts to the King, as

well at the common law as upon this statute, and that all shall be equally extended by force of this branch, according to the purview of this act. 7 Rep. 21. b. in Sir Thomas Cecil's Case.

A debt came to the Queen by *attainder of the creditor*, upon which an *extent issued against one of the ter-tenants*, liable to the debt, and not against all; it was moved, that upon a branch of the said statute all the ter-tenants ought to be charged. But it was the opinion of divers, that such a debt which cometh to the King by attainder, is not within the said statute; for although the attainder is by judgment, yet *debt by judgment* it *cannot properly be said, but where a debt is recovered by judgment*. And that was the Case of the Lord Norris, for a debt due to Heron by the Lord Williams, which Heron was attainted. 2 Le. 33. pl. 39. 31 Eliz. The Lord Cromwell's Case.

(M. 2) *Statutes* relating to Debts of the King.

By 9 *H.* 3. *cap.* 8. *THE King nor his bailiffs shall levy any debts upon lands or rents so long as the debtor hath goods and chattels to satisfy, neither shall the * pledges be distrained so long as the principal is sufficient; but if he fail, then shall the pledges answer the debt, howbeit they shall have the debtor's lands and rents until they be satisfied, unless he can acquit himself against the pledges.*

By order of the common law, the King for his debt had execution of the body, lands and goods of his

debtor; this is *an act of grace*, and restrains the power that the King before had. 2 Inst. 19.

* It was resolved by the Court, that this act does not extend, nor was ever taken to extend to sureties in a bond or recognizance, if they may be so call'd, being bound themselves equally with the principal, as sureties to perform covenants and agreements are in like manner; but to pledges and mainoptors only, who by express words are not responsible, unless their principals become insolvent, and so are conditional debtors only. And so the act has always been construed, and the words themselves imply as much. Hard. 378. Mich. 16 Car. 2. Attorney General v. Reiby.

2. By 9 *H.* 3. *cap.* 18. *The King's debtors dying, the King shall be served before the executor.*

By this statute, the King by his prerogative

shall be preferr'd in satisfaction of his debt by the executors before any other. And if the executors have sufficient to pay the King's debt, the heir nor any purchaser of his lands shall not be charged. 2 Inst. 32.

3. *West.* 1. 3 *E.* 1. *cap.* 19. enacts, That *the sheriff having received the King's * debt, upon his next account shall discharge the debtor thereof, in pain to forfeit three times so much to the debtor, and to make fine at the King's will.*

* Under this word [debitum] all things due to the King are

comprehended, and not only debts in their proper sense, but duties or things due, as rents, fines, issues, amercements, and other duties to the King received or levied by the sheriff; for debt in its large sense signifies whatsoever a man doth owe; and debere dicitur quia deest habere; debitori enim deest quod habet, cum sit creditoris, maxime in casu domini regis. 2 Inst. 198.

*The sheriff and his * heirs shall answer all monies that they whom he employed do receive; and if any other that is answerable to the Exchequer by his own hands do so, he shall render thrice so much to the plaintiff, and make fine as before.*

* This is to be understood *quoad restitutionem* but *not quoad pœnam*; that is for the civil but not for the criminal part; for it is a maxim in law, Pœna ex delicto defuncti hæres teneri non debet; and again In restitutionem non in pœnam hæres succedit. 2 Inst. 198.

Upon payment of the King's debt, the ſheriff ſhall give a talley to the debtor, and the proceſs for levying the ſame ſhall be ſhewed him upon demand without fee, on pain to be grievouſly puniſhed.

Vide (K). 4. 28 *E.* 1. *cap.* 12. enacts, That *beaſts of the plough ſhall not be diſtrained for the King's debts ſo long as others may be found, upon ſuch pain as is elſewhere ordained by ſtatute, (viz.) by the ſtatute de diſtrictione ſcaccarii.* 51 *H.* 3.

This is *an act of grace*, and upon this act there lies a writ directed to the ſheriff, commanding him to receive ſurety according to this act, which if he refuſe, an attachment lies againſt him, or the party offering ſurety, according to this act, if it be refuſed, may have an action againſt the ſheriff &c. 2 Inſt. 565.

The great diſtreſſes ſhall not be taken for his debts, nor driven too far; and if the debtor can find convenient ſurety, the diſtreſs ſhall in the mean time be releaſed; and he that does otherwiſe, ſhall be grievouſly puniſhed.

See (G).—For otherwiſe, if without giving ſuch ſecurity, the party takes forth execution upon his judgment, and levies the money, the ſame money may be ſeiſed upon to ſatisfy the King's debt; per Doderidge J. Godb. 290. cites 45 E. 3. Decies tantum. 12.

5. 25 *E.* 3. *Stat.* 5. *cap.* 19. *enables a common perſon to ſue a debtor of his (who is likewiſe indebted to the King) to judgment, but he cannot proceed to execution, unleſs the plaintiff* gives ſecurity to pay the King's debt firſt, *and then he may take execution for his own and the King's debt too.*

See (Y. c. 4.)—None other is to be charged, but ſuch as were liable to the bond when it was made; per Shute. Sav. 10 Paſch. 22 Eliz. Parker's Caſe.

6. 33 *H.* 8. *cap.* 39. *ſ.* 2. enacts, That *all obligations and ſpecialties concerning the King and his heirs, or made to his or their uſe, ſhall be made to his Highneſs and to his heirs, Kings, in his or their name or names, by theſe words, Domino Regi, and to no other perſon to his uſe, and to be paid to his Highneſs by theſe words, Solvend' eidem domino regi hæred' vel executoribus ſuis, with other words uſed in common obligations, which obligations and ſpecialties ſhall be in the nature of a ſtatute-ſtaple.*

An *obligation for performance of covenants* is within this act, after that the covenants are broken. Reſolved, 7 Rep. 20. b. Mich. 39 & 40 Eliz. in the Exchequer, in Sir Tho's Cecil's Caſe.—S. C. cited Hard. 368. Paſch. 16 Car. 2. in Caſe of the Attorney General v. Waring.—S. C. cited Hard. 442. Paſch. 19 Car. 2. in Caſe of Attorney General v. Sir Henry Palmer.

S. 3. *All ſuch obligations, the debt not being paid, ſhall come, remain, and be to the heirs or executors of the King as he ſhall aſſign or appoint. And if any perſon take any obligation to the uſe of the King or his heirs, otherwiſe than as aforeſaid, he ſhall ſuffer ſuch impriſonment as ſhall be adjudg'd by the King or his honourable council.*

S. 6. *Coſts and damages are given to the King.*

See (Q. 6). *S.* 7. *Directs debts to be ſued for in the proper courts.*

See (Q. 6). *S.* 13. *And every of the ſaid courts are impowered to ſet ſuch fines, penalties and amercements, upon parties, ſheriffs officers and other perſons, for their defaults, contempts, negligences or miſdemeanors, as to the ſaid reſpective courts ſhall ſeem expedient. And all trials in the ſaid ſeveral courts ſhall be by due examination of witneſſes, writings, proofs, or ſuch other ways as by the ſaid ſeveral courts ſhall be thought expedient.*

S. 25.

S. 25. *And in all actions and ſuits in any of the courts aforeſaid for any debt due to the King, by reaſon of any attainder, outlawry, forfeiture, gift of the party, or by any other collateral ways or means, it ſhall be ſufficient in law to ſhew and alledge generally, that the party to whom the ſaid debt did belong, ſuch a year and day did give the ſame to the King, or was attainted, outlaw'd &c. whereby the ſaid debt did accrue to the King, ſhall be of the ſame force and effect as if the whole matter had been alledged and declared at large according to the order of the common law.*

See (Q. 6).

S. 26. *If any ſuit be commenced or taken, or any proceſs be hereafter awarded for the King, for the recovery of any of the King's debts, that then the ſame ſuit and proceſs ſhall be preferred before any perſon or perſons.* (2) *And that our ſaid ſovereign Lord, his heirs and ſucceſſors, ſhall have firſt execution againſt any defendant or defendants, of and for his ſaid debts, before any perſon or perſons; * ſo always that the King's ſuit be taken and commenced, or proceſs awarded for the ſaid debt, at the ſuit of our ſaid ſovereign Lord the King, his heirs or ſucceſſors, before judgment given for the ſaid other perſon or perſons.*

This ſtatute abridges the prerogative, and controls the common [525] law; and here is a negative implied, per Baron Parker and Nicholas, S. P. tho' the ſtatute ſounds in the affirmative; for it enacts a new thing, and the ita quod makes a condition precedent and a limitation. And Steele Ch. B. accordingly, and the words are introductive. Hard. 27. Mich. 1655. in Scacc. The Attorney General v. Andrew.

* Strange arg. ſaid, That upon this act he took it, the ſuit muſt be ſaid to be then taken or commenced when the firſt ſtep is made towards the proceeding to execution; and the firſt ſtep to be taken is to procure a fiat of a Baron, and then it is in fact that the proceſs is awarded. G. Equ. R. 222. Hill. 12 Geo. 1. in Scacc. in Caſe of the King v. Mann.

S. 27. *All manors, lands, tenements, poſſeſſions and hereditaments, the which now be, or that hereafter ſhall come or be, in, or to the hands, poſſeſſion, occupation, or ſeiſin of any perſon or perſons, to whom the ſaid manors &c. have heretofore, or hereafter ſhall deſcend, revert or remain in fee-ſimple or in fee-tail, general or ſpecial, by, from or after the death of any his or their anceſtor or anceſtors as heir, or by gift of his anceſtors whoſe heir he is, which ſaid anceſtor or anceſtors was, is, or ſhall be * indebted to the King or to any perſon or perſons to his uſe, by judgment, recognizance, obligation or other ſpecialty, the debt whereof is or ſhall not be contented and paid; † that then in every ſuch caſe the ſame ‡ manors &c. ſhall be and ſtand by authority of this act, from henceforth charged and chargeable to and for the payment of the ſame debt, and of every part thereof.*

See (F). — A. ſeiſed of the manor of of F. *in conſideration of a marriage to be had between B. his ſon and M. daughter of J. S. covenanted to levy a fine, to the uſe of himſelf and his wife for their lives,* remainder to the uſe of *B. and M. and the heirs of their bodies* with remainders over. Afterwards *A. acknowledged a recognizance to the Queen and died. His wife died.* The manor is extended for the Queen's debt, by force of the ſtatute. It was argued by Coke, that the manor is not chargeable by the ſaid ſtatute; that it was made for the King's benefit in 2 points. 1. To make lands intail'd liable for the King's debts where they were not ſo before againſt the iſſue. 2. To make bonds taken by the officers of the King to the uſe of the King as alſo of ſtatutes; that the word *(was or ſhall be indebted)* ſhall not be intended after the gift made; that *(ſhall be)* is to be intended of future debts after the ſtatute, whereas at the time of the ſettlement A. was not receiver or other officer to the Queen; the words are *(by gift after the debt acknowledged to the Queen.)* That this Caſe is not within the ſtatute; for the words are *(of the gift of his anceſtor)* but here B. has not the manor of the gift of A. but rather by the ſtatute of uſes, and ſo he is in the poſt and not in the per by his anceſtor; for the fine was levied to divers perſons to the uſes aforeſaid, nor was the gift a mere gratuity but in conſideration that he ſhould marry the daughter of J. S. and the debt accrued not till after the gift. He admitted that had there been any fraud in the caſe, or any *purpoſe in A. when*

be made the conveyance to become the King's debtor or officer, it would be within the ſtatute; and the gift had been a mere gratuity &c. And afterwards (as Coke reported) B. and his lands were diſcharged. 2 Le. 90, 91. pl. 114. Mich. 29 Eliz. in the Exchequer. Foſkew's Caſe.

* This is intended an immediate debt, and not ſuch debts as are due to the ſubject and appertain or accrue to the King by ‡ *attainder, outlawry, forfeiture, gift of the party, or by any other collateral way or means*; for which this ſtatute has a clauſe a little before this branch for the writ and general manner and form of pleading in ſuch caſes of the part of the King for the recovery of them. That the party *ſuch a year and day* &c. [which ſee at S. 25. above] ſo that the ſeveral manners of penning theſe two branches manifeſt the intention of the makers of the act to preſer immediate debts due to the King by judgment &c. before debts of the ſubjects which accrue to the King by aſſignment, attainder, outlawry &c. and the reaſon was, becauſe debts due immediately to the King by judgment, recognizance, obligation, or other ſpecialty, are in their nature more high, and may be better known, and upon ſearch found than debts due to ſubjects. Reſolved, 7 Rep. 22. a. in Lord Anderſon's Caſe.

‡ S. P. But for ſuch debts the King is left at common law. If the King's debtor, officer or accountant has *leaſes for years or goods*; theſe leaſes and goods are not liable if the ſaid debtor ſell them bona fide: but *if he ſold* them by *covin* it is otherwiſe. If land be purchaſed with the King's money, it is liable to ſatisfy the King. Jenk. 226. pl. 99.

The debt ought to be immediately to the King himſelf, or if it be to any other than to the King, it ought to be originally to the uſe of the King. 7 Rep. 21. a.

It was reſolved, that if tenant in tail becomes indebted to the King by receipt of monies of the King or otherwiſe, unleſs it be by *judgment, recognizance, obligation or other ſpecialty* and dies, the lands in the poſſeſſion of the ¶ *iſſue in tail* by force of this act ſhall not be extended by this act for ſuch debt; for the ſtatute extends only to the ſaid four caſes, and all other debts remain at common law. 7 Rep. 21 b. Trin. 41 Eliz. in Scacc. in Lord Anderſon's Caſe.

[526] ¶ The iſſue in tail *the land being in his hands* is alſo liable in either of the ſaid 4 caſes, *but not the bona fide alienee of the iſſue*; for the words of the ſtatute do not extend to this alienee. The common law did not help the King in theſe caſes; the ſtatute helps the King in the ſaid caſes againſt the iſſue in tail. Jenk. 226. pl. 99.—S. P. Ibid. 285. pl. 19.

The iſſue in tail ſhall not be charged by this ſtatute for the penalty, upon a conviction of recuſancy of the tenant in tail by proclamation, by the ſtatute 28 Eliz. But otherwiſe it had been if he had been convicted by the 23 Eliz. 1 Roll. R. 94. Mich. 22 Jac. B. R. in Caſe of the King v. Doctor Foſter ——Cites it as reſolved. Mich. 39 & 40 Eliz.

† By the expreſs purview of this act, the land ſhall be ſolely extended as long as it is in the poſſeſſion or ſeiſin of the heir in tail; for this act ſays, that *in every ſuch caſe the land ſhall be charged*. And in as much as the land againſt the iſſue in tail was not extendable before this act, the King has benefit to extend it in the poſſeſſion of the heir in tail which he could not do before; but the King cannot extend the lands of the alienee; for the ſtatute does not extend to this, and the makers of the act have reaſon to favour the purchaſors, farmers &c. of the heir in tail, more than the heir himſelf; for they are ſtrangers to the debts of the tenant in tail, and they come to the land bona fide, and upon good conſideration. Reſolved, 7 Rep. 21. b. Trin. 41 Eliz. in Scacc. in Lord Anderſon's Caſe.

‡ If the *goods and chattels* of the King's debtors be *ſufficient*, and ſo can be made appear to the ſheriff, whereupon he may levy the King's debt, then ought not the ſheriff to extend the lands and tenements of the debtor or of his heir, or of any purchaſor or tertenant. 2 Inſt. 19.

See (P).— By this clauſe the intent of the makers of the act appear that the heir in tail ſhall be

S. 28. The King ſhall not be excluded to demand his debts againſt any of his ſubjects, as heir to any perſon indebted to his Highneſs or to his uſe, albeit this word heir be not comprized in ſuch recognizance or ſpecialty, or that ſuch perſons ſhall ſay, that they have not any hereditaments to them deſcended, but only ſuch as be entailed or given to them by the anceſtors.

only charged with the debt of the King; but lands in fee ſimple were extendable at the common law in whoſeſoever hands they came, and therefore as to them this ſtatute was only declarativum antiqui juris: but as to the eſtates in tail, it was introductivum novi juris againſt the iſſue in tail. Reſolved, 7 Rep. 21. b. Trin. 41 Eliz. in Scacc. in Lord Anderſon's Caſe.

One P. was indebted to the Queen, and one W. was bound to P. in 100l. in which obligation W. did not mention his heirs; P. aſſigned the obligation in which W. was bound to him to the Queen, and upon this proceſs was made againſt the heir of W. And it was held by the Court, that inaſmuch as W. did not oblige himſelf and his heirs, that the heir by the death of the father was diſcharged: and if the aſſignment had been made in the life of the father, and then the father had died, the heir ſhould be diſcharged, but the ſon may be charged as executor or adminiſtrator &c. Sav. 2. Paſch. 22 Eliz. Warren's Caſe.

S. 29.

S. 29. Provided that the King may at his liberty demand his debts of any executers or adminiſtrators of any perſon indebted if the executers &c. have aſſets.

See (P) and (a) the note to S. C. pl. 28. infra.—J. S. was obliged to Sir Richard Cavendiſh, late Treaſurer of the Chamber to King H. 8. in 100l. who was indebted to the King, upon which proceſs was made againſt thoſe who were tertenants of the ſaid J. S. tempore confectionis ſcripti pred' made to the ſaid Sir Richard. Per Manwood Ch. B. The tertenants are not chargeable in this caſe, but the heirs and executors. Per Shute 2d Baron, If obligation be made to the King it ſhall be of the ſame nature as a ſtatute ſtaple to all intents by this ſtatute; but *obligations made to other perſons to the uſe of the King, ſhall be executory againſt the obligor, his heirs, executors or adminiſtrators, and not againſt other perſons.* But if J. N. be bound to J. S. and J. S. aſſigns this to Sir Richard Cavendiſh, and he over to the King, no proceſs ſhall be made thereupon, which the Court and all the Clerks agreed. And it was held, that if obligor, after the obligation made, voluntarily makes feoffment of lands, ſuch feoffees ſhall be charged, otherwiſe it is of purchaſors before the obligation made in Caſe of the King. Sav. 12. pl. 33. Paſch. 22 Eliz. Anon.

S. 30. If the ſaid hereditaments ſhall be evicted out of the poſſeſſion of ſuch perſons by juſt title without fraud, whoſe hereditaments ſhall not be chargeable as is abovesaid; then all ſuch hereditaments ſhall be acquitted of the ſame debts.

See (L).—B. was indebted to the Queen, for the payment of which debt certain lands, which were the lands of the ſaid B. at the time of the ſaid debt, were purchaſed by one W. againſt whom and one C. and D. the ſaid B. exhibited his bill in the Exchequer Chamber, praying that the equity of the caſe might there be examined. Before any anſwer made W. pay'd the debt, and then demanded judgment if the Court would hold further plea inaſmuch as the cauſe of the privilege was determined, which is the debt due to the Queen. And it was held by the Court, that upon this reaſon the Court ought to diſmiſs the cauſe, and ſo it was done. Sav. 15. pl. 39. Paſch. 22 Eliz. Sir Thomas Ragland v. Windgooſe.—S. C. Ibid. 11. pl. 27.

*S. 31. If any perſon of whom any ſuch debt ſhall be demanded, ſhew in any of the ſaid courts * ſufficient matter in law, reaſon or † good conſcience, why ſuch perſons ought not to be charged with the ſame, and the matter ſo ſhewed ‡ be ſufficiently proved, the ſaid courts ſhall have power to allow the proof, and acquit all perſons ſo impleaded, any thing in this act to the contrary notwithſtanding.*

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See (L).

* This proviſo does not give benefit only to him who has matter in good conſcience, but alſo to him who has good, perfect and ſufficient cauſe and matter in law, reaſon (and then comes) good conſcience; and without queſtion the firſt words, viz. cauſe and matter in law ſhall extend to all the debts of the King, and proceſs thereupon as well at common law as upon this act. And the concluſion of the ſaid branch does not make againſt it. For the ſenſe thereof was, that he ſhould plead matter in law or good conſcience, and that nothing contained in the ſaid act ſhould be an impediment thereto. Reſolv'd per Cur. 7 Rep. 19. b. Mich. 39 & 40 Eliz. in Sir Tho. Cecil's Caſe

Scire facias iſſued againſt Sir W. H. as heir to M. H. his father, upon a recognizance acknowledged to King E. 6. by the ſaid M. H. The ſheriff returned ſcire feci, and upon his default judgment was given. And becauſe in truth he never was ſummoned, and had good matter, if he had had notice thereof, to plead in diſcharge of the recognizance, becauſe he had no land by deſcent from his father, nor any land from him after the recognizance acknowledged, all which he ſhew'd in certain in a bill in Engliſh in the Exchequer Chamber; upon which, upon conference had by Manwood and the other Barons with the two Ch. J. he was diſcharged of the ſaid recognizance. 7 Rep. 20. a. in Sir Tho's Cecil's Caſe.——as 3 Rep. Trin. 37 Eliz. Sir William Herbert's Caſe.

† A. obtained of the King a privy ſeal, whereby the forfeiture of certain recognizances for appearing at the ſeſſions, amounting in the whole to 800l. was granted to her. And it was now made a queſtion, whether the Court might compound thoſe forfeitures by virtue of their privy ſeal, which was granted before the privy ſeal, and grant to A? And it was doubted whether the ſaid privy ſeal, did not take away and revoke the power given to the Court in this particular? But it was held clearly per Cur. that the Court might upon good matter in equity diſcharge theſe debts by virtue of this ſtatute. And the caſe in queſtion ſeem'd a hard caſe to the Court, becauſe the party himſelf was the cauſe why there was no appearance by beating the party ſo heinouſly the very day before they ought to have appeared that they were diſabled thereby to appear. Hard. 334. Mich. 15 Car. 2. in Scace. Mrs. Athe's Caſe.

W. put 100l. out at intereſt to the defendant, and took bond in the name of one T. who became felo de ſe, and now the plaintiff was relieved againſt the King upon this truſt in equity upon the

ſtatute. Sed quære, whether this ſtatute extends to any equity againſt the King, otherwiſe than in caſe of pleas by way of diſcharge? But it was likewiſe decreed in this cauſe, that the plaintiff ſhould be ſaved harmleſs from all others. Hard. 176. Hill. 12 & 13 Car. 2. Sir William Hix v. the Attorney General and Sir Wm. Cooper.

‡ Scire facias iſſued againſt T. the father, and T. the ſon, to ſhew cauſe wherefore they did not pay to the King 1000l. for the mean profits of certain lands holden by them from his Majeſty, for which land judgment was given for him in the Exchequer, and the meſne rates were found by inquiſition, which returned that the ſaid meſne profits came to 1000l. upon which inquiſition this ſcire facias iſſued; whereupon the ſheriff returned that T. the father was dead; and T. the ſon now appeared, and pleaded that he took the profits but as a ſervant to his father, and by his command, and rendered an account to his father for the ſaid profits, and alſo the judgment for the ſaid land was given againſt his father and him for default of ſufficient pleading, and not for the truth of the fact; and he ſhewed this ſtatute, which he pretended aided him for his equity; whereupon the King demurr'd. Tanfield Ch. B. ſaid, That the matter in equity ought to be ſufficiently proved, and here is nothing but the allegation of the party and the demurrer of Mr Attorney for the King; and if the demurrer be in law an admittance of the allegation, and ſo a ſufficient proof within the ſtatute, is to be adviſed upon; and for that point the caſe is but this: a ſcire facias iſſues out of this Court to have execution of a recognizance, which within this act ought by pretence and allegation of the defendant to be diſcharged for matter in equity, and the *defendant pleads* his *matter in equity*, and *the King* ſuppoſing this not to be equity within this ſtatute, *demurs in law*, whether that demurrer be an inſufficient proof of the allegation within the ſtatute or not? Adjournatur. Lane 51. Paſch. 7 Jac. in the Exchequer. Trallop's Caſe.

S. 33. This act ſhall not take away any liberties belonging to the dutchy and county palatine of Lancaſter.

S. 34. Proceſſes and executions for debts in the Court of Exchequer ſhall be made in the Exchequer by ſuch officer as hath been uſed, as by this act is limited.

The *Queen* by her letters patents, *granted catalla utlagatorum & felonum de ſe*, within ſuch a precinct. *One who was indebted to the Queen is felo de ſe within the precinct.*

7. *Stat.* 13 *Eliz. cap.* 4. *ſ.* 1. enacts, That *all the* lands, *tenements and hereditaments*, which any accomptant *of the Queen, her heirs and ſucceſſors*, hath *while he remains accountable*, ſhall *for the payment of the debts of the Queen her heirs and ſucceſſors* be liable, *and put in execution in like manner* as if *ſuch accomptant had ſtood* bound by writing obligatory *(having the effect of the ſtatute-ſtaple) to her Majeſty, her heirs and ſucceſſors, for payment of the ſame.*

[528] It was the opinion of all the Barons, and ſo ruled, that notwithſtanding the grant by the ſaid letters patents, the Queen ſhall have the goods for ſatisfying her debt. 3 Le. 113. pl. 161. Hill. 26 Eliz. in the Exchequer. Anon —— Mo. 126, 127. S. C. between the QUEEN AND BISHOP OF SARUM AND COXHEAD, and there per Manwood Ch. B. the *patent* does not extend to have the goods of felo de ſe againſt the Queen for her debt, becauſe it *wanted the words (licet tangat nos;)* but he agreed, that if the lands of the felon be liable [ſufficient to anſwer] all the debt of the Queen, the Court may in *diſcretion take all the lands in extent, and leave the goods to the patentee.* And as to a petition of Coxhead praying a diſcharge of the lands &c. by him purchaſed of the officer debtor to the Queen, it was anſwered, that the land was ſubject to the Queen's extent for all arrears of accounts by his office received before the conveyance thereof, though the receipt be after the conveyance, and that by reaſon of this ſtatute; but as to another *office accepted after the conveyance of the land*, the arrears of that ſhall not charge the land ſo conveyed.

B. L. having *purchaſed a long term* for years in the Lamb Inn, and of other houſes in St. Clement's parish, *afterwards* purchaſed *the inheritance*; afterwards he *became receiver* of North Wales, and having occaſion for 500l. *aſſigned* over *the term by way of mortgage* to J. S. Afterwards *on the marriage of* E. L. *his ſon, he ſettled the houſes in* St. Clement's *(inter alia) on himſelf for life, remainder to* E. L. *his ſon, and the heirs of his body.* There was iſſue of the marriage a daughter, now the wife of P. After this *B. L. mortgages theſe houſes to N. for* 500l. The King extends theſe houſes for the debt of B. L.—N. gets an aſſignment of the extent, and a privy ſeal for the debt. Reſolved, firſt, that by the ſtatute of Queen Eliz. the land and real eſtate of B. L. was bound and ſtood liable to anſwer the King's debt, although he was *not actually a debtor to the King*, nor any extent againſt him in ſeveral years after. Secondly, That where a *term is attendant on the inheritance*, if the King extends the inheritance, he ſhall have a right to the term; but if it be a *term in groſs*, and aſſigned before any actual extent, the aſſignment will ſtand good, and the term not liable to the King's debt. 2 Vern. 389, 390. Mich. 1700. in Canc. Nicholls v. How, and Porter, & al. & e contra.

S. 2, 3. *If this* ſuper *be* not paid within 6 months *after the account paſt, the* Queen *&c.* may ſell ſo much of his eſtate *as will anſwer the debt, and the overplus of the ſale is to be rendered to the accomptant or his heirs, by the officer that receives the purchaſe-money, without further warrant.*

Upon this ſtatute divers doubts and queſtions were moved. 1ſt, If the *debtor died*, whether the land might be ſold? 2dly, When the account is determined after his death? 3dly, When the accomptant after his becoming debtor, and in arrearages makes *feoffment*, or other eſtate over, or charges or incumbers the land, either to his iſſue or others of his blood to prevent the Queen's ſelling, or upon other conſideration, whether ſhe may ſell the land, the words of the act being *make ſale &c. of ſo much of the lands &c. of every ſuch accomptant or debtor ſo found in arrearages &c. And that the ſale ſhall be good and available in law againſt the party accountant, and his heirs claiming as heirs.* 4thly, If the accountant was *ſeiſed of land in tail*, whether this land might be ſold to be good againſt the iſſue; for the ouſting of which doubts the *ſtatute* 27 *Eliz. cap.* 3. was made, but this *gives remedy only, that the land ſhall be ſold after the death of the debtor, and when the account is made after his death*, and therefore *to remedy the other miſchiefs, the ſtatute* 29 *Eliz. cap.* 7. *was made.* [But the ſame being only a temporary act is expired.] Mo. 646. &c. pl. 895. Anon. [where part of the ſaid laſt mentioned act is ſet forth and explained.]

S. 5. *If ſuch accomptant or debtor* purchaſe *lands* in others names *in truſt for their uſe, that being found by office or inquiſition, thoſe lands alſo ſhall be liable to ſatisfy the debt in ſuch manner as before is expreſſed.*

S. 6. *Lands* purchaſed *by accomptants* ſince the beginning of the Queen's reign, *either in their own names, or in the names of others in truſt for their uſe, ſhall be alſo liable to be ſold for the diſcharge of their debts as aforeſaid, rendring the overplus to the accomptant as before.*

S. 9. *Provided, that* biſhops lands *ſhall be* only chargeable for ſubſidies or tenths, *as they were before the making of this act, and not otherwiſe.*

S. 10. *Neither ſhall this act* extend to *charge any accomptant whoſe* yearly receipt exceeds not 300 l. *otherwiſe than as he was lawfully chargeable before this act.*

S. 11, 12. *Neither ſhall this act* extend to ſuch *accomptants* as *by order of their offices, and charge, immediately after their accounts paſt*, are to lay out money again; *ſuch as are the treaſurers of war, gariſons, navy, proviſion of victuals, or for fortifications or buildings, and the maſter of the wardrobe; unleſs the Queen &c. command preſent pay.*

S. 13. *Neither doth this act extend* to ſheriffs, eſcheators or bailiffs of liberties, *concerning whoſe accompts the courſe remains the ſame that it was before.* [529]

S. 14. Lands bought of an accomptant bona fide, *and without notice of any fraudulent intent in the accomptant*, ſhall be diſcharged; *and if they be found by office, yet ſhall they upon traverſe be diſcharged without livery, ouſter le main, or other ſuit.*

If a man is a receiver to the King, and is not indebted, but is clear, and ſells his land, and ceaſes to be receiver, and afterwards is appointed to be receiver again, and then a debt is contracted with the King, the former ſale is good. Arg. 2 Mod. 247. Trin. 29 Car. 2. in Scacc. Attorney General v. Alſton.

S. 15. *The* Queen *&c.* being ſatisfied *by ſale of land, the* ſureties ſhall be diſcharged *for ſo much, and if any yet remain unpaid, the ſureties ſhall pay the reſidue ratably according to their abilities.*

8. By 27 *Eliz. cap.* 3. *ſ.* 2. *the Queen &c. may* make ſale *of the accomptant's lands &c. as well* after his death *as in his life-time, and as well* where the accompt is made *and the debt known* within 8 years after his death, *as where the accompt is made and the debt known in his life-time.*

S. 3. *Provided, that after the accomptant's death, and before the lands be ſold, a* ſcire facias *ſhall be awarded* to garniſh the heirs, to *ſhew cauſe why lands &c. ſhould not be ſold &c. whereupon if the heir, upon ſuch garniſhment or to two nichils returned, do not* prove *unto the Court,* that the executors *or adminiſtrators of the accomptant* have ſufficient, *then ten months after ſuch two nichils or garniſhment returned, the lands &c. ſhall be ſold and diſpoſed according to the ſtatute of* 13 *Eliz.* 4.

S. 4. *Nevertheleſs, the heir's* ſale bona fide *upon good conſideration* before the ſcire facias *awarded, ſhall be good to him that is not conſenting to defraud the Queen &c.*

S. 5. *This ſtatute ſhall* extend to all officers of receipts and accompts *to her Majeſty and to no other.*

S. 6. *If the debt grow in the* courts of the dutchy *or wards,* a privy ſeal ſhall iſſue *out* againſt the heir *to appear at a certain day, to ſhew cauſe &c. When, if he appears not, upon affidavit made that it was duly ſerved, an attachment with proclamation ſhall iſſue out againſt him, to be proclaimed in ſome open market in the county where he dwelt* 20 *days (at leaſt) before the return thereof, whereupon* if he appears not, the lands &c. ſhall be ſold *and diſpoſed as aforeſaid.*

S. 7. *The heir's lands ſhall* not *be ſold* during his minority; but *at any time* within 8 years after his full age, *they ſhall be liable as aforeſaid.*

(M. 3) *Extent in Aid.* In the King's Name.

1. IF the King *ſues his debtor* in the Exchequer, the *defendant may ſurmiſe that J. S. has part of his goods* by which he cannot ſatisfy, and there proceſs ſhall go againſt the ſaid J. S. *ad reſpondendum tam nobis quam defendenti.* Br. Prerogative, pl. 28. cites 38 Aſſ. 20.

A former of exciſe, having eſtate ſufficient to ſatisfy his debt to the King, takes out an extent in aid

2. Where a *debtor of the King is inſufficient,* there a debt due to him ought not to be aſſigned to the King, but only where the debt is doubtful, and that was the ancient courſe; but now many are thought rich that are not, and therefore omnis ratio tentanda eſt to recover the debts of the King; per Manwood Ch. B. 2 Le. 31. Mich. 31 Eliz. in Bridget's Clerk's Caſe.

againſt a debtor of his that had failed. Per Jeffries C. decreed, that he refund with coſts, calling it an oppreſſion and a trick to defeat other creditors. Vern. 460. Trin. 1687. Capel v. Brewer.—Cited Ch. Prec. 255. Paſch. 1701.—Cited 2 Vern. 426. Paſch. 1701. in Caſe of Brown v. Trant.—Court of Chancery will not examine the quantum of the King's debt due on an extent, nor how far extents ſued out are neceſſary; but where defendant who ſued out an extent in aid confeſſes by his anſwer, that he *has ſufficient eſtate of his own* to pay the King's debt, as in the Caſe of Capel v. Brewer, or where it appears to be a fraudulent contrivance

trivance *to gain a preference to a debt of an inferior nature*, it will relieve as in Case of CHOLMEY v. STUART, cited 2 Vern. 426. Paſch. 1701.—Cited Ch. Prec. 155. Paſch. 1701.

3. A. for debt extended the lands of B. Then D. to extend the lands of B. for his own debt, and to have the lands out of the hands of A. (by recognizance) *acknowledges himſelf to be indebted to the King's* auditors. For which debt of D. the lands of B. were extended and taken out of the hands of A. In this caſe D. for *abuſing the prerogative* of the King was cenſured in the Star-Chamber. Noy. 154. Widow Dobbin's Caſe.

4. *Obligor gives a judgment* to the obligee for his debt; afterwards an extent was taken for the King on the ſaid bond. The extent is *void*, becauſe the *bond tranſivit in rem judicatam*, and profits taken on ſuch extent are relievable. Chan. R. 107. 12 Car. 1. Tryon v. Michel.

5. *A.* was *indebted to the King*, and *B.* was *indebted to A.* and *C. to B.* The debt due from C. may be ſeiſed to ſatisfy the King's debt, this being a debt in the third degree only, but no debt in a more remote degree is liable. But as for ſatisfying debts owing to the King's debtor, it would be extremely inconvenient to go ſo far; for at the rate, if A. were indebted to the King in 100 l. and B. indebted to A. in 1000 l. and C. indebted to B. in 10000l. theſe ſeveral debtors ſhould have the benefit of the King's prerogative againſt the lands, and for recovery of their ſeveral debts. But there would be no inconvenience if the King's own debt were ſo levied, tho' in the 10th degree; for then his prerogative would be exerted for the ſatisfying of his own debt only; and there is no queſtion but the King's own debt may be ſo levied. But to make the King's prerogative a ſtale to ſatisfy other mens debts would be unreaſonable, inconvenient and miſchievous to the ſubject; and ſo it is declared by the privy ſeal made in 12 Jac. Per Hale Ch. B. Hard. 404. Paſch. 17 Car. 2. in the Exchequer. The Attorney General v. Poultney & al.

6. *A.* was *indebted to the King*. *B. was bound for A.* and paid the money. *A. became a bankrupt*, and the King's debt is ſatisfied afterwards; then B. prays in aid, and an extent is had, and by order of the Exchequer the money levied upon the extent paid to B. and if B. ſhall detain this money againſt the reſt of the creditors is the queſtion. Holt ſaid, the extent was before the bankruptcy, and then being a prerogative caſe it is good; nay, if it were after an act of bankruptcy it would for the King over-reach the bankruptcy, and be good againſt the creditors; he cited Dy. 96. but the Court was of opinion againſt him, and gave judgment for the plaintiff upon a ſpecial verdict. Skin. 162. Hill. 35 & 36 Car. 2. B. R. Jefferies v. Williams.

If an extent for the King of the goods of a *bankrupt* comes *before the aſſignment* of the bankrupt's eſtate, it muſt be preferred, becauſe till then the property is not veſted. 2 Show. 480. Trin.

2 Jac. B. R. Attorney General v. Capel & al.—Ibid. 481. cites a Caſe in the Exchequer. 20 Car. 2. Attorney General v. Hanbury and Lewis.

The King's receiver takes out an extent in aid againſt his own debtor, againſt whom a commiſſion of *bankruptcy* was before awarded. The aſſignees bring a *bill in Chancery to ſet aſide the extent in aid*, and after 14 years ſuit the bill was diſmiſſed; for that it was *proper only for the Exchequer* being the Court of the King's revenue and which was firſt poſſeſſed of the cauſe, and therefore only examinable

examinable there; and ſhould it be ſet aſide here, yet the King would not be concluded by it in the Exchequer; for till the account be diſcharged there, that Court may carry on the proceſs. Ch. Prec. 153. Paſch. 1701. Brown v. Bradſhaw.

The Reporter ſays, that not long before the Court had relieved Alderman STURT in [531] Caſe of ſuch extent. But adds a quære, wherein this caſe differs from that, otherwiſe than that there the creditors were plaintiffs, and here the executor was.

7. A. was *indebted to B. C. and D. by ſeveral bonds, and to J. S. by ſimple contract.* A. died, leaving W. R. his executor. —*B. got judgment* on his bond againſt W. R. —— *J. S. being the King's receiver took out an extent in aid againſt himſelf*, and has this ſimple contract debt found; and upon a ſcire facias againſt W. R. had judgment thereupon in the Exchequer. Whereupon W. R. ſued in Chancery, ſuggeſting fraud &c. and that this extent was not proſecuted by the King, but by W. R. himſelf, and *at his own charges, and* that he was not really indebted to the King at the time, though the bond was kept on foot, or that if he was indebted, he *was able to pay*, and ſo the King's debt not in danger. In his anſwer W. R. pleaded theſe proceedings in bar, and confeſſed that he proſecuted it at his own charges, and that he was able to pay the King at the time of the extent. The Court allowed the plea. Chan. Prec. 47. Trin. 1692. Dickinſon v. Molineux.

Ibid. 48.

8. Rules concerning extents in aid. Decemb. 4th, 1721. MS. Tab. Yale v. the King.

(M. 4) *Account. In what Caſes.*

And if the King *grants land for life*, and does not ſay without rendring

1. IF the King grants a *bailiwick or ſhrievalty* to J. S. *without account to be rendered*, the words (without account) are not good; for this is *contrary to the nature of the thing granted.* Br. Patents, pl. 99. cites 36 H. 8.

any thing for the ſame, he ſhall render the profits; per Cateſby. Br. Patents, pl. 109. cites 2 H. 7. 6. —So *of a ward* granted. Ibid.—*But* the caſe of the grant of land **for life*, or *years*, or *in tail*, was denied, and that of the ward agreed. Ibid.

* He ſhall neither render farm, nor rent, nor ſhall he account to the King. Br. Patents, pl. 50. cites 3 H. 7. 12.—But *otherwiſe* it is *of ward*; for there he ſhall anſwer to the King. Ibid.—So of *ſheriff of a county*; for he is the committee of the King; and all this was ſaid for law. Ibid.

* Br. Patents, pl. 109. cites S. C. where it was held by Brian and Cateſby, that theſe words, (rendring 100 l.) ſhall be intended for the office and not for the profits, and that therefore he

2. The King granted to H. Earl of Northampton the *ſhrievalty of the county of Northampton, and the office of ſheriff for term of his life*, to have, occupy and *exerciſe that office, and all other offices belonging to the ſheriff in the county aforeſaid, by himſelf or his ſufficient deputy* * *rendring* therefore to the King and his heirs annually 100 *l.* at his Exchequer, *without any other account* to be render'd or made thereof *to the King.* And it was held, that *becauſe the iſſues and profits of the county were not granted* to him, that therefore *he ſhall account*, and that where the King grants as above, without any account to us to be rendered, and *does not ſay to us or our heirs to be rendered*, the heir of the King ſhall have account for it; for in this caſe the law implies account. As where the King grants to a man *commiſſion of all manner of pleas*

in

in B. out of the King's Courts, that is to ſay, extra Curiam Regis, *and does not ſay extra Curiam Regis & hæredum ſuorum*; for it is not the Court of the King, but only during the life of the King, and after it is the Court of the Heir of the King, that is to ſay, of the new King who is not expreſs'd in the grant; quod nota. And ſo ſee that the matter of this caſe reſts upon theſe words, *without account to us to be render'd*, where (*heirs*) *is wanting*, and upon thoſe words extra curiam noſtram, and does not ſay, & hæredum noſtrorum. For where the King *grants fair, market, warren, conuſance of pleas* &c. *to a man and his heirs*, tho' the King does *not* grant it *for him and his heirs*, yet the grant is good in fee; for tho' the King has no fee in them, but *creates them by his grant*; yet the King is † inabled by his prerogative to grant them, and therefore the *grantee has fee, without the words Heirs of the King*; and ſo note a diverſity. Br. Patents, pl. 45. cites 2 H. 7. 6.

ſhall account for the profits; but Brooke makes a quære; *but* by all except Brian and Cateſby, the *grantee ſhall not account as ſheriff* in this caſe, *but of green wax.* † Orig. (inherit.)

3. *Bailiff of the King ſhall be charged by his occupation*, though he be not aſſigned bailiff; per Brian Ch. J. Br. Baille, pl. 25. cites 4 H. 7. 6.

If the *King has bailiff by parol*, and not by

record, he cannot compel him to account; but if information be thereof ſent into the Exchequer, he ſhall account. Br. Surmiſe, pl. 31. cites 15 H. 7. 17. per Vaviſor. [532]

4. J. K. ſon and heir of J. K. was brought into the Exchequer to anſwer to the Queen for a certain ſum of *money* by him *received of the abbot of F. to pay to the abbot of C. who was attainted* of treaſon; and a bill was ſhewn unſealed, made by the abbot of F. to the abbot of C. upon which the defendant demurred in law; and becauſe it was only a *choſe en action*, and a naked contract upon the matter, he was diſcharged. Sav. 40. pl. 91. Mich. 24 & 25 Eliz. in Scacc. Kitchin's Caſe.

(N) King. Account. In what Caſes he may have an Account. *Againſt what Perſon. Party himſelf.*

Fol. 161.

[1. IF *any man takes the goods of the King*, the King may have an account againſt him. Co. 11. Count. Devon. 90.]

S. P. Mo. 476. Arg. Mich. 39 & 40 Eliz. in Caſe of the Queen v. Doddington.—If a man intermeddles with the King's treaſure, (the King pretending a title to it), he ſhall be chargeable for the ſame to the King. Godb. 291. in Sir Edward Coke's Caſe.——Cites 11 Rep. 89. Earl of Devon's Caſe.

[2. *So* where a man *enters by tort into the land of the King*. The King may charge him in account. Co. 11. 90.]

S. P. 10 Rep. 114. b.— He who *gets livery out of*

the hands of the King, who ought not to have livery, ſhall anſwer the iſſues to the King. Br. Iſſues Ret. pl. 19.

Tenant of the King dies ſeiſed, and J. N. abates in part of the tenements; the *heir of the abator* ſhall be charged with the iſſues of it, and not the heir. Br. Iſſues Ret. pl. 20. cites 12 R. 2. and Fitzh. Livery 28.

[3. If

S. C. cited Godb. 291. 292. Paſch. 21 Jac. in Sir Edward Coke's Caſe.

[3. If the *maſter of the ordnance, by colour of his office, takes the broken ordnance as his vailes*, where they are not due, and converts them to his uſe, he may be charged in account. For tho' he claims them to his uſe, yet the law makes a privity. Co. 11. Count. Devon. 90.]

[4. If *goods are deviſed to the King*, into whoſoever hands they come, *the poſſeſſor* ſhall be charged in account; for the King is not driven to his action of treſpaſs. Co. 11. 90.]

S. C. cited by Doderidge Godb. 292. Paſch. 21 Jac. in Sir Edward Coke's Caſe.—

[5. If an *officer of the King receive for his lawful expences the treaſure of the King to his own uſe, yet if* he receives it *without lawful warrant, he knowing that it was the treaſure of the King*, the law makes privity in caſe of the King, and for this he may charge him in account. Co. 11. Sir Walter Mildmay. 92. b.]

S. C. cited by Doderidge J. 2 Roll. R. 296. in Sir Edward Coke's Caſe.

[6. *Or*, in this caſe, the King *may charge him who made the unlawful warrant* at his election. Co. 11 92. b.]

S. C. cited by Doderidge J. Godb. 292. Paſch. 21 Jac. in Sir Edward Coke's Caſe.—

[7. If *a man preſents another to the King as a ſufficient officer &c. and offers to be mainpernor for him*, but is not accepted; if the officer be after in debt to the King for his office, the preſentor of him may be charged in account, becauſe he was the means of the loſs of the King. Co. 11. *Walwaine* 92. b. (but quere this.)

Ibid. 296. S. C. cited by Hobart Ch. J. and ſays the body and goods of the officer were delivered as in execution to repay him the money which the King had levied upon him.—S. C. cited by Hobart Ch. J. 2 Roll. R. 300, 301. in Sir Edward Coke's Caſe.

[533] 8. Where a *patent is repealed*, becauſe it was *of a market*, and was to the *nuſance of the other market*, and therefore it is repealed for ſuch cauſe or other ſuch cauſe, by which the King loſes the profits, [yet] the *party ſhall anſwer him of meſne profits*, quod nota. Br. Iſſues Ret. pl. 3. cites 11 H. 4. 6.

9. Sir William Pelham was *ſurveyor* of the ordnance, and *delivered* the *money of the King to Painter* clerk of the ordnance. It was holden in this caſe, that for the ſaid money the Queen might have *accompt againſt Painter, although there wanted a privity*, which cannot be ſo in caſe of a common perſon; for if my receiver make one his deputy, I ſhall not have an accompt againſt him. 4 Le. 32. 33 Eliz. in the Exchequer. The Queen v. Painter.

10. If one of the Exchequer *lend* unto another 500 *l. of the Queen's money, and takes a bond* for it *in his own name*, yet the Queen ſhall have an accompt againſt the borrower; per Popham attorney-general. 4 Le. 32. 33 Eliz. in the Exchequer. The Queen v. Painter.

11. *If one* by letters patents, or *by virtue of his office*, has power to *aſſeſs fines upon grants* or admittances made to copyholders *within the King's manor*, and he *aſſeſſes ſmall fines* for the Queen, *and under hand takes great ſums* or other rewards of the copyholders to his own uſe, in diſceit and prejudice of the King; in

this caſe he may be charged to the King in account for all; for in truth all was due to the King. 11 Rep. 90. b. Hill. 4 Jac. in the E. of Devonſhire's Caſe.

12. At *common law*, accompt lay againſt any who had the land of the King's debtor, if he had not bought it bona fide. Jenk. 226. pl. 99.

(O) *How it* ſhall be brought, *and by what Name.*

[1. THE King is *not bound to charge* the defendant in account *as bailiff, or receiver*, as common perſon ought; *but he may alledge in his information generally, that he ad compotum domino regi reddendum tempore mortis ſuæ tenebatur* in ſuch a ſum of money due to the King &c. Co. 11. Count. of Devon. 90. b.] S. P. Godb. 291. Paſch. 21 Jac. in Sir Edward Coke's Caſe.

(P) *Againſt whom* it lies. Againſt *Executors* [or *Heirs.*] See (M. 2) pl. 3. Par. 2. and pl. 6. f. 27. 28. 29.

[1. THE King *may charge an executor* in an account by his prerogative. Litt. Co. 11. *Count. de Devon.* 90.] Ibid. 90. b. cites it as the Caſe of Cary and Doddington executors of Sir Walter Mildmay.——Mo. 476. S. C. by name of the Queen v. Doddington. Adjornatur.

The * King ſhall have action of *account againſt the executors of a receiver*; contra of a common perſon; for he ſhall not have ſuch action againſt executors. Br. Prerogative. pl. 126. cites Litt. tit. Homage, Fealty and Eſcuage.—* S. P. Becauſe the law there maketh a privity, it being found by matter of record, that the teſtator was indebted to the King, which record cannot be denied. But in the caſe of a common perſon, account will not lie for want of privity. Per Doderidge J. Godb. 291. Paſch. 21 Jac. in Sir Edward Coke's Caſe.—S. P. Per Doderidge J. 2 Roll. R. 295. in S. C.

[2. *Where the teſtator might be charged as guardian in ſocage, baily or receiver*, there the King may charge the executors, for this is an account. Co. 11. 89. b.]

[3. *So where the King could not charge the teſtator ordinarily*, viz. *as guardian*, bailiff or receiver, *but by his prerogative*, yet the King ſhall have an account againſt the executor. Co. 11. 89. b. 90.]

[4. *As if the maſter of the ordnance takes, claiming to his own uſe, the broken ordnance* of the King, as appertaining to his office, and dies, the executor may be charged in account, becauſe for the King account would lie againſt teſtator by prerogative without privity. Co. 11. 90.] [534] S. C. cited by Doderidge J. Godb. 291. 292. Paſch. 21 Jac. in Sir Edward Coke's Caſe.——S. C. cited by Hobart Ch. J. 2 Roll. R. 300. in Sir Edward Coke's Caſe.

[5. 3 E. 1. Rot. Fin. Memb. 33. The *heir of a ſheriff* ſhall be charged to account in Scacc. &c.] Fol. 162.

[6. 1 E. 1. Rot. Pat. Memb. 18. The *heir of the Juſtice of Cheſter* charged to account &c.]

[7. 2 E.

If any officer be indebted unto the King, and dies, the courſe of the Exchequer is to call in his *executors*, or the *heir*, or the tertenants to anſwer the debt, and if he has no lands, then a writ iſſues out of the Exchequer to know what goods he had, and to whoſe hands they be come. Per Tanfield Ch. B. Godb. 294. Paſch. 21 Jac. in Sir Edward Coke's Caſe.

[7. 2 E. 1 Rot. Pat. Memb. 3. *J. S. being heir and executor of one who was conſtable of Burdegal* charged to account.]

(Q.) Account by the King. Againſt whom it lies. *Againſt Tertenants.*

S. P. Per Tanfield Ch. B. Godb. 294. Paſch. 21 Jac. in Sir Edward Coke's Caſe.

[1. AN account lies for the King againſt the tertenants *of J. S. who was an officer accountant* to the King, *after his death (there not being heir or executor as the ſheriff returned)* to render account for the arrear due to the King for his office, *from the time that he became officer till his death, tho' no judgment was given againſt J. S. in his life*, of any debt of account of his office, and tho' the tertenants are not privy to his reckonings. D. 5 El. 224. 32. Demurrer.]

Br. Prerog. in pl. 137. Brooke ſeems of opinion that the tertenants are chargeable.

[2. *But* there it is ſaid that upon ſearch there were found *divers precedents* that ſuch proceſs have been made by the prerogative of the King againſt tertenants, ad computandum, and ſome have been compelled to account, and ſome have pleaded pardons and releaſes; and at the end of the ſaid caſe, a pardon is obtained.]

[3. In Fitz. N. B. tit. Ident. Nominis. fol. 268. A. in the end of the writ, it is ſaid, *Proceſſum debitum verſus prafatum J. S. (who was an officer) ſi ſuperſtes ſit vel hæred. & executor. Seu terrarum & tenementorum ipſius J. S. ſi mortuus fuerit, tenentes juxta juris exigent' facient' &c.*]

(Q. 2) *Debts owing by the King*, and Subſidies &c. aſſign'd for Payment. *What Remedy for the ſame* againſt the Collectors and their Executors &c. *And Pleadings.*

Tenths and fifteenths are granted to the King to be paid at certain days, the King makes an [535] aſſignment of part of theſe fifteenths to his creditors; the King makes

1. THE *clergy granted* to King R. 3. *a tenth to be paid at two days*, and *the collectors were aſſign'd by the biſhop*, and the *King aſſigned divers tallies to his debtors of it, ſome at the firſt* day, *and ſome at the ſecond day, who ſhewed their tallies to the collectors before the day of payment*, and the *King died after the firſt day and before the ſecond day*, and the *collectors had not collected any thing*. And it was held that the power of the collector is not determined by the death of the King; for *they are appointed by the biſhop and not by the King*; and they ſhould have collected after the death of the King: and therefore by all the Juſtices, the collectors ſhall be charged to the debtors, and not to the new King; and to the ſecond payment by aſſignment of the King, and by ſhewing of the

the tallies by the debtors to the collectors, the collectors ſhall be charged, and the King is diſcharged; and after the ſhewing the tallies to the collectors, the King cannot pardon the collectors nor the clergy of the payment of it; for the debt is to the creditors now, and not to the King; quod nota; as rent granted. Br. Quinzime, pl. 7. cites 1 H. 7. 8.

collectors of theſe fifteenths, and the convocation makes a collector of the tenths; the creditors

give them *notice of theſe aſſignments*. If the *creditors die after the day for payment*, and after notice of the aſſignment, the collectors *are liable for all* that is aſſign'd, *altho'* they have *not received any part* thereof; for it was not their fault that they had not collected them. *If a collector dies before the day of payment*, he is anſwerable only for ſo much as he has received. If a collector dies after day of payment, his executor ſhall anſwer for the whole, if he has aſſets, or for ſo much as the aſſets amount to; if after a collector's death his *executor collects* any of them, he is liable pro tanto. And tho' he had no power to collect, he is liable to account to the King, and ſo is every one who meddles with the King's right. A King who is an uſurper makes ſuch aſſignment, it ſhall bind the rightful King. A *tally*, according to the uſe of the *Exchequer*, *is ſufficient for ſuch aſſignment*. Jenk. 167. pl. 21.

(Q. 3) *Joinder in Action.* In what Caſes *the King and a common Perſon* ſhall join in actions.

See Forfeiture (R).

1. THE *King aſſign'd* in Chancery to a woman his tenant's widow dowable of a fair held in capite, *a rent iſſuing out of* it, and afterwards granted the fair to A. in fee. A. did not pay this rent to the widow according to the aſſignment; ſhe brought a ſcire facias in her own and the King's name againſt the ſaid A. for the ſaid rent, and did not mention in the ſcire facias how much of the rent was arrear. This ſcire facias was brought into the Exchequer. The plaintiff had judgment affirm'd in error. Jenk. 14. pl. 24. cites 14 E. 3.

Rex proſequi in judicio poteſt, in qua curia ei viſum fuerit; and may join in this caſe with the tenant's widow. Jenk. 14. pl. 24.—

This woman was the King's widow, and therefore the ſcire facias is well brought in both their names. Jenk. 14. pl. 24.

2. The *King and his chaplain joined* in action *for treſpaſs* and contempt done in the King's palace, and in preſence of him and his Juſtices. Br. Prerogative, pl. 48. cites 27 Aſſ. 49.

Br. Joinder in Action, pl. 56. cites S. C.

3. Where the King and another perſon join in action, the *writ ſhall abate as to the common perſon, and ſtand for the King*. Br. Prerogative, pl. 100. cites 35 E. 3. and Fitzh. Brief 729.

4. A. is *bound* by a written obligation *in* 100*l. to the King and his cuſtomers*. If the 100 l. be not paid, the King and the cuſtomers ought to bring their action upon the ſaid obligation jointly in the name of the King and the cuſtomers. By all the Juſtices in the Exchequer. Secta quæ ſcripto nititur, a ſcripto variare non debet. Jenk. 65. pl. 22. cites 21 R. 2. Fitzh. Joinder in Action 3.

5. A man may be *tenant in common* with the King, *and* may *join in preſentment* with the King. Br. Prerogative, pl. 105. cites F. N. B. fol. 32.

So the King and a ſubject might join in ſuing a *quare impedit*; ſo they may in founding a college or alms-houſe, but the King only ſhall be reputed the founder. Jenk. 65. pl. 22.

6. If

S. P. Because the outlaw'd [536] person without the other obligee, might have released the obligation. Jenk. 65. pl. 22.—S. P. Per Parker Ch. J. in delivering the opinion of the Court. 10 Mod. 245. cites 21 H. 7. 19.

6. If a *man is bound to two* by obligation, and the *one is outlawed*, and the King gets the obligation, the King shall have action in his own name for the whole sum, and the other shall have nothing with him, and so a chose en action may accrue to the King. Br. Prerogative, pl. 23. cites 19 H. 6. 47.

(Q. 4) *What Actions the King may have, or may be brought against the King*, or what the party may do in lieu of Action.

Wilby said that a man might have had writ of *præcipe Henrico Regi Angliæ*, and *in lieu of this is now given petition* by the prerogative; quære of such writ. For it seems that it never was law; for the King cannot write to nor command himself. Br. Petition, pl. 12. cites 24 E. 3. 55.——Br. Prerogative, pl. 31. cites S. C. Brook says, Quære who should send such process; quære if the grand constable of England, when they were used, might do it or not.

1. *IN the time of H.* 3. and always before, *a man might have sued the King* as a common person shall be sued; *but* King *E.* 1. *ordained that none shall sue the King, but* shall sue to him *by petition*; quod nota: and quære how far the process shall be nomine Regis, which cannot be against himself. Br. Prerogative, pl. 2. cites 22 E. 3. 3. and Fitzh. Error 8.

Vide the Year-book, pl. 8. which is, that the defendant put himself upon the inquest instead of the grand assise; but it seems there that Wilby refused to grant it, unless the King's attorney obtained a warrant for the same.—* S. P. And so note that the King may use other writ as well as quare impedit and writ of right of advowson; and so see that the King may be out of possession there as a common person; but Brook says it seems to him that if office be found, which finds the King's title, that there the King is in possession by office without action; but where the King is heir to one who is deforced of land, there he may have writ of right; and it seems that this action ought to be tried by grand assise only; for quære if the King shall be compelled to join battle and find champion? It seems that he shall not; for no subject ought to join battle with the King. Quære. Br. Droit de Recto, pl. 13. cites 24 E. 3. 37.

2. The *King brought* writ of **right of advowson* of the church of D. in London; the defendant put himself upon the inquest; and nisi prius was obtained, because the privilege of London ought not to be broken. Br. Prerogative, pl. 27, cites 24 E. 3. 23.

Br. Prerogative, pl. 55. cites S. C.

3. The King cannot have action which *proves him out of possession* as *assise*, or *ejectione firmæ*, nor action upon the statute of 8 H. 6. of *forcible entry*, quod expulit & amovit; and this is of things *local and permanent*; *contra* of *things transitory*, *as quare impedit*, *ravishment of ward* &c. And in the other case there shall be *office or information*. Br. Prerogative, pl. 89, cites 4 H. 7. 1.

4. Where *a statute gives a thing which was not at common law before*, as the statute of 4 *H.* 7. *cap.* 17. *gives ward of heir to cesty que use by writ of ward*, there the King and every other shall have action, viz. the *subject shall have writ of ward*, and the *King shall have scire facias*, tho' it be found by office; for where

where it is given by ſtatute, every one ought to purſue the ſtatute, and there the *King cannot enter by office, but ſhall have ſcire facias;* quod nota. Br. Parliament, pl. 46. cites 12 H. 7. 19. per Frowike.

5. If a man gets *arbitrement meſne between the verdict and judgment*, he cannot plead it for default of day in Court, but ſhall have audita querela, unleſs in the Caſe of the King, and there *he may plead it*; for this action does not lie againſt the King. Br. Prerogative, pl. 96. cites 21 H. 7. 33.

6. Where *writ to the biſhop* has been *awarded againſt the King* in quare impedit, *yet the King may have another quare impedit, and make new title.* Br. Prerogative, pl. 106. cites F. N. B. 35.

7. The King may have *writ of eſcheat*, which is *præcipe quod reddat*. Br. Prerogative, pl. 119. cites the Regiſter, fol. 165. [537] And yet by ſome, in the time of H. 8. the King ſhall not have præcipe quod reddat, but his title ſhall be found by office. Br. Prerogative, pl. 119.

8. The King ſhall have *treſpaſs de bonis aſportatis*, but not *de clauſo fracto*, nor other action of treſpaſs done in land; for this ſhall come by *information.* Br. Prerogative, pl. 130. cites F. N. B. fol. 90.

9. An action does not lie againſt the King. Jenk. 78. pl. 53. S. P. Nor *Voucher.*— Br. Prerogative, pl. 146. cites 9 H. 6. 56.

(Q. 5) Variance. *In what Caſes the King may vary his Count &c.*

1. IN *quare impedit by the King* the *defendant made title, and traverſed the title of the King;* and it was ſaid that the King might *take iſſue upon which point he pleaſed.* Br. Prerogative, pl. 78. cites 4 E. 3. 11. If a man traverſes the office of the King, and makes titles to himſelf as he ought abſque hoc &c. and ſo traverſes the title of the King contained in the office, the King may *chooſe to maintain his title, or to traverſe the title alledged* by the plaintiff who travers'd; for the King is not bound to ſtand to the firſt traverſe which tenders an iſſue, but may traverſe the matter of the plea of his adverſary; contra of a common perſon; for he ought to maintain that which is contained in the abſque hoc; note the diverſity. Br. Prerogative, pl. 65. 13 E. 4 8.——S. P. Ibid. pl. 69. cites S. C. For none ſhall have the lands out of the hands of the King without making title.—S. C. cited Vaugh. 62. Trin. 21 Car. 2. C. B. in Caſe of the King v. the Biſhop of Worceſter.——S. P. Per Egerton Sollicitor. 2 Le. 123. Mich. 29 & 30 Eliz. B. R. in Caſe of Venables v. Harris.——2 L. P. R. 141. cites S. C.——*And* it was ſaid, Hill. 7 E. 6. That ſo it is * uſual in *information* ſent *by the ſubject for the King into the Exchequer*, that where the *defendant pleads bar, and traverſes the information*, the *King may traverſe the matter of the bar*, if he will, and is not bound to maintain the matter which is contained in the abſque hoc. Ibid.—* Orig. (Videtur.)—S. C. cited Vaugh. 62. in Caſe of the King v. the Biſhop of Worceſter.——Br. Traverſe per &c. pl. 369. cites 38 H. 8. contra.——*Where* the King's title *appears to be no more than a bare ſuggeſtion*, the King cannot forſake his own title, and endeavour only to deſtroy the defendant's title; for the weakening the defendant's title cannot make a good title to the King. Vaugh. 61 Trin. 21 Car. 2. C. B. in Caſe of the King v. the Biſhop of Worceſter.

2. *Quare impedit* by the *King*, *he declared, and* after, *in another term, the defendant travers'd the preſentments.* Danby prayed that the King might vary and declare de novo; for where the *King* demurs in law, he *may* * *waive the demurrer and traverſe* Br. Variance, pl. 79. cites S. C. —* The King may *waive his*

demurrer in law, and join iſſue. Br. Prerogative, pl. 64. cites 5 E. 4. 118. —S. P. 5 Rep. 104. Trin. 42 Eliz. B. R. in Baker's Caſe——S. P. Or he may *waive the iſſue and demur.* Ibid. pl. 69. cites 13 E. 4. 8.——S. P. Vaugh. 65. in Caſe of the King v. the Biſhop of Worceſter.——S. P. 10 Mod. 200. cites Vaugh. 65 Dy. 53. and 1 Vent. 17.——*But if* the *demurrer be adjudged againſt the King, it is peremptory*; and the party ſhall have outler le main; quod nota. Br. Prerogative, pl. 111. cites 29 H. 6. and Fitzh. Traverſe 2.—*Or* if the King *joins iſſue*, which is *found againſt him*, he *cannot tender other iſſue after* upon this matter. Br. Prerogative, pl. 13. cites 9 H. 4. 6.——Br. Traverſe de Office 9. cites S. C.

In *quare impedit* by the *King*, he *made title, which was inſufficient*, by reaſon of the ſtatute of 25 *E.* 3. pro clero, *cap.* 1. of voidances of churches in another's right; and the *defendant took exception* by it, and the Court held with him; and the King departed from this title, and *made other title* by another right and mean, and was ſuffered; quod nota. Br. Prerogative, pl. 14. cites 11 H. 4. 8.

† In quare impedit the *King made count*, and *in another term relinquiſh'd it*, and counted another count. Br. Prerogative, pl. 15. cites 11 H. 4. 37.——Ibid. pl. 69. cites 3 E. 4. 5. Contra, that a *man traverſed office*, by which the *King and he were at iſſue*, and *venire facias awarded returnable in B. R.* and the King's attorney came and would have *changed the iſſue*, and could *not in another Term*, but might in the ſame Term——S. P. For the matter is not chan'd Jenk. [538] 133. pl. 17.——S. P. For then he might do it indefinitely. Vaugh. 62. 63. in Caſe of the King v. the Biſhop of Worceſter.——*And* in *quare impedit* pro Rege, if he declares, he cannot *vary from the declaration* in another Term, and make a new one, but the ſame Term he may. Ibid.——S. P. otherwiſe the King might change without limit, and tie the defendant to a perpetual attendance; for in theſe caſes, as to the right, all things remain, and are as they were at firſt. Vaugh. 63. In Caſe of the King v. the Biſhop of Worceſter, cites 13 E. 4. and 28 H. 6. 2. a.

So in a *decies tantum* where the *defendant pleads ill bar*, and the *plaintiff replies to it, and will not demur*, the King cannot demur; quod the Reporter conceſſit; for the King is not intitled till judgment, but he denied the other caſe, for there the King is intitled by the judgment upon the outlawry. Ibid.

3. The King cannot *demur upon plea pleaded in avoidance of outlawry, where the plaintiff replies and joins iſſue*; for the King is not intitled but by reaſon of the party. Br. Prerogative, pl. 43. cites 38 H. 6. 1.

But if it be found for the King, the recognizance is determined, and the King ſhall have the ſum. Br. Recognizance, pl. 21. cites S. C.

4. *Scire facias* pro Rege *upon recognizance of the peace* for breaking the peace; *after the jury challenged, the King relinquiſhed the iſſue*: but there the *King may have a new ſcire facias after*; but this iſſue is determined, and the recognizance remains in force; quod nota bene. Br. Prerogative, pl. 140. cites 10 H. 7. 11.

S. C. cited Vaugh. 63. Trin. 21 Car. 2. C. B. in Caſe of The King v. The Biſhop of

5. Where *information* is put *in the Exchequer upon penal ſtatute*, and the *defendant makes bar and traverſes the plea*; there the *King cannot waive ſuch iſſue* tendered *and traverſe the former matter* of the plea, as he may upon traverſe of office &c. where the King is ſole party, and intitled by matter of record; for upon the information there is no office found before, and alſo a ſubject is party with the King to recover the moiety or

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the like; quod nota bene. Br. Prerogative, pl. 116. cites 34 H. 8. Per Whorwood, the King's Attorney, & al'.

WORCESTER, as 38 H. 8. And ſays that this caſe ſeems to conclude, that when the information is only for the King, and a material point travers'd, upon which iſſue is joined, that the King is not bound to that iſſue, but may take another. —And Ibid. 64. S. C. cited verbatim; and then adds, Here it is moſt apparent that upon an information, when the King hath no title by matter of record, as he hath upon office found, the King cannot waive the iſſue tender'd upon the firſt traverſe, tho' the information be in his own name; and for the ſupernumerary reaſon, that the King is not the ſole party in the information, is but frivolous and without weight, but the ſtreſs is where the King is ſole party, and intitled by matter of record.

6. In a *quo warranto for uſurping certain liberties*, the defendant *pleaded a ſpecial plea*; the King *replied*, the *defendant was ready to rejoin*, and after *in another Term the King changed his replication, and* therein *tender'd a new iſſue*. It was *moved, that the defendant might change his plea*, inaſmuch as the King had alter'd his replication in divers matters of ſubſtance, and the pleading is yet in paper. But per Cur. this is not ex gratia curiæ, that the King ſhall alter his replication, but jure prerogativæ; and tho' the pleading be in paper, yet it is in another Term, and therefore without the aſſent of the King's attorney it cannot be amended; nor would the Court allow him to plead the general iſſue, viz. non uſurpavit, without aſſent of the King's counſel. 2 Roll. R. 41. Trin. 16 Jac. B. R. The King v. Glemmon.

7. An action was brought for imbezziling the King's goods, and the *declaration laid it to be done in London*. The Court held, that the King might chooſe his county, and waive that which he ſeemed to have elected before, as he may waive his demurrer and join iſſue, and e contra. Vent. 17. Paſch. 21 Car. 2. B. R. The King v. Webb.

8. If the *King* brings a quare impedit, and *counts that he was ſeiſed of the advowſon in groſs and preſented*. When *the true patron* ſhall confeſs his preſentation, and *avoid it by ſhewing that his preſentation was in right of the ward by lapſe*, by reaſon of *outlawry, or of temporalties being in his hands*; the King ſhall deſert his own title, and controvert the defendant's title in whoſe right he did formerly preſent, and if his title happen to appear not good, ſhall recover the ſecond preſentation. Vaugh. 61. Trin. 21 Car. 2. C. B. in Caſe of the King v. the Biſhop of Worceſter. [539]

9. The Crown may change their own venue. The Queen may amend her pleadings at any time, nor will any eſtoppel bind the Crown. 10 Mod. 200. cites Hob. 339. Sid. 412.

(Q. 6) *Pleadings and Proceedings.*

See (M. 2) pl. 6. ſ. 7. 13. 25. 34. and pl. 8. ſ. 3. (Q. 5.)

1. WHERE the King is party, the *proceſs* ſhall be always *non omittas*; for no franchiſe can hold againſt the King; quære if *licet fuerimus pars* be in the patent. Br. Prerogative, pl. 109. cites 41 Aſſ. 17.

2. In quare impedit the *King may alledge preſentation in his anceſtor and another in himſelf*, and it is not double; contra between common perſons; and *plenarty is no plea againſt the King*, for laches ſhall not be adjudged in him; quod nota bene by reaſon of his prerogative. Br. Prerogative, pl. 76. cites 43 E. 3. 14.

And if *double return ſhall be made for the King of the ſtatute againſt a merchant who does not import bullion according to the form of the ſtatute*, a man ſhall have advantage of the doubleneſs. Br. Double, pl. 98. cites 4 E. 4. 3.

3. If a man *pleads double plea againſt the King*, there the *King may have advantage of it*. Br. Double, pl. 98. cites 4 E. 4. 3.

4. Where *writ of error* is ſued *againſt the King*, no *ſcire facias* ſhall iſſue; for the King *is always preſent in Court*. And therefore *the entry is, Quod W. H. attornatus generalis domini regis qui pro ipſo rege ſequitur*, and not Quod dominus rex per attornatum ſuum ſequitur &c. Br. Prerogative, pl. 128. cites F. N. B. fol. 21.

S. P. Jenk. 133. pl. 61.

5. If *evidence* be given *for the Queen* in information or any other ſuit, and the *defendant offers to demur* upon it, the counſel of the *Queen ſhall not be compelled to join in demurrer, but* in ſuch caſe the *Court may direct the jury to find the ſpecial matter*, and upon this they ſhall adjudge the law, as appears 34 H. 8. D. 53. But this is by the prerogative of the King. 5 Rep. 104. Trin. 42 Eliz. B. R. in Baker's Caſe.

(Q. 7.) * *Monſtrans de Droit & Petition &c. for reſtoring Lands &c. Antiquity* thereof, and how conſidered. And *in what Caſes* it may be, *and How.*

* Monſtrans de droit *is* as much as to ſay, the ſhewing of right: in a legal ſenſe it denotes a ſuit in Chancery, for the ſubject to be reſtored to lands and tenements, which he ſhews to be his right, though by office found to be in the poſſeſſion of another lately dead; by which office the King is intitled to a chattel, freehold or inheritance in the ſaid lands. Cowel Interp. verbo Monſtrans de Droit.—2 L. P. R. 201.—* See (Q. 8) infra.

1. IF *a man holds of the King in capite, and other lands of other lords*, and dies, his heir within age, *the other lords ſhall have petition of their rents in the nonage of the heir*. Br. Petition, pl. 43. cites 24 E. 3. 4. per Hillarie J.—But ſee now the ſtatute of * 2 & 3 E. 6. 8. Ibid.

Br. Petition, pl. 78. cites S. C. and that in ſuch caſe *age* does not lie for the heir in ward of the King, in whoſe right the King preſented; and that before any plea pleaded *ſcire facias iſſued againſt the preſentee* of the King *ad informandum dominum regem* before any plea pleaded; and becauſe the preſentee of the King would not maintain that the heir had any thing

2. A man ſued by petition to the King *to have his preſentation repealed, and that the plaintiff be reſtored to his advowſon*, and upon the matter had the preſentation of the King repealed by the petition, which was *in nature of quare impedit*. Br. Preſentation, pl. 40. cites 43 Aſſ. 21.

thing by deſcent (the plaintiff in the petition having ſet forth a gift of the land, and of the advowſon appendant to him with warranty in fee) the preſentation was repealed. Quod nota.

3. If *joint-feoffee confeſſes that the feoffment was made to him and others by colluſion* by the King's tenant *to defraud the King of the ward*, the King may ſeiſe all the land, and the other feoffee ſhall be put to petition, as it ſeems. Br. Petition, pl. 33. cites 10 H. 4. and Fitzh. Traverſe, 50.

4. *At common law* there was no traverſe, but *petition*; and this *was in lieu of writ of right for the party, and to avoid delays the ſtatute was made*, that a man may traverſe the office, *which ſtatute does not toll the ſearch which was at common law, but the petition*; per Sotel. And per Spilman, the ſtatute which gives traverſe is only of ward, and of fine for alienation &c. which are only chattels, and of thoſe was no traverſe at common law; but of franktenement, traverſe was at common law. Br. Traverſe de Office, pl. 18. cites 9 E. 4. 51.

S. P. and *petition* to the King *is a writ of right*. Br. Petition, pl. 15. cites S. C.—— Traverſe and petition was before the ſtatute of 36 E. 3.

per Littleton, but Choke contra. Br. Traverſe de Office, pl. 40. cites 21 E. 4. 3.—*Traverſe was not at the common law of a thing real, before the ſtatute of* 34 & 36 E. 3. but petition and monſtrans de droit. *But of a chattle* traverſe was at common law. Br. Traverſe de Office, pl. 38. cites 13 E. 4. 8.—Br. Petition, pl. 30. cites S. C.—S. C. cited 2 Inſt. 689.—Petition *was not at the common law of* * *chattels*; for petition did not lie but of franktenement at the leaſt; per Cateſby; quod Huſſey conceſſit. Br. Petition, pl. 19. cites 1 H. 7. 3.—*Of chattle real* a man ſhall have petition of right, as well as of franktenement; per Brian. Br. Petition, pl. 24. cites 7 H. 7. 11.—* S. P. becauſe chattels perſonal are bona peritura, and cannot abide the delay of a petition. 2 Inſt. 689.

5. In caſe *where a man may traverſe an office, he may ſue by petition*; per Spilman; quod non negatur. Br. Traverſe de Office, pl. 18. cites 9 E. 4. 51.

S. P. per Spilman; and if he ſues by petition, the nature is to have ſearch. Br. Petition, pl. 15. cites S. C.

6. Petition of right *is in nature of his real action*, which he cannot have againſt the King, becauſe the King by his writ cannot command himſelf. 4 Rep. 55. a. Trin. 30 Eliz. in Caſe of Warden &c. of Sadler's Caſe.

7. A petition of right *is grounded upon a matter of fact ſuggeſted*, upon which a commiſſion iſſues *to inquire of the truth* of this ſuggeſtion, except the attorney confeſſes the truth of the matter ſuggeſted, as in a petition of dower. Skin. 608. Mich. 7 W. 3. B. R. in the Banker's Caſe.———cites 3 Inſt. 215.——— Moor 629.———Co. Ent. 462.———9 Hen. 4. 4.

8. In all caſes of a petition to the King, this *is to controvert the title of the King*; the caſe might have been ſo that a petition might have been neceſſary, *as if the* King's creditor had been attainted before an aſſignment inrolled, and after a grant was made, and a ſeiſure had been made into the King's hands, the party ought to go by way of petition; for in no caſe is the party put to his petition, but when he controverts the title of the King. Skin. 608. Mich. 7 W. 3. B. R. in the Banker's Caſe.

(Q. 8) Monſtrans de Droit or Petition. *Statutes* relating thereto.

1. 36 *E.* 3. *cap.* 13. *ſ.* 1. *FOR grievous complaint, that the King has heard by his people of his eſcheators, and of their evil behaviour, he wills and has ordained, that* * lands ſeiſed *into his hands* becauſe of ward, *ſhall be ſafely kept without waſt or deſtruction.*

This act is more extenſive than the ſtatute of 34 *E.* 3. *cap.* 14. which extended only to caſes where the King was intitled by office, and to the caſes of alienation, without licence, and the caſes of ward. But three things were grievous, which were not remedy'd by that act. 1. No office was within the purview, but only *office* found *virtute brevis* or *commiſſionis*, the words being (taken by commandment of the King) to that office found *virtute officii* was out of that act. 2. The ſaid act *extended only to* two caſes, viz. *alienation without leave, and of ward.* 3. It extended to *travers only*, and *not to monſtrans de droit*; ſo that tho' iſſue was found for the plaintiff, yet the Judges could not proceed to judgment without a writ of *precedendo ad ſaciendum*, and to remedy theſe miſchiefs was this ſtatute of 36 E. 3. cap. 13. made. 4 Rep. 56. b. 57. a. Caſe of the Wardens &c. of Sadlers.

* Reſolved, that this act *extends generally to lands ſeiſed* &c. by office, it being a beneficial law made in advancement, and for execution of juſtice and right without delay, and therefore ſhall be taken generally, according to the letter and intention of the act. 4 Rep. 58. a. And the Reporter in a nota there ſays, that a termor may have travers by this ſtatute.

S. 2. *And that the eſcheator have no fee of wood, fiſh, nor of veniſon, nor other thing, but ſhall anſwer to the King of the iſſues and profits yearly coming of the ſaid lands, without doing waſt or deſtruction.*

S. 3. *And if he do otherwiſe, and thereof be attainted, he ſhall be ranſomed at the King's will, and yield to the heir the treble damages at his own ſuit, as well within age, as of full age.*

S. 4. *And his friends, as long as he is within age, ſhall have the ſuit for him, anſwering to the ſaid heir of that which ſhall be ſo recovered.*

S. 5. *And* alſo of * other lands ſeiſed *into the King's hands* by inqueſt of office *taken before the eſcheators, this ordinance and penance ſhall hold place againſt the eſcheators.*

* Theſe words are general, 1. As to the matter; for they are not reſtrained to the two things, viz. of alienation and ward mentioned in the 34 E. 3. 14. and 2dly, as to the office, but *extend* as well to *offices* found *virtute brevis* or *commiſſionis*, as to *offices* found virtute officii. 4 Rep. 57. a. Caſe of Wardens &c. of Sadlers.

S. 6. *And if there be any man that will make claim or challenge to the lands ſo ſeiſed, that the* * *eſcheator ſend the inqueſt into the Chancery within a month after the lands ſo ſeiſed, and that a writ be delivered to him to certify the cauſe of his ſeiſin into the Chancery, and there he ſhall be* † *heard without delay to* traverſe the office, or otherwiſe to ſhew his right, *and from thence ſent before the King to make a final diſcuſſion without attending other commandments.*

* It was inſiſted that theſe words, (viz. That the eſcheator ſend the inqueſt into Chancery within the month &c.) ought to be *intended of office found virtute brevis* or *commiſſionis*; becauſe no office found before the eſcheator virtute officii may by the law be returned into Chancery, but only into the *Exchequer*, according to 4 E. 4. 24. a. and Stamf. Prerogat. 70. b. But it was anſwer'd and reſolved upon ſhewing infinite precedents in

in all ages, that ſuch offices have been returned by the eſcheator, as well into Chancery as the Exchequer, and he has *election to return it into which of the two Courts he will*; for he is attendant to both, and they are both the Courts of the King.—And as to the following words, (viz. † He ſhall be heard without delay to traverſe the office) thoſe words are general as to the matter and manner of the office; ſo by thoſe two branches the two firſt of the ſaid defects were remedy'd; (or otherwiſe ſhew his right &c.) by which words, the monſtrans de droit was given to make a final diſcuſſion, without attending other commandment, and by thoſe words ſhall proceed to judgment without any procedendo, and ſo all the ſaid miſchiefs are remedy'd. But it was reſolved, that this act *extends not to any judicial record or recovery, but only when nothing appears of record for the King beſides the office*: and therein was great reaſon; for *in caſe of* ‡ *attainder and office, the King is intitled by double matter of record*, and therefore the party grieved ought to avoid it by double matter of record, and not by ſingle travers or monſtrans de droit, and therefore ſhall be put to his *petition*, upon which he ſhall have office found, comprehending his title of record; and upon this the party griev'd ſhall traverſe the title of the King found by the office, or ſhew his writ and confeſs and avoid it, and if upon the travers or monſtrans de droit it be found for him, or the ſame be confeſs'd by the Attorney-General, he ſhall then have an *amoveas manum*; for he has anſwered and ſatisfied double matter of record by double matter of record. 4 Rep. 57. a. b.——But ſee ſtatute 2 E. 6. 8. [542]

‡ S. P Br Petition, pl. 28. cites 4 E. 4. 21.——S. P. Br. Traverſe de Office, pl. 28. cites 3 H. 7. 7. and ſays, this was agreed very often in the time of H. 8.— Br. Petition, pl. 28. cites S. C.—See (Q. 11) pl. 11.

2. 2 & 3 *E.* 6. *cap.* 8. *Where many and divers* perſons holding, *or that have holden*, lands, *tenements, or hereditaments, ſome* for term of years, and *ſome* by copy of Court-roll, *have been* expulſed, *and put out of their terms and holds*, by reaſon of inquiſitions, *or offices found before eſcheators, commiſſioners, and others, containing tenures of the King in capite*, intitling the King *to the wardſhip or cuſtody of ſuch lands or tenements; and ſometimes intitling the King* to the ſame, upon attainders *of treaſon, felony, or otherwiſe*, by reaſon that ſuch * leaſes &c. for years, or intereſt *by copy of Court-roll of ſuch perſons*, have not been found in ſuch inquiſitions *or offices; after which expulſion or putting out, the ſaid perſons have been without remedy, for the obtaining of the ſaid terms and holds, during the King's poſſeſſion therein, and can have no traverſe, monſtrans de droit, nor other remedy for the ſame, becauſe their ſaid intereſt is but a chattel in the law, or cuſtomary hold, and no eſtate of freehold; and alſo, where any perſon or perſons has any* rent, common, office, fee, or *other* profit apprender of any eſtate of freehold, or for years, or otherwiſe, out of ſuch lands *or tenements, ſpecified in ſuch offices or inquiſitions, the ſaid rent, common, office, fee, or profit apprender, not being found in the ſame office or offices, ſuch perſons are in like manner without remedy to obtain, or have the ſaid rent, common, office, fee, or profit apprender by any traverſe, or other ſpeedy mean, without great and exceſſive charges, during the King's intereſt therein, by force of ſuch inquiſition or office.*

It was reſolved, Mich. 34 & 35 Eliz. in the Court of Wards, by the two Chief Juſtices, in Caſe of the Countreſs of Rutland, upon conſideration had of the ſaid acts of 34 E. 3. 36 E. 3. and 8 H. 6. that he in the remainder expectant upon an eſtate tail or freehold, or that hath a dry reverſion, expectant upon any eſtate of freehold, without any rent or profit but only fealty, ſhall not traverſe a falſe office, finding the dying ſeiſed of ſuch a remainder or reverſion; for theſe ſtatutes give a traverſe, when the lands are ſeiſed by the King, and the party outed thereof; and the ſeiſin of tenant for life is the ſeiſin of him in remainder or reverſion. And the judgment cannot be given, quod manus domini regis amoveantur. See Stamf. Prerog. 13. He in the reverſion may ſue livery &c. Dyer 14 Eliz. 310. Stamf. Prerog. 62 a b. 2 Inſt. 688.

* Upon theſe words it has been doubted, whether a *tenant by ſtatute merchant, ſtaple*, or *elegit*, or *executors* that have intereſt in lands by a devite *for payment of debts*, and the like, were within this law, becauſe they are not leaſes for years; but the common opinion is, that theſe intereſts are within the purview of this act: for that they are not only within the ſame miſchief, being without remedy, but within the expreſs reaſon of this law, viz. becauſe their ſaid intereſt is but a chattel real, and all the aboveſaid intereſts are but chattels real. 2 Inſt. 688.

This hath reference to the preamble, and extendeth not only to offices in case of wardship by tenure in capite, but to offices upon attainders of treason, felony or otherwise; wherein the generality of these words (or otherwise) is to be observed. 2 Inst. 685.

S. 3. *Where any office or* inquisition *is found*, omitting any title, for *term of* years, *by* copy of Court-roll or other interest, *every lessee or copyholder, and every person that shall have any interest to any* rent, common, or profit apprender, out of any lands contained in such office *or inquisition, shall enjoy their leases and interests, rents &c. as they might have done, in case there had been none such office or inquisition found, and as they ought to have done in case such lease, interest by copy of Court-roll, rent, &c. had been found in such office or inquisition.*

S. 6. *If any person be* untruly found lunatick, ideot, or dead, *every person grieved by such office or inquisition shall have his traverse, as in other cases of traverse upon untrue inquisition or offices.*

S. 7. *Where it is* untruly found, that *any* person attainted *of treason, felony, or præmunire,* is seised of any lands *at any time of such treason, felony or offence committed or after,* whereunto any other *person* has just title *of freehold; every person grieved thereby*
[543] *shall have his traverse or monstrans de droit, without being driven to any petition of right, and like remedy and restitution upon his title found or judged for him, as has been used in other cases of traverse.*

This proviso extends only to traverses, and not to any monstrans de droit to be pursued by force of this act, either for the suing out of writs of scire facias, or that therein writs of search shall be granted, because the monstrans de droit does confess and avoid the title of the King, and the traverse denies it. 2 Inst. 681. cites 14 E. 4. 1, 7.

S. 13. *Provided in all such cases, as* any person *shall be* enabled *by this act* to have any traverse, *and shall pursue his traverse, he* shall sue *one or several writs of* scire facias against all such as shall have interest by the King or his patentees, *as is requisite upon traverses or petitions heretofore pursued. And in every such scire facias the patentees or* defendants shall have like pleas, as *they had* in any scire facias before *this time awarded against any patentees in any case of petition; and upon every traverse pursued by virtue of this act, in such case as the party that shall pursue should by the common law have been put to sue by petition to the King, there shall be* two writs of search *granted, as like writs have been granted upon petitions made to the King.*

Note, In many cases 2 matters of record with necessary averments shall amount to an office; but thereupon a scire facias is to be granted, wherein the party may traverse any of the material averments &c. 2 Inst. 194. cites 21 Ass. p. 36. 21 E. 3. Livery, 40 Ass. 40. 50 Ass. 2. 2 E. 3. 10. b.

* The words (upon any traverse) extend not to a monstrans de droit to be pursued on this statute. 2 Inst. 675.—This proviso was added (for that this act gave a traverse, where none was at the common law, and that it should be judged for them, for whom it was found &c.) least the judgment being warranted by authority of parliament should bind any former right the King had; and it appeareth also by the conclusion of this branch, viz. the said traverse and judgment thereupon given notwithstanding: but it seems it to be abundans cautela, for the judgment upon a traverse

S. 14. *Provided also, that* if after *any* judgment *given * upon any traverse by virtue of this act,* it shall appear *by any matter of record,* that the King *has any* other former title, *the same shall be saved to the King, the said traverse and judgment thereupon given notwithstanding.*

is,

is, Quod manus domini regis amoveantur, & poſſeſſio reſtituatur him that traverſeth, ſalvo jure &c. It is to be obſerved, that there be certain records, which intitle the King, that by law are not traverſable; in which caſes, tho' the King be intituled but by ſingle matter of record, yet the party grieved is put to his petition, and cannot be holpen by traverſe or monſtrans de droit. As taking one example for many, King H. 4. recovered in the King's Bench, in a quare impedit againſt the prior of T. the preſentation to a church, and had a writ to the biſhop, and his clerk received &c. where in truth the prior never knew of the ſuit, nor was ſummoned, attached, or diſtrained by the ſheriff; and thereupon the prior moved the Court of King's Bench to grant a writ, to cauſe to come before them the ſummoners, the pledges and mainpernors upon the diſtreſs to be examined in this matter. And in this caſe five points were reſolved by Gaſcoigne Ch. J. and the Court, viz. 1ſt, That the prior was driven to his petition in nature of a writ of diſceit, albeit in this caſe the King recovered in auter droit. 2d, That if a common perſon had recovered, the defendant had been driven to his original writ out of the Chancery, and could not proceed upon any judicial proceſs out of this Court. 3d, That if the concluſion of the petition be, that the King ſhould command the Court of King's Bench to proceed to the examination &c. then, without any writ out of the Chancery, the Court may proceed to the examination. 4th, But if the petition doth conclude generally, that the King ſhould do right, then the prior ſhould be driven to his original out of the Chancery. 5th, That before ſuch writ be granted, the prior, upon a commiſſion out of the Chancery, ought to have his right found by inqueſt. But this ſtatute extendeth to offices found by writ, commiſſion, or ex officio, and not to other records. 2 Inſt. 695.

Ld. Coke ſays, His advice to ſuch as ſhall traverſe by force of this act is, that in the inducement to the traverſe, they allege their own title (which they ought to do; for no man ſhall have the lands out of the King's hands, without making a title) juſtly and truly; for the Attorney-General for the King may either take iſſue upon the traverſe, or by the King's prerogative upon the title of the party that traverſeth, at his choice. 2 Inſt. 695.

It is a maxim in law, that whenſoever any man is by any office traverſable amoved from his poſſeſſion, he muſt traverſe the office in the Court where the office is returned. Of houſe and lands which do lie in livery, and whereof there is manual occupation and profit preſently taken, the party, by finding of the office, is out of poſſeſſion; but of rents, villeins, commons, advowſons and other inheritances incorporeal which lie in grant, the owner is not out of poſſeſſion (be they appendant or in groſs) by the finding of an office; and therefore, in any information or action brought by the King for the ſame, the party may traverſe the office in that Court where the information or action is brought for the King. And in all caſes, when the King is not in poſſeſſion by the office, and he obtains not poſſeſſion within the year after the office found, then cannot the King ſeiſe without a ſcire facias. 2 Inſt. 695, 696.

(Q. 9) Petition, or Monſtrans de Droit, for reſtoring Lands &c. out of the King's Hands. *Neceſſary; In what Caſes.*

[544]
See (Q. 11).

1. WHERE *a man holds of the King in capite, and of others in chivalry*, and dies, and the *King ſeiſes the heir within age and all the lands*, the lords may ſue to the King by petition for their *rents*, and ſhall have it, and ſhall have writ thereof, and yet by ſome their ſeigniories are ſuſpended for a time &c. Br. Rents, pl. 9. cites 24 E. 3. 24.

2. When the *preſentee of the King is inſtituted and inducted*, and the *preſentee of another is ouſted*, he who is ouſted has no other remedy, but by petition; for the ſtatute of 13 *E.* 3. does not benefit him. 2 H. 4. 17. a. b. pl. 25.

Br. Petition, pl. 5. cites S. C. and Brook ſays, that the words are, that *he ſhall plead againſt the King*, but where *no action is brought* he cannot plead, and therefore upon inſtitution and induction he ſhall have petition.

3. Where the *King has ward by deſcent*, as he may (for chattel ſhall deſcend in caſe of the King), *and grants the land for life*, the *remainder over in fee*, yet the heir ſued ſci. fa. to repeal the patents, and they were repealed, and the land reſeiſed

Where the *King is poſſeſſed of land* in ward and dies, it ſhall deſcend to

the new King, and not to the executor, and by this he ſhall not be ſeiſed in fee, and in this caſe the King was not ſeiſed in fee but in ward; and therefore, when the King *makes a gift in fee* of ſuch land, becauſe he is deceived in his grant, he ſhall re-ſeiſe and make livery, and the heir ſhall not be put to ſue by petition. Br. Livery, pl. 16. cites 7 H. 4. 41.

ſeiſed and livery made to the heir, and he not put to ſue by petition, becauſe the King by deſcent of the chattel was not in fee, and *ſo deceived in his grant*, and the grant not good, and yet the heir of him in remainder ſhall have the remainder by deſcent after the grantee, but the tenant for life was alive. Br. Petition, pl. 7. cites 7 H. 4. 33.

Contra, where the King enters without office or title, and makes feoffment or leaſe, there the other may *enter*. Ibid.

4. *In every caſe, where the King is ſeiſed by judgment of record*, as by forfeiture &c. *though the King makes feoffment*, or leaſes for term of life *where another has title or cauſe of action*, there he ſhall ſue by petition. Br. Petition, pl. 9. cites 9 H. 4. 4. per Gaſcoigne.

It was ſaid for law, that if land comes to the King by office, out of which I have a *rent-charge*, or rent *ſeck*, *which is not found in the office*, I am put to petition. Br. Office devant &c. pl. 38. cites 4 E. 4. 22, 21.——S. P. Br. Petition, pl. 28. cites 4 E. 4. 21.——*So of common, ſtatute-merchant* &c. Br. Petition, pl. 28. cites 4 E. 4. 21.—*So where the King after this gives the ſame land by patent* to another, yet the party is put to his petition for the rent, and cannot diſtrain; but if the charge had been found by office, then the party might diſtrain the patentee, but cannot diſtrain the King; and this where the King is intitled by record. *But if he enters without title or* otherwiſe *without record, (as)* if a man infeoffs him by deed inroll'd of my land, I cannot diſtrain nor enter upon the King; but if in this caſe he gives it over by patent, I may diſtrain or enter upon the patentee. Br. Petition, pl. 28. cites 4 E. 4. 21.

5. Where a man has *title of rent-charge* iſſuing *out of the land ſeiſed into the hands of the King*, there during the poſſeſſion of the King he ſhall ſue by petition, and ſhall have the rent; *but if* the King *makes feoffment* or leaſe for term of life, he *may diſtrain* for the rent notwithſtanding he was once put to ſue by petition. Br. Petition, pl. 9. cites 9 H. 4. 4. per Hank.

Br. Nonſuit, pl. 12. cites 11 H. 4. 52.

6. Petition of right, and traverſe upon it, and non-ſuit in the petition; and the opinion was, that he may have new petition notwithſtanding the nonſuit; and ſuit by petition *ſhall not be made to the Queen, but* he ſhall have *aſſiſe*. Br. Petition, pl. 10. cites 11 H. 4. 52. 67.

7. He who recovers *in value* againſt the King *by reaſon of warranty or clauſe of recompence, ſhall have his reaſon entered upon*
[545] *his aid prayer of the King*, and then ſhall have his recovery by petition, and otherwiſe not; quod nota; that he ſhall make petition thereof. Br. Petition, pl. 1. cites 9 H. 6. 3.

But where tenor is outlaw'd, and the *term expires*, the *leſſor may enter* upon

8. Where the King may ſeiſe, and *ſeiſes land*, as for alienation without licence, or the like, there the *party*, when he has made fine, or when the intereſt of the King is determined, cannot enter, but is compelled to ſue livery. Br. Office devant &c. pl. 2. cites 9 H. 6. 20.

9. It was ſaid for law, that where *the eſcheator ſeiſes* for the King *virtute brevis where the King has no title*, yet the party who has term for years, and is ouſted by it, is put to his petition; and ſo note there, that it is admitted, that petition *lies of a term.* Br. Petition, pl. 2. cites 9 H. 6. 21.

But where the eſcheator *ſeiſes without title* as above, *virtute officii*, he is not put to any petition, but may diſturb the eſcheator, or have writ of *treſpaſs*. Ibid.

10. In the caſe of charter of *pardon* of the King *pleaded in bar of execution* it was agreed by all the Juſtices, that a man ſhall have petition *to re-have his goods and chattels*. Br. Petition, pl. 3. cites 34 H. 6. 51.

As if *eſcheator virtute officii ſeiſes goods, and accounts for them in the Exchequer.* Ibid.—*Or* if a man be *outlaw'd, and the eſcheator accounts* for his goods in the Exchequer, and after the *party reverſes the outlawry by writ of error* or the like, he ſhall have petition in thoſe caſes &c. and the *King ſhall indorſe the petition* in ſuch form, *Let right be done to the parties*; quod nota. Br. Petition, pl. 3. cites 34 H. 6. 51.

11. It was found by a certain inquiſition, that the Lord Hungerford was attainted by parliament anno 1 E. 4. and that *L. and J. were ſeiſed of the manor of S. of the feoffment of A. to the uſe of the Lord Hungerford*, the 4th day of March anno 1 E. 4. *and* that *by the ſtatute* 1 *E.* 4. *the* ſaid *Lord H. was attainted of high treaſon, and that all caſtles, manors, lands, tenements, and other hereditaments, whereof he was ſeiſed, or others to his uſe in fee or fee tail the 4th day of March anno* 1 *E.* 4. *ſhall be forfeited* &c. upon which *commiſſion iſſued* to enquire &c. *and found as above*, and the office was returned in Chancery, and the *King gave the ſaid manor of S. to D. T.* and *within a month* after the putting in of the office, *the feoffees* aforeſaid *came into Chancery and put in their traverſe againſt the King*; and *in the act of attainder it was ordained, that if any of thoſe attainted were ſole ſeiſed, or jointly ſeiſed and to another's uſe, that this land ſhould not be forfeited or ſeiſed* into the hands of the King; *and ſaid that they were ſeiſed to the uſe of the Lady H. mother of the lord who was attainted, abſque hoc, that they were ſeiſed to the uſe of the Lord H. who was attainted*, and prayed livery cum exitibus, and upon this the Lady H. put in ſurety for the feoffees, and took the land to farm according to the ſtatute &c. And the queſtion was, if the party ſhall have his traverſe as here, or ſhall be put to his petition? And there it was ſaid, that where the King is *intitled by double matter of record*, as by * *attainder and inquiſition*, the party grieved ſhall not have traverſe, but petition to the King; *but* where the King is intitled *by inquiſition or office only*, there the party grieved may traverſe, and ſhall not be put to his petition. Br. Petition, pl. 28. cites 4 E. 4. 21. Lord Hungerford's Caſe.

S. C. cited 4 Rep 58. in Caſe of the Wardens and Commonalty of Sadleirs.

* Where it is *found by office that J. S. who was attainted of treaſon, was ſeiſed* of certain land, yet *the party may* come into the Exchequer or Chancery where the office is, and *ſay that there is no ſuch attainder, and if this be ſo found he ſhall have his land without petition*; quod nota, per all the Juſtices. Br. Petition, pl. 23. cites 4 H. 7. 7.

12. Where the King has a *valet admitted to a corody* without other matter, this is ſuch poſſeſſion as cannot be diſcharged without petition. Br. Petition, pl. 26. cites 5 E. 4. 118.

13. It

Hard. 13. cites this caſe, and reports the judgment to be that the mortgagee ſhould receive the profits preſently, and ſhould be put to his monſtrans de droit to get his lands out of the King's hands.—The King ſhall loſe the whole by the re-entry of the mortgagor. D. 369. pl. 51.—S. C. cited Hard. 13. Arg.

13. It was found by office that a *mortgagee of* lands held in ſocage *died ſeiſed* of them, and of lands held in capite, his heir being within age; afterwards the *mortgagor paid the money* to the executors of the mortgagee and entered. D. 236. pl. 25. Mich. 6 & 7 Eliz. makes a quære, if he ſhould anſwer the profits to the King till livery ſued out by the heir or not? But ſays it was held, Paſch. 10 Eliz. in the Caſe of BOWER v. BARNES, that the mortgagor after the payment ſhall have the land out of the King's hands by a monſtrans de droit upon this matter of record and ſuggeſtion of payment without being driven to his petition.

S. C. and P. Skin. 619. Mich. 7 W. 3. B. R. by name of Breton v. Cole.

14. In treſpaſs by B. againſt a ſheriff's bailiff for taking 43 ſheep, and two lambs. They juſtified the taking them levant and couchant on the land, whereof J. S. was ſeiſed in fee, and which was extended on an outlawry of the ſaid J. S. by virtue of a levari facias to the ſheriff, and of his precept to them. Whereupon there was a demurrer. Holt Ch. J. in delivering the opinion of the Court, held, that if the plaintiff had *a right to the land precedent to the outlawry*, as for inſtance a leaſe for years from J. S. yet if this be not found by inquiſition, or afterwards allowed in the Exchequer, he cannot have action of treſpaſs. For if it be not found, he muſt go into the Exchequer by way of monſtrans de droit, and plead it there. 12 Mod. 175. 177. Hill. 9 W. 3. Britton v. Cole.

(Q. 10) *Who* ſhall have Petition *in Reſpect of Eſtate.*

1. EXception was taken inaſmuch as *T. F. ſued by petition, and had nothing but in right of A. his wife*, et non allocatur; for the execution upon the ſtatute is only a chattel, which he may alien at his will, and they may join, or he alone may have the ſuit; quod nota. Br. Petition, pl. 17. cites 37 Aſſ. 11.

* S. P. Br. Petition, pl. 2. cites 9 H. 6. 21.

2. *Tenant by ſtatute merchant*, who has only a chattel real, may have petition if he be ouſted, and ſhall have reſtitution; and therefore Brooke ſays, it ſeems to him that *the ſame law is of a* * *termor*. Br. Petition, pl. 17. cites 37 Aſſ. 11.

See (Q. 8.)

(Q. 11) *Recovery againſt the King*; *how* it ſhall be; by Monſtrans de Droit, Petition, Traverſe, or Scire Facias.

Br. Reſeiſer, pl. 13. cites S. C.

1. PEtition ſhall be made to the King *during the time that the King has the franktenement in him*, and *not after* he has diſmiſſed himſelf of the franktenement, per Shard; Brook ſays, quære

quære inde, where office is found, which intitles the King. Br. Petition, pl. 13. cites 24 E. 3. 65.

2. If the *King ſeiſes the ward of J. S. which does not belong to him, but to W. N.* yet the heir cannot enter at full age, but ſhall ſue to the King; per Thorp J. and Cur. Brooke makes a quære, if this ſuit ſhall be by petition or monſtrans de droit. Br. Petition, pl. 40. cites 26 Aſſ. 57.

3. It was *found* by diem clauſit extremum, that *J. N. tenant of the King died ſeiſed without heir* of land in London, *by which the King granted it to T. N. for his life*, and a writ to the Mayor to put him in ſeiſin, who returned, that the ſaid *J. N. deviſed it by teſtament inrolled within the year to E. his feme for term of life*, who is yet alive, and *the reverſion to be ſold by her*; the *grantee of the King entered*, and *E. ſued ſcire facias to re-have the land*; and becauſe this *deviſe is not found* in the office, nor any office is found for the ſaid E. the deviſee, therefore the *ſcire facias* does not lie. But by ſome E. may have aſſiſe. Quære. It ſeems, *E. ſhall have petition or monſtrans de droit*; for E. cannot traverſe; for the office is true, and the *deviſe ſtands with the office*, and both are true. Br. Office devant, &c. pl. 19. cites 29 Aſſ. 31. [547]

S. C. cited 4 Rep. 55. b. 56. and that by award of all the Juſtices the writ was abated, becauſe no office was found for the deviſee, and they bid the deviſee ſue to the King by petition for an office, which might ſerve her. Out of which the Reporter obſerves, 1ſt, That at common law, when the King by office was ſeiſed of eſtate of franktenement, tho' all the points of the office were true, yet the party grieved was put to his petition in nature of his action real, unleſs his title be found by office. 2d, That petition lies to the King, tho' he had departed with the franktenement. 3d, That inaſmuch as the title of the King is found by inqueſt of office by oath, the title of a ſubject ought to appear by record of as high a nature, viz. by like inqueſt of office upon oath, and not by return of the mayor, which tho' it be of record, yet is not of ſo great regard in law as office found by oath.

4. J. A. ſued by petition in parliament, ſuppoſing that where the *King ſeiſed certain lands as eſcheat for felony done by W. which the King had given to S. U. in fee, which deſcended from S. to R. as heir of S. and that W. who was the felon, had nothing but in right of Alice his wife, mother of J. A. now plaintiff*, and prayed to have right, which petition was indorſed, and ſent to Chancery to do right, and ſci. fa. was awarded againſt *R.* who *came, and becauſe his father had the land of the gift of the King, and that he is in by deſcent, prayed that the plaintiff ſue at common law to ſave the warranty of the defendant.* Ludd. ſaid, We cannot have writ of entry againſt you, ſuppoſing that you had not entry unleſs by your anceſtor, to whom the King leaſed, who wrongfully diſſeiſed our anceſtor thereof; for the King cannot be a diſſeiſor, and ſo the writ fails at common law; and becauſe this ſuit was allowed in parliament, and alſo ſuch ſuit was allowed in ſuch Caſe for M.S. Shard ordered him to anſwer, whereupon the other prayed aid of the King, and had it by aſſent. Br. Petition, pl. 16. cites 33 Aſſ. 10.

5. Where the *King ſeiſes land or reſumes it* after livery to a prior alien &c. *for cauſe, which* cauſe *is of record in the reſeiſer or reſumption*, a man ſhall have *traverſe to the cauſe, and ſcire facias againſt the party who has it.* Br. Petition, pl. 4. cites 2 H. 4. 10. per Cur. *But if* he reſeiſes or reſumes *without ſhewing cauſe*, there the party grieved ſhall have *petition to the King, and ſcire facias againſt the party who has the land*; and ſo it was done. Ibid.

6. If

But where it is found that J. N. was attainted of treaſon or felony by matter of record before, and the King grants this land over to another, there he who right has cannot traverſe, nor enter, nor have action, but is put to his petition. Br. Petition, pl. 36. cites 10 H. 6. 15.

6. If it be *found before the eſcheator that J. N. did treaſon*, by which the *King ſeiſed*, whereas he *was never indicted nor attainted*, he who is ouſted by this means ſhall not be compelled to ſue by petition, where the King has granted the land over, but may have ſcire facias to repeal the letters patent. Br. Petition, pl. 8. cites 8 H. 4. 21. per Gaſcoigne.

7. If the *preſentee of the King ouſts the incumbent without induction, ſpoliation lies* for the incumbent; *but if* he ejects *after induction*, the incumbent ſhall have *petition* to the King, *and ſcire facias* againſt the preſentee of the King; per Gaſcoign and Huls. Brooke ſays, This is to be underſtood as it ſeems where the King is intitled to the advowſon by office. Br. Petition, pl. 44. cites 8 H. 4. 21.

[548] 8. If *office* be *found which intitles the King to* fee ſimple or *franktenement*, the party grieved ſhall not have traverſe but petition; per Babington J. quod nemo negavit, quod nota. Br. Petition, pl. 32. cites 8 H. 5. & Fitzh. Traverſe 47.

9. It was found by office before the eſcheator who ſat by virtue of his office, *that J. N. gave in tail to P. rendring rent, and* for default of payment *a re-entry, and that the donor entered for non-payment, and was ſeiſed till by the iſſue of P. after the death of P. diſſeiſed, and the iſſue had iſſue N. and died ſeiſed, and after N. was attainted by act of parliament, and to forfeit his land in poſſeſſion and in uſe;* and that after *N. died*, and that the *donor made continual claim at the time of the death of N.* which office was returned in the Chancery; and upon this *J. N. the diſſeiſee came and pleaded the matter above, and* that in a *proviſo in the ſtatute* of attainder *of ſaving to all lieges not attainted their right poſſeſſion and lawful entry* in all the land of the ſaid N. who was attainted, *and ſhewed the ſeiſin and diſſeiſin, and the continual claim and the dying ſeiſed*, and the ſeiſin in the hands of the King by office virtute officii, *and prayed to remove the hands of the King*. And by ſome he ſhall be put to his petition of right; but the * beſt opinion was contra, and that he ſhall be *reſtored by plea, becauſe his title is found in the office*, and by reaſon of the ſaving of the act. And it was ſaid, that the office ſhall be received in the Chancery, tho' it be found againſt the King, as it is here, viz. the ſeiſin and the diſſeiſin, and the continual claim; for the jury ought to find the truth, and therefore it ſhall be return'd. As, where it is found that A. killed B. ſe defendendo, yet this ſhall be return'd, and the King ſhall make to him his grace; and ſee 4 E. 4. 21. Diverſity. And ſo the beſt opinion here was that he may enter, or have ouſter le main at leaſt; and where the King enters by title or without title, which is without office as it ſeems, yet a man cannot enter upon him. Br. Office Devant, &c. pl. 37. cites 3 E. 4. 24.

* Br. Petition, pl. 27. cites S. C.

10. In the Exchequer Chamber Brian rehearſed how *at another time it was found by office that the Duke of E. died ſeiſed of the manor*

manor of E. C. which deſcended to the King, and he entered, and after A. ſued to the King by petition, inaſmuch as he was ſeiſed of the manor till by the ſaid Duke diſſeiſed, and proceſs continued till he had reſtitution, which *A. infeoffed B. and C. who gave to E. in tail*, and *now by another office it is found, that the ſaid Duke died ſeiſed of* 40 *acres of land in E. C. and D.* by which the King *ſeiſed it and granted to J. S.* and thereupon *came E. the tenant in tail, and rehearſed all the matter, and ſaid that the* 40 *acres are parcel of the manor, of which the reſtitution was made, and prayed reſtitution, and had ſcire facias againſt the patentee, who* came and *prayed writ of ſearch.* And per Spilman, In this caſe, where a man traverſes an office, he may ſue by petition, and if he ſues by petition, *the nature is to have ſearch, but in* its nature of *monſtrans de droit*, as here, *ſearch ſhall not be granted*; and ſo ſee here that the firſt matter was a petition, but this ſecond matter is a monſtrans de droit, and ſo admitted without contradiction. Br. Petition, pl. 15. cites 9 E. 4. 51.

11. *Petition* was made to the King *reciting that the King had not title but by forfeiture of J. S.* &c. and had *ſcire facias againſt the patentee* as well if it had been upon a traverſe. Br. Petition, pl. 31. cites 16 E. 4. 6.

12. There is a diverſity between monſtrans de droit, petition, and traverſe; for *monſtrans* de droit *is when the King is intitled by matter in fact which is true, and yet the party has right*, as where the King's tenant is diſſeiſed, and the diſſeiſor dies ſeiſed, and office is found &c. in this caſe he may confeſs the matter, and ſhew the diſſeiſin, and pray that he may be reſtored, and this is good monſtrans de droit. Br. Petition, pl. 20. cites 3 H. 7. 3.

In all caſes a grantee may maintain a monſtrans de droit, *where lands come to the King by matter of fact*, as upon

a vacancy of a biſhoprick &c.; and he need not reſort to a petition, becauſe his title is as high as that of the King. Skin. 613, 614. Mich. 7 W. 3. B. R. in the Banker's Caſe.—*But* if the King's title be by *matter of record*, there, *at common law*, the party was put to his petition of right; but where the King comes by lands by act of law, this is in the manner as before mentioned. Skin. 614. in the Banker's Caſe.

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13. *Petition is, when the King is intitled by matter of record*, as where it is *found that one is attainted of treaſon, and is ſeiſed* of certain land, in this caſe the diſſeiſee ſhall have petition, and ſhew his title and the title of the King, and the King may traverſe his title if he will. And if feoffment upon condition be made of the part of the feoffee, and he breaks it, and after is attainted of treaſon, the feoffor ſhall have his petition ſhewing the matter. And it ſeems that this is where the King is intitled by *double matter of record*, as the attainder and office found, of which land he was ſeiſed at the time of the attainder. Br. Ibid.

Br. Prerogative, pl. 59. cites S. C.—For where the King is intitled by double matter of record, a man cannot traverſe. Br. Office devant, &c. pl. 37. cites 3 E. 4. 24.—Br. Petition, pl. 27. cites S. C.—S. P. For the King is not only intitled by the office, but by the attainder alſo; quod nota. Br. Petition, pl. 28. cites 4 E. 4. 25.—S. P. Ibid. pl. 35. cites 33 H. 8.—*So if the King grants it over after the double matter* of record found. Ibid.

If a man be *attaint of treaſon, and* be *found to be ſeiſed of the land of another*, the perſon is put out of poſſeſſion, and before the ſtatute which gave a traverſe he had no remedy, but a petition of right; for an office is found upon oath, and is a judicial proceeding, where the party who has a title has a ſufficient notice to come and make it appear; but now diverſe ſtatutes have given a *traverſe*. Skin. 614. Mich. 7 W. 3. B. R. in the Banker's Caſe.—See (Q. 8) pl. 1. ſ. 6. And in notis, and pl. 2. per tot

14. And

14. And *traverſe is where the title of the King is falſe*; and per Huſſey, the party cannot traverſe but where livery ſhall be made; for if it be found that A. held land for term of life, and died, the reverſion to the King, there, if this be falſe, yet the party ſhall not have traverſe, becauſe livery does not lie in this caſe. Ibid.

15. Office was *found that J. O. was attainted of treaſon by parliament in the time of R. 3. and that he forfeited to the King* his land, and *all that he could forfeit*, and that he was ſeiſed of 1000 acres of land in Dale in fee, and the King ſeiſed. And *S. O.* came and *ſaid that at the ſame parliament it was enacted that he ſhould be reſtored to all that which J. O. his anceſtor forfeited, and the attainder againſt J. O. annulled*; and ſaid that J. O. was ſeiſed of thoſe lands at the time of the attainder, *and prayed reſtitution*; and by all the Juſtices, where the King is intitled by matter, he ſhall be put to his petition, and ſhall not have traverſe; and this ſeems to be *double matter of record* as here, that is to ſay, *the attainder* by parliament *and forfeiture of his land, and the office finding that he was ſeiſed of this land at the time of the attainder*, he ſhall not have monſtrans de droit, where the King is intitled by matter of record as above; but in this caſe he *confeſſes and avoids the title of the King by as high matter of record as the King is intitled by*, and therefore he is not put to his petition; for his petition is by the act of parliament; by all the Juſtices without queſtion, and he ſhall have it by way of plea, and ſhall have the land; quod nota. Br. Petition, pl. 23. cites 4 H. 7. 7.

16. If *two jointenants* are, and it is *found* by office *that the one was ſeiſed in fee, and the land deſcended to W. his ſon, as heir* &c. the other has remedy by monſtrans de droit, which ſhall be in this manner, viz. *he ſhall come into the Chancery, and ſhall ſhew all his matter, and pray allowance* of it, and ſhall have it; quod nota. Br. Petition, pl. 25. cites 9 H. 7. 24.

As if one deviſe houſes in London deviſable by cuſtom, and *held of the*

17. *Eſtate veſted* in the King ſhall be *defeated by force of a condition* by act in law without office or monſtrans de droit. Cited 2 Rep. 53. Paſch. 29 Eliz. in Scacc. in Sir Hugh Cholmley's Caſe. As Pl. C. 489. Lord Lovel's Caſe.

King in tail, and if the donee dies without iſſue, that the land ſhould be ſold by his executors, and died, the *deviſee died without iſſue*, now the *land is eſcheated to the King, yet the bargain and ſale of the executors ſhall deveſt the eſtate of the King* for neceſſity, and this without petition or monſtrans de droit; and alſo their vendee is in by the deviſor paramount the eſcheat. Cited 2 Rep. 53. Paſch. 29 Eliz. in Scacc. in Sir Hugh Cholmley's Caſe, as 49 E. 3. Iſabel Goodcheap's Caſe.—And Ibid. 53. it is ſaid, Arg. That in as much as the executors in this caſe having only a power, they had no other means but only to ſell; for they could not have petition, monſtrans de droit, or other remedy.——*But* it was ſaid that *if* land upon condition comes to the King, and the condition is broken, and *the King makes a leaſe for life*, he who has the condition cannot enter, but ought to have petition or monſtrans de droit &c. and this appears in the book of 9 H. 4. 4. a. b. a man bound in a ſtatute conveyed land to the King who leaſed for life, the conuſee ſhall not extend upon the poſſeſſion of the tenant for life. 2 Rep. 53. b. in Sir Hugh Cholmley's Caſe.

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18. When an *eſtate* ſhall be *deveſted out of a common perſon*, and veſted in another *without action, entry or claim*, this *ſhall be deveſted out of the King without petition or monſtrans de droit* &c. *But* when in the caſe of a common perſon, the eſtate ſhall not be

be deveſted out of him without action, entry, or claim, there it ſhall not be deveſted out of the King without petition or monſtrans de droit &c. 2 Rep. 53. in Sir Hugh Chomley's Caſe. —cites Pl. C. 489. Lord Lovel's Caſe.

19. It was found by mandamus that A. was ſeiſed on the day of his death of certain meſuages &c. in London, and *died without heir, and that they were held of the Queen in ſocage.* The warden and commonalty of ſadlers in the Chancery ſhewed their right, that *long time before A. any thing had therein, one J. S. was ſeiſed of them in his demeſne as of fee, and ſo ſeiſed by will deviſed them to the ſaid wardens &c. in fee, and were ſeiſed till by the ſaid A. diſſeiſed, who ſo ſeiſed died without heir*, and ſhewed the *cuſtom* of London for a freeman *to deviſe in mortmain*, and that J. S. was a citizen and freeman at the time of his death. Upon a demurrer, the queſtion was, if monſtrans de droit lay in this caſe, or that they were put to their petition? It was reſolved that in all caſes *at common law*, when the *King* was *ſeiſed of* any eſtate of inheritance or *franktenement by any matter of record, or* by *matter in fact* and *found by office of record*, he, who right had, could not have any traverſe upon which he was to have an amoveas manum, but was put to his petition of right to be reſtored to his franktenement and inheritance. *But* when the *title* of the King was *by matter in fact*, as by reaſon of purchaſe by an alien-born, or by the King's villein, or alienation in mortmain, or death of his tenant without heir &c. if, * *in the ſame office found for the King, the title and intereſt of the party was found likewiſe*, there the party grieved at common law might have his monſtrans de droit, becauſe his title appears by the ſame record by which the King is intitled. 4 Rep. 54. b. 55. a. Trin. 30 Eliz. in Canc. The Warden and Commonalty of Saddlers in London.

S. C. And. 180. 181. That it was agreed by all the Juſtices except two; and this upon conference at Serjeant's Inn, that remedy might be in this caſe by monſtrans de droit, becauſe the ſame is to be ſo underſtood by the words of the ſtatute of 36 E. 3. which gives the traverſe and monſtrans de droit.

* *As* if *diſſeiſor alien'd* in mortmain, or to alien born, or to the King's villein, *or dies without heir*, the *land being held of the King*, and the whole ſpecial matter is found by office, viz. the diſſeiſin and the alienation, or dying without heir, the party grieved ſhould have monſtrans de droit at the common law. 4 Rep. 55. a. and ſays that ſo are the books to be intended in 9 E. 4. 5. and 13 E. 4. 8. a. 41. 21.

And it was further reſolved, that when the *King's tenant ſeiſed of land in fee dies without heir*, the fee and franktenement is immediately upon his death, and before office found, caſt upon the King, and has not a franktenement in law only, as a common perſon in like caſe has. But when a *ſtranger is ſeiſed, and in poſſeſſion at the time of the eſcheat*, ſo that poſſeſſio eſt plena & non vacua, there the King ſhall not be adjudged in poſſeſſion till this ſeiſin and poſſeſſion be removed. 4 Rep. 58. a. in the Warden &c. of Sadler's Caſe.

20. When the *whole truth of the caſe appears in the office there was monſtrans de droit at common law.* 4 Rep. 55. a. in Caſe of Warden &c. of Sadlers.

So if *land was conveyed to the King upon condition*, if the *performance is of record*; as if the condition be to levy a fine of other land to the King, or to make recognizance to the King in any Court of Record, or other like conditions which are to be perform'd of record, the performer may have his monſtrans at common law; for his title appears of record, and there is no record which abſolutely intitles the King; *but if* the performance be *not of record, but* it be *found by office*, he ſhall have monſtrans de droit by the common law. *But if the office finds title for the King only, and omits the right or title of the party, tho' all the words of the office be true*, yet by the common law he could not have monſtrans de droit, but was put to his petition. 4 Rep. 55. a. b.

21. King Char. 2. being indebted to diverſe perſons in the ſum of 416,000 l. 8s. 2d. for the payment of the intereſt of that ſum, grants for him his heirs and ſucceſſors 25,000 l. per ann. to be paid out of his revenue of the hereditary exciſe to Sir R. V. in *truſt for ſuch creditors of Sir R. V. who would deliver their ſecurities and take aſſignments for their debts*; and directs the Office of the *Exchequer to ſtrike tallies, and upon receipt of the revenue of the exciſe to pay them immediately &c. Proviſo on payment of the principal ſum to be void.* W. one of the creditors of Sir R. V. took an aſſignment of part and delivered his ſecurity, and this aſſignment was enrolled; and he brought the letters patents and aſſignments into the Court of Exchequer, and prayed them to be allowed, and that he might be paid his arrears and growing intereſt for the future. The attorney-general demurred. And, per Holt Ch. J. W. had taken a proper remedy; and he ſaid, firſt, that monſtrans de droit, and petition of right, were the remedies in ſuch caſe at the common law; and that monſtrans de droit is enlarged by ſeveral ſtatutes, and except in a few caſes a traverſe lies, 4 Rep. 54. 2 Inſt. 688. Stamf. Prerogat. 74. But this caſe is not within any of the ſtatutes, but is at common law; and the party in this caſe is not put to his petition of right, but monſtrans de droit is his proper way; a petition of right is not neceſſary, tho' the party may admit himſelf out of poſſeſſion, as in the caſe of a tenant in tail of a rent, who may have a formedon, and then a warranty would bar him, but this is not neceſſary; ſo here if the party will admit himſelf out of poſſeſſion, he might have a petition of right. 2d, A petition of right is not neceſſary, becauſe a petition of right *is grounded upon a matter of fact ſuggeſted*, upon which a commiſſion iſſues *to enquire of the truth* of this ſuggeſtion, except the attorney general confeſſes the truth of the matter ſuggeſted, as in a petition of dower, 3 Inſt. 215. Moor. 639. Co. Ent. 462. 9 Hen. 4. 4. But here no matter of fact is to be inquired of, but his title is by letters patent, which are matters of record; it is true that W. claims under Sir R. V. but he claims by deed enrolled, directed by the patent; neither does the patentee go to deſtroy the title of the King; but this is an affirmance of the King's title, and in all caſes of a petition to the King, this *is to controvert the title of the King*; the caſe might have been ſo, that a petition might have been neceſſary; *as if* Sir R. V. had been attainted before the aſſignment inrolled, and after the grant made, and a ſeiſure had been made into the King's hand, the party ought to go by way of petition; for in no caſe is the party put to his petition but when he controverts the title of the King, but here the annuity is not put to a right; nothing is done to turn the ſubject's title to a right, and therefore there is no reaſon to have a petition; alſo as a petition is not neceſſary, ſo the remedy here purſued is proper, viz. a monſtrans de droit, which is a remedy at common law; cites Kell. 178. and 4 Rep. 55. and if it be demanded when is ſuch remedy to be purſued? it may be anſwered, when the title appears upon record; as ſuppoſe an inquiſition found a title for the King; as alſo one for

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the party, as in the case of an alienation in mortmain by a disseisor; Saddler's Case. 4 Rep. And that a monstrans de droit *lies in the Exchequer*, appears in Sheffield's Case, and is admitted in the Com. 186. Coke's Entr. 205. (tho' 26 E 3. does not mention the Exchequer,) for it lies in some cases there by the common law; and *at this day* a monstrans de droit *lies only in Chancery and the Exchequer, except in a special case.* Skin. 601, 608, 609. Mich. 7 W. 3. B. R. The Banker's Case.

(Q. 12) *Scire Facias for the King*; Necessary, *in what Cases.* [552]

1. IN all cases *where a common person is put to his action*, there, upon office found, the King is put to his scire facias, *as in* case of *waste*, *cessavit* &c. *But* when a common person may enter without seisure, there office without scire facias shall suffice for the King. 9 Rep. 96. b. Pasch. 9 Jac. in Canc. in Sir George Reynell's Case. — cites * 12 H. 7. 21. b. 14 H. 7. 2. 15 H. 7. 6. b. Stanf. 54.

* Poph. 27. cites S. C. and P.

(Q. 13) *Proceedings and Pleadings* in Petition and Monstrans de Droit.

1. IF the *King grants land* to another, there he, who makes petition, or monstrans de droit, or traverses the office, shall have *scire facias against the patentee*, and both the *King and the Party shall be parties*, and therefore the patentee shall not have aid of the King; for he shall be made party. Br. Petition, pl. 37. cites 9 H. 4. 51.

2. The Justices of B. R. *may proceed to the examination* of the matter by themselves, *if the petition contains that the King commands them* to examine it, and this *without original out of Chancery; but if* the petition *concludes that they shall do right*, there they cannot proceed without original out of Chancery; note the diversity. Br. Petition, pl. 34. cites 10 H. 4. and Fitzh. Traverse 51.

Brooke says this original seems to be a petition of right in Latin, whose form commencesthus, viz. *Supplicavit humilime vestræ celsitudini regiæ* &c. and so to show his matter as his case is, which is used to be *indorsed by the King to the Chancellor, that he do right*, and then the other party shall answer in Chancery; and when they are *at issue upon a demurrer*, it is used to be *sent out of Chancery into B. R. there to be tried and adjudged.* Ibid.

3. The abbot of L. sued petition of right to the King, that where *R. M. before time of memory founded the abbey of L. and conveyed the foundation by descent to S. M. who was attainted in the time of H.* 3. for levying war against the King, *by which the King seised the advowson and patronage* aforesaid, *and conveyed it to King E.* 3. and that he writ to the abbot to have corody for W. and that this shall not be prejudice to the abbot afterwards to have other corody, and conveyed to King R. 2. and that at his

deſire A. was admitted to the corody there, and conveyed to King E. 4. and *traverſed abſque hoc that the King was patron in jure coronæ, or that it was of the foundation of the King, or his progenitors, Kings of England*; and *abſque hoc that the King had ever other poſſeſſion of the corody, unleſs in forma prædicta, and prays the King to do him right*; by which it was indorſed and ſent into the Chancery, and commiſſion was awarded to inquire of thoſe matters, which was returned accordingly, and the King's attorney *demurred* in law for four cauſes; 1ſt, *Becauſe it is alledged that the King was not founder, which is one matter.* 2dly, *He ſhews another matter in which King E. 3. diſcharged the corody by his letters patents*, and *after King R. 2. obtained poſſeſſion.* 3dly, *That R. M. founded the abbey before time of memory, which cannot be try'd.* 4thly, *Becauſe it does not appear in the petition that the King, who now is, has any valect there, and therefore they are not grieved.* And yet the petition was held good, becauſe *the firſt matter of King E. 3. was only a recital*, which was admitted: and it is good notwithſtanding the allegation of foundation by R. M.
[553] before time of memory, *for it is conveyed after to S. M. and ſo ſufficient matter within time of memory to be try'd*; and by ſome the plaintiff ſhall not have petition till he be grieved by admitting the valect to the corody, which is not ſo; for the King, by intitling by office of foundation, is in poſſeſſion of it till it be diſcharged by petition, and the concluſion of the petition ought to be to pray that the King diſcharge him of the corody and to do him right; and after by the Juſtices the petition is good, notwithſtanding that it does not prove that the King has *valect admitted to the corody*; but otherwiſe it is in petition *of land*; for there, if the tertenant of the grant of the King be not named in the petition, he ſhall not have ſcire facias againſt him after to remove him. Br. Petition, pl. 26. cites 5 E. 4. 118.

But if petition be found againſt the party, he ſhall be *barr'd of all titles before*; for the *petition to the King is the writ of right of the party*; and for eſchewing delays the ſtatute has ordained, that the party may traverſe the office. Ibid.

4. Every *petition ought to* make * *mention* of *all the titles of the King*, and if any be omitted, the petition ſhall abate; and where *iſſue* upon petition is *taken between the King and the party*, and *paſſes againſt the King*, he *ſhall be concluded of all titles in the petition expreſſed*, but not of other titles which are not expreſſed; for the judgment is, Salvo jure Regis &c. Br. Petition, pl. 15. cites 9 E. 4. 51. Per Sottel.

In petition *all conveyances and acts which give poſſeſſion to the King ought to be expreſs'd*; and the King in this ought to be informed of all the titles, and this certainly, and not generally; as to ſay that divers perſons were ſeiſed &c. or the like, and otherwiſe the petition is not good. Br. Petition, pl. 21. cites 3 H. 7.—* S. P. *But* after judgment, to find ſuch a fault, he muſt have a ſcire facias. Cited Godb. 304. in Caſe of Lord *Sheffield v. Ratcliff*, as 16 E. 4. 7.

5. Petition was ſued and was indorſed to the Chancery, and had commiſſion, by which it was *found for the King* and not for the plaintiff; and Brian and Fairfax held that he ſhall have *new commiſſion*, and that his plea is determined becauſe it is found againſt him; and Townſend thought that he might have a *new petition* or ſue a new commiſſion; for the *petition is to no purpoſe*

till

'till he has commiſſion which ſerves for him, and then he ſhall come into Chancery and maintain the petition and traverſe the title of the King, and there the * *King may chuſe if he will maintain his title or traverſe the title of the plaintiff*, and if the plaintiff be *nonſuited after iſſue joined* this is peremptory; and after the Court held the new petition good, and that he ſhall have new commiſſion thereupon. Br. Petition, pl. 22. cites 3 H. 7. 13.

* Br. Prerog. pl. 60. cites S. C. accordingly. ——S. P. Contra of a common perſon. Ibid. pl. 20. cites 3 H. 7. 3.

6. You cannot have a *writ of error* to be brought *in parliament*, but of neceſſity you ought to have the King's hand and his *licence* for it, otherwiſe you can have no writ of error there. Per Coke Ch. J. 2 Bulſ. 162. Paſch. 12 Jac. B. R. Heydon v. Godſalve.

7. A *writ of error* may be againſt the King without petition, tho' anciently that was uſed and was a decency; but ſince 1640, writs of error have been made out ex officio. 1 Salk. 264. 1 Will. 3. Per Holt Ch. J. Anon.

8. A monſtrans de droit *lies in the Exchequer*, as appears in SHEFFIELD'S CASE; and is admitted in the Com. 186. Coke's Entr. 205. (tho' 26 E. 3. does not mention the Exchequer;) for it lies in ſome caſes there by the common law; and *at this day* a monſtrans de droit *lies only in the Chancery and the Exchequer, except in a* *ſpecial caſe. Skin. 609. Mich. 7 W. 3. B. R. in the Banker's Caſe.

* A monſtrans de droit was *brought in B. R.* becauſe the *record* of the conviction and ſeiſure *were there.* Skin. 610. Mich. 7 W. 3. B. R. in the Banker's Caſe.

9. When a man is put out of poſſeſſion by virtue of an *inquiſition* returned for the Queen, and another comes and pleads his right, that is a *diſtinct record* from the inquiſition; and ſo if *a third comes and pleads his right, that is another diſtinct record*; and if *demurrer* be to all, then it is determined there, or may be ſent into B. R. to be argued and determined; but if *iſſue* be *joined* in it, then the way is to award a venire facias out of Chancery, returnable at a day certain out of B. R. and the record is delivered in B. R. by the hands of the Chancellor &c. to be there at the day of the return of the venire facias; but the inquiſition is never ſent thither; but the party comes into *Chancery* and complains of his being aggrieved by the inquiſition, and prays he may be admitted to ſhew his right and plead againſt the inquiſition, and that *is a monſtrans de droit*, and all the operation of the inquiſition is to make title for the King; and the party comes in as plaintiff, and *either traverſes it, or ſhews his right conſiſtent with it*, and if he will traverſe it he muſt ſhew *title in himſelf*. The Caſe of JEFFERSON v. DAWSON was part on demurrer and part on iſſue, and if there be a miſpleader, and a *repleader* awarded, that muſt be in B. R. and where there is *iſſue and demurrer*, and the party will not proceed on the demurrer, the Court will give judgment on the demurrer. Per Holt. Farr. 32. Trin. 1 Ann. B. R. The Queen v. Maſon.

If the *inquiſition be falſified*, it ſhall be ſet aſide ſo far as to make way for the plaintiff's right; and [554] if the party's right can be collected from the inquiſition, it ſhall be affirm'd by the judgment; ſo was Holland's Caſe, and ſo is Kelw. 93. 2 Salk. 448. the Queen v. Maſon. The monſtrans de droit *recites* the inquiſition, and concludes, Prout patet per recordum inquiſitionis in filaciis curiæ cancellariæ, and may ſet forth the inquiſition with an inter alia, and *eyer* may be crav'd of it. 2 Salk. 448. Trin. 1 Ann. B. R. The Queen v. Maſon.

See (Y. d).

(Q. 14) *What ſhall go to the Succeſſor*, or to the Executors.

1. THE King ſhall have *preſentation fallen in the time of another King*, and not his executor. Br. Quare Impedit, pl. 47. cites 7 H. 4. 25. 37.

2. *Chattel* ſhall deſcend in the Caſe of the King. Br. Petition, pl. 7. cites 7 H. 4. 33.

(R) * *Priſage.*

* Priſage *is a cuſtom taken of wines of all ſorts*, and is in certainty, viz. two tons of wine out of every ſhip laden with 20 tons or more; one ton is to be taken before the maſt of the ſhip, and the other behind the maſt. And becauſe this cuſtom is part of the merchandize imported, it is called priſage. And this cuſtom *was payable in England by all merchants, denizens and*

‡ Fol. 163.

[555] *by aliens before the charter of* 31 *E.* 1. by which the King demiſed to the merchant ſtrangers all priſes; and in the ſame charter is expreſs'd,

[1. Rot. Parl. 2 H. 4. 109. THE commons pray, that as of ancient time grant was, that the King, who then was, and his heirs ſhould have of every ſhip laden with 30 tons of wine or more, two tons in name of the priſe in every port of England, according to what was accuſtomed and uſed in every port, till *John Waltham late biſhop of Sarum in time of King R.* was treaſurer of England, tortiouſly without authority of parliament made the butler, who then was, to take in every port within the *ſouth and weſt*, of every ſhip carrying 20 tons or more, two tons for the priſe, againſt the uſages and cuſtoms in the ſaid port uſed in the time of the moſt noble E. 3. or in any time before, and againſt the grant made in parliament the firſt time that the priſage was granted to the King, who then was, in great deſtruction, oppreſſion and ‡ ruin of the open eſtate of the merchants and mariners throughout all the ſouth and weſt parts of England; and notwithſtanding that judgment was given by the Barons of the Exchequer in the 16th and 17th years of R. 2. againſt Thomas Coſtome and others merchants of Briſtol, and againſt Thomas Tanner of Wells, Philip Batt of Bridgwater, William Portman of Taunton, and ſeveral other merchants, that they ought to pay *of every ſhip carrying* 20 *tons or more two tons for the priſe*, as appears by the records of judgments aforeſaid; whereupon the commons in the laſt parliament held at Weſtminſter before this preſent parliament ‡, among their petitions prayed our moſt dread lord the King, that they ought to pay their priſe of wines in the manner which they were uſed to pay in the time of the moſt noble King E. 3. or in any time before, notwithſtanding any judgment given in the Exchequer, or other ordinance made by the ſaid treaſurer, or any other in the time of the ſaid King Rich. to account of the uſages aforeſaid. To which petition the King who now is, by advice of the Lords and others of his moſt wiſe council in the ſaid laſt parliament, granted of his ſpecial grace that the priſe ſhould be paid from henceforth as it had been uſed heretofore, as appears by the anſwer of the ſame petition. And notwithſtanding the grant of our lord the King in the parliament

ment aboveſaid, the deputies of the butler who now is, in every of the ports aforeſaid, take of leſs number than of 20 tons, being in one ſhip, one ton for the priſe, againſt all judgments, uſages, or any other ordinance made to the contrary, that it pleaſe our lord the King of his ſpecial grace to grant in this preſent parliament, that the butler, nor none of his deputies, henceforward take the priſe in any other manner than has been paid before the ſaid laſt parliament. And if the butler, or any of his deputies, do the contrary, that prohibitions needful be ordained and granted in the caſe. Anſwer, Be the uſe as it has been heretofore, and the right of the King ‖ ſaved of his part.] that in conſideration thereof the merchant ſtrangers have granted to pay to the King and his heirs, in the name of cuſtom, two ſhillings of every hogſhead of wine brought or cauſed to be brought by them into the kingdom &c. which ſaid cuſtom of two ſhillings is now here in England called * *butlerage*, and payable there by all merchant-ſtrangers. Dav. Rep. 8. b. Mich. 5 Jac. B. R. in Ireland, in the caſes of Cuſtoms.—*Priſage* is a cuſtom due *by* †† *preſcription, and parcel of the ancient inheritance of the Crown*, and, that he has an inheritance in it, appears by the charters granted to the citizens of London and thoſe of the cinque ports, to be diſcharged thereof in all ports for ever. Dav. Rep. 10. a. the caſe of Cuſtoms.—It is a royal prerogative due time out of mind as an incident to the Crown, but yet not inſeparable: it is due for the King's proviſion, and to be delivered to the King's chief butler. Per Fleming Ch. J. 3 Bulſt. 8. And per Croke J. Ibid. 3. This priſage probably grew from this, that the King was to ſcour the narrow ſeas. Hill. 12 Jac. in Caſe of Sir Thomas Waller v. Hanger.——* S. P. Mo. 832. Paſch. 9 Jac. B. R. Sir Thomas Walter v. Hanger.——S. P. 2 Molloy 283. cap. 8. ſ. 8.——It is called butlerage, becauſe the King's chief butler receives it. Ibid. Priſage is the wine in kind, and butlerage is the impoſition or other conſideration given for the wine. Mo. 833.——†† S. P. And not by the common law. Per Coke Ch. J. 2 Bulſt. 253. Trin. 12 Jac. in Caſe of Kenicot v. Bogan.——And by 5 & 6 E. 3. it is a thing againſt common right. Ibid.

Priſage is a certain taking or purveyance for wine to the King's uſe; and the ſame is an ancient duty which the Kings of England time out of mind had and received; the manner hath been by taking of every ſhip or veſſel that ſhall come into this realm, if 10 ton, to have for priſage one ton, and if it contain 20 ton or more, to have two ton, (viz.) unum ante ** dolium, and the other deorſum paying 20s. for each ton. This ancient immunity they have enjoyed as a flower of the Crown, and by ſome has been conceived not grantable away without act of parliament. But yet in 6 E. 3. fol. 2. Caſe 15. mentions the ſame to be grantable over. 2 Molloy 281. (bis) cap. 8. ſ. 1.

† Orig. (del over.)—‡ Entour les commons petitions prieront noſtre tres doubt.—‖ Orig. (ſauue celle party.)—** This ſeems to be miſprinted for (malum.)

[2. 25 E. 3. Rot. Parl. N. 52. A petition by the Commons that the butlers of the King ſhall not take more wine than is neceſſary, and to a certain number of tons in every port. Quere, whether this was for priſage, or purveyance.] Prynne's Cotton's Records, Abr. 81. No. 52. ſays, the print for taking wines for the King, cap. 12. agrees with the record.

3. 1 E. 1. Clauſo Memb. 5. Certain merchants claimed to be of the *liberty of the five ports*, and therefore not to pay priſage of wine, and thereupon upon ſurety their goods were bailed to them; and ibid. * Soon after, the *Barons of the cinque ports claimed to be free* of priſe of wine *by preſcription.*] * Orig. is (Proch. apres.)

(R. 2) Priſage. *Payable, by whom.* [556]

1. INformation was exhibited in B. R. by W. againſt H. containing that *King E.* 3. by patent anno 1 regni ſui, reciting that whereas he had of every 10 tuns of wine imported within this realm one tun, and of 20 tons two tons, the one before, the other See 3 Bulſt. 1. to 26. S. C. and the arguments.——

And ibid. pag. 5. Croke J. ſaid, If the *bulk* of the ſhip was *opened before the teſtator's death*, his executors may well take and carry the wine without the payment of priſage, becauſe it was diſcharged by the opening in the life of the teſtator—S. C. cited Noy. 97. in Caſe of IRELONGER v. NEWSAM, as SIR THOMAS WALKER's CASE, who ſays it was adjudged that where a freeman of London imports wines, and before the landing of them he dies, his executors ſhall not pay priſage, altho' the executor was not a freeman; which Doderidge J. alſo affirmed.

other behind the maſt; now he *granted majori & civibus London, quod nulla priſagia ſint ſoluta de vinis civium & liberorum hominum London &c.* George Hanger, *a citizen and freeman, had wines in the port and others upon the ſea and died, making the defendant,* his feme, *his executrix,* and the information charged her to pay the priſage for all thoſe wines. She *pleaded that ſhe was a * freewoman of London, and pleaded the charter* &c. upon which the plaintiff demurred in law. And the queſtion was, if the executor of a citizen had the privilege to be diſcharged for the goods of the teſtator? and in this the Juſtices varied, and were equally divided in their opinions. But it ſeems the better opinion that the executor ſhall be diſcharged. And a doubt was, if the executrix ſhould be diſcharged as well for thoſe wines which were upon the ſea coming to the port in the life of the teſtator, as for thoſe which were in the port at the time of his death. And Coke, Doderidge, Williams, and Yelverton, agreed that the executrix ſhould be diſcharged of ſuch wines alſo, becauſe the privilege goes in diſcharge negatively, and the privilege runs to the wines principaliy, and to the perſon, and the executrix is poſſeſſed by repreſentation of the perſon of the teſtator for the goods, as appears inaſmuch as he cannot forfeit the goods. Mo. 832. Paſch. 9 Jac. Sir Thomas Walter v. Hanger.

If a citizen has a factor beyond ſea, who has ſold all the commodities, and converted them into money, and then the *citizen dies*, and after the *factor buys other goods* with the money, they ſhall not be diſcharged of priſage, becauſe the teſtator was never poſſeſs'd of them in his life. And ſo it ſhall be (as was ſaid at the bar by Yelverton that) if *executor trades with the ſtock of the teſtator, and imports goods*, he ſhall pay priſage. Per Doderidge J. quod fuit conceſſum per Coke Ch. J. Roll. R. 143. Hill. 12 Jac. S. C. by name of the King v. Hanger.

* A freewoman is within the charter; per Doderidge J. and per Coke, *ſo* it is of an *apprentice in London*. Roll. R. 316. Hill. 13 Jac. in Spencer's Caſe.

By this grant to the corporation, they ſhall have benefit thereof, every one in his natural capacity; but it ſeems that upon this grant,

2. *But* it was reſolved by all, that the charter made majori & civibus, ſhall *not enure to the body politic of the city*, but to the particular perſons of the corporation; becauſe the words are (quod nulla priſagia ſoluta ſint de vinis civium & liberorum hominum), which makes the patent in fruit and execution to be applied to citizens and freemen, and not to the wines of the body politic of the city. Mo. 833. In Caſe of Sir Thomas Walter v. Hanger.

if the city of London trade in their politick capacity, they ſhall not be privileged from priſage within this patent; for this was * not the intent of the patent; per Doderidge J. and this diverſity was granted per Yelverton ſollicitor, who argued for the King. And it was agreed per tot. Cur. that every citizen ſhall have advantage of this charter in his natural capacity. Roll. R. 142. Hill. 12 Jac. B. R. S. C. by name of the King v. Hanger.

Calth. 37. &c. S. C. * One had a *ſhop and ſervant at London*, (being a

3. It was likewiſe reſolved by all, that he, who is * civis, & liber homo to take benefit of this privilege, *ought to be free of the city, and alſo an inhabitant within the city, and* alſo to be a *paterfamilias within the city*; for one may be free of the city and not civis, as if he removes and lives elſewhere, and he may be a citizen

tizen by habitation and yet not free, and he may be a citizen and free, and not a houſe-keeper; and in all theſe Caſes he ſhall not have this priviledge. Mo. 833. In Caſe of Sir Thomas Walter v. Hanger.

citizen of London *but his reſidence and family was at Briſtol*;

and therefore it was adjudged that he *was not civis* within the patent, to be diſcharged of priſage, becauſe he was *not ſubject to ſcot and lot*. Roll. R. 148. in Caſe of the King v. Hanger, cited by Coke Ch. J. and agreed per tot. Cur. as Trin. 4 H. 6. inter communia placita in ſcaccario, Rot. 14. ——S. C. cited by Croke J. 3 Bulſt. 4. in Caſe of the King v. Hanger, as 4 H. 6. Knowls's Caſe.——S. C. cited by Doderidge J. Ibid. 16. in S. C.—— So if he be a citizen and freeman of London, and dwells there as a *lodger, but keeps no houſe*, this charter of diſcharge ſhall not extend to him. Ibid. 16. cited by Doderidge J. as adjudged in the Exchequer. Hill. 43 Eliz. Rot. 22. in Caſe of Sacheveril and Snede.—Same caſes cited 2 Molloy 282. (bis) cap. 8. ſ. 4 & 5.—Coke Attorney-General put this difference of citizens, viz. that there is a *citizen nomine*, a citizen *re*, and a citizen *re & nomine*. But it was reſolved that only the citizen re & nomine, viz. he who is a freeman of London, and is alſo an inhabitant, and pays ſcot and lot, ſhall be free of priſage by the ſaid charter. Dav. 10. b. Mich. 5 Jac. B. R. in Ireland, in the Caſe of Cuſtoms.

4. The charter extends to the *goods of which a citizen is ſole owner*; for if a citizen has goods jointly or in common with another who is no citizen, there priſage ſhall be paid for all the goods; for otherwiſe the ſtranger ſhall have benefit of this patent againſt the intent of the King. But if *two citizens have goods jointly or in common*, they ſhall be diſcharged. Per Doderidge J. and this diverſity was agreed per Coke Ch. J. Roll. R. 142, 143. Hill. 12 Jac. B. R. The King v. Hanger.

And per Doderidge J. he who ſhall have the benefit of this charter, ought to be the intire owner; for a citizen who *has goods in*

pledge, ſhall not have the benefit of this charter, becauſe he has only a ſpecial property; nor if a citizen *pledges goods to another*, he ſhall not have the privilege of thoſe goods, becauſe he has only the general property, and not the entire property; and this diverſity was alſo agreed per Coke Ch. J. Ibid.—And per Doderidge, he who ſhall have benefit of this charter, *ought to have the true property* of the goods; for if a *ſtranger brings in goods* here, *and ſells them to a citizen, to the intent that he ſhould ſell them again to him after the unloading*, he ſhall pay priſage. Alſo he who ſhall have benefit of this charter *ought to continue proprietor* of the goods, *without* alteration of the property or *diſability of his perſon*, otherwiſe he ſhall not be diſcharged; as if before it is unladen, and after it is come in, he be diſtranchiſed; for there the perſon is diſabled *by his own act*, and therefore ſhall not have benefit of this patent. And all this was agreed per Coke Ch. J. who ſaid that he, who would have benefit of this charter, ought to have proprium in the goods quarto modo. Ibid.—And per Doderidge J. So if he *ſells them to another*, he ſhall pay priſage. Ibid.—3 Bulſt. 17. S. P. per Doderidge J. and agreed by Coke Ch. J. Ibid. 23. in S. C.—Calth. 33 &c. S. C.

5. It *ought to be a merchant who ſhall pay* priſage; for if a man brings wines over the ſea here for his own uſe, and not to ſell again, without doubt he ſhall not pay priſage. Per Coke Ch. J. Roll. R. 145. Hill. 12 Jac. in Caſe of the King v. Hanger.

Calth. 33. &c. S. C.

6. If a *foreigner brings a ſhip* laden with wines *into the port of London, and* then *makes a citizen his executor*, and dies, he ſhall not have benefit of this immunity from payment of priſage for theſe wines, becauſe they are not bona civium. 3 Bulſ. 7. Hill. 12 Jac. In Caſe of the King v. Hanger.

S. P. 2 Molloy 282. cap. 8. ſ. 6. —S. P. And ſo if a *citizen* of London that hath wines

abroad coming into England, *makes a foreigner his executor*, and dies, and after theſe wines return home; now tho' theſe wines are aſſets in the hands of the executor, and are in appellation the goods of the firſt citizen, yet they are [not] ſuch wines as are capable of the diſcharge of priſage within the charter. Calth. 33. &c. in S. C.

7. If one, *at the time that he fraighteth, be not a citizen in all degrees, tho' afterwards*, before the return of the ſhip, he be *inabled* in every reſpect, yet he ſhall not enjoy the benefit of the charter, inaſmuch as he was not ſo at the time that the ſhip was ſent abroad. Calth. 33. &c. In Caſe of Waller v. Hanger.

S. C. cited by Hale Ch. B. Mich. 14 Car. 2. in Scacc. in Caſe of Waller v. Travers.

8. The King *granted to a Venetian* merchant *to be quit of all cuſtoms, ſubſidies and impoſitions, and of all other ſums of money due and payable for whatſoever merchandizes to be imported* &c. *and that he ſhould be as free as the citizens of London.* He is not hereby diſcharged of priſage, becauſe *priſage is not ſpecially expreſſed* in the ſame grant. Dav. Rep. 17. a. cited by the Lord Ch. Baron, as adjudged in the Exchequer in England.

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9. A *ſtranger* ſhall pay *butlerage but not priſage*, and an Engliſhman ſhall pay priſage but not butlerage, and a citizen of London ſhall pay neither of them; per Coke Ch. J. 2 Bulſ. 254. Trin. 12 Jac. in Caſe of Kenicot v. Bogan.

See (R. 2) pl. 5.

(R. 3) Priſage; payable *in what Caſes*, &c.

1. 1 *H.* 8. *cap.* 5. *ſ.* 6. ENacts that *no citizen of London, or other ſubjects inhabiting the cinque ports, or other, being free of priſage or butlerage by grant, cuſtom, or otherwiſe, ſhall cuſtom wines of any perſon not free of priſage or butlerage.*

S. 7. *If any do ſo, he ſhall forfeit to the King the double value of the priſage.*

2. If *wines* ſhould be *made in England*, as in times paſt they have been, and they ſhould be tranſported from one port to another to be ſold, *no priſage ſhall be paid* for them. Calth. 33. &c. in Caſe of Waller v. Hanger.

So where a merchant *in ſeveral veſſels laden at the ſame time*, and at Amſterdam, imported into the ſame port here, viz. that of Hull 10 tons and more of ſack and rheniſh wines. The Chief Baron conceived that prima facie this ſhould be intended fraud, being imported from the ſame place to the ſame

3. Bill was preferred in the Exchequer for priſage againſt S. who had *imported nine tons and a half of wine*, in which caſe it was argued that priſage ought to be paid as well as if there had been 10 tons; for otherwiſe merchants will import but ſuch quantities in every veſſel on purpoſe to defraud the King; ſo that it is fraud apparent. The defendant in his anſwer deny'd the fraud without any proof. And upon ſhewing of precedents, viz. 11 May 15 Car. SIR WILLIAM WALLER and others v. DERRICKE, and Paſch. 6 Car. and Mich. 9 Jac. SIR THOMAS WALLER v. POOL, and 16 Jan. 13 Jac. SINGLETON v. GAMMON, and 28 June 8 Car. SIR WILLIAM WALLER v. ATKINS, in the books of decrees in this Court (by which it appeared that the Court had declared ſuch importations *apparent fraud* without proof, and declared againſt them, and gave notice accordingly to all merchants in all ports of England); and alſo upon view of an ancient account in Mich. 16 E. 3. in this Court, of priſage taken upon the importation of *nine tuns only* in a ſhip called the Trinity of London; the Court declared this to be fraud apparent, and decreed priſage to be paid, but if *under nine tuns* be imported, no priſage is due, as was agreed by the Court.

Court. Hard. 56, 57. Paſch. 1656. in Scacc. Attorney General v. Shirt.

place, and at the ſame time in ſeveral veſſels, and conſigned to the ſame merchant, and belonging to the ſame owner, unleſs there be ſome proof to the contrary to diſprove theſe preſumptions, as that one veſſel was not ſufficient to import all, or was almoſt laden before, or the like; et adjournatur. But afterwards the Court held it to be fraud upon the ſaid circumſtances. Hard. 218. Mich. 13 Car. 2. in Scacc. Sir William Waller v. Topham.

If *nine tuns only* be imported, priſage has very rarely been allowed without apparent evidence, and proof of a fraud. But where *leſs* than nine tuns are imported, priſage is never paid, and as it is an equitable conſtruction againſt the letter of the law that *nine tuns and half* ſhould pay priſage, ſo by equity if *ten tuns be laden, and by leakage nine tuns only are really imported*, no priſage is to be paid; for here is equity againſt equity, which muſt take place againſt the King as well as for him. Per Hale Ch. B. Hard. 477. Hill. 19 & 20 Car. 2. Attorney General v. Horſham.

4. A merchant imported a large quantity of wines into Briſtol, and for not paying priſage an information was brought. He *pleaded that*, at the time of importation, and long before, *he was, and ſtill is a citizen of London, and that E.* 1. *by charter granted to the citizens of London, that no priſage ſhould be taken of the wines of the citizens of London againſt their wills, but that they ſhould be quit thereof for ever.* Upon this the queſtion was, if priſage ſhould be paid for citizens wines out of the city? And decreed that priſage be paid; for the grant being by indefinite words do not import an abſolute univerſality. Hard. 301. to 311. Mich. 14 Car. 2. in Scacc. Sir William Waller v. Travers.

But if a ſhip laden with wines for a citizen of London intitled to an exemption from payment of priſage, ſhould *by ſtreſs of weather be* [559] *forced into any other port.* In ſuch a caſe a citizen ſhall enjoy his privilege as well as if the ſhip had arrived in the port of London. Per Hale Ch. B. in Caſe of WALLER v. TRAVERS, and ſaid it had been ſo held 25 E. 3.

5. If a *foreigner arrives* with a ſhip laden with wine at a port with an intent to unlade, and *before* the goods are entered, or *bulk is broken, he ſells them to a citizen*, priſage ſhall be paid notwithſtanding; for it was never the King's grant to diſcharge a citizen in ſuch a manner. 2 Molloy 282. cap. 8. ſ. 6.

6. If the *King diſcharges ſuch a ſhip of J. S. being at ſea*, particularly naming it, from payment of priſage, and *he dies before the ſhip arrives*, no duty can be demanded. 2 Molloy 282. cap. 8. ſ. 7.

7. The *cinque ports are diſcharged* of priſage; yet if a *citizen of Saliſbury* ſhould *conſign wines to be delivered and unladed at Dover*, the bare diſcharge of the goods at that port will not acquit the importer from the duty; for it is not the party's importation, but his domicil, that qualifies him for the benefit of his immunity. 2 Molloy 284. cap. 8. ſ. 11.

(R. 4) Priſage; Payable *at what Time, and how.*

1. SIR J. Y. farmer of the priſage of wines in Briſtol, complained that the citizens and merchants of Briſtol refuſed to allow him his priſage, viz. one tun before the maſt, and another

another behind the maſt, ſuch as he would chooſe, but would give him vinegar for wine, and the veſſels are not full. Per Moriſon, he ſhall have his *election*, and the *cuſtomer* is to be blam'd; for he *ought not to make entry of any wines before the priſe-wine be deliver'd*; for then the wines are forfeit. And there is an allowance of 10 tuns in 100 tuns for leakage, therefore the merchant ought to empty his veſſels to the butler; and ſo he ſaid it was uſed at Hull where he was under butler. By which the Court wrote to the merchants to permit him to chooſe his wines, and to empty their veſſels. Sav. 33, 34. Mich. 24 & 25 Eliz. Sir John Young's Caſe.

If the merchant at a haven unlade but one tun, the King by his officer there ſhall ſeiſe all his priſage there immediately;

2. If a merchant *imports* 20 *tuns* of wine, tho' he *unlades only nine tuns or four tuns*, yet the King ſhall have his whole priſage, viz. two tuns; for if the bulk (as Fleming Ch. J. termed it) be once broken, it is ſufficient to the King to take all his priſage; adjudged per Cur. And ſo it appears to be by infinite precedents in the Exchequer. Yelv. 200. Hill. 8 Jac. B. R. Kenicot v. Bogan.

for otherwiſe the merchant by fraud may conſtrain the officer to travel from port to port all over England, which ſhall be inconvenient. Ibid.—2 Bulſ. 250. to 254. Trin. 12 Jac. S. C.—S. C. cited 3 Bulſ. 4. Hill. 12 Jac. B. R. in Caſe of Waller v. Hanger.—2 Molloy 282. cap. 8. ſ. 3. cites S. C.——2 Molloy 283. cap. 8. ſ. 9. cites S. C.

Priſage becomes *due by the breaking of the bulk*, and not before;

3. Priſage is *not a compleat duty till the wine is arrived at the port*, but the duty commences as ſoon as the wine is ſhipp'd, and paſſing upon the ſea. Reſolved Mo. 833. Paſch. 9 Jac. B. R. in Caſe of Sir Thomas Waller v. Hanger.

for before breaking they may depart without paying any priſage. Cited by Fleming, Yelverton and others, to have been adjudged in the Exchequer, and affirmed in error. Roll. R. 140. Paſch. 12 Jac. B. R. in Caſe of the King v. Hanger.——S. P. per Croke J. 3 Bulſ. 5. in S. C.——S. P. Caith. 33. &c. in S. C.

2 Molloy 284. (bis) cap. 8. ſ. 9. cites S. C.

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4. It was held per Cur. that tho' in point of prerogative there is due to the King one tun before the maſt, and another behind the maſt, yet it is not neceſſary that *the King* ſhould take his duty in ſuch form, but he *may take which two tuns he pleaſes*; for otherwiſe this tun before the maſt may by the ſubtilty of the maſter be tranſpoſed to be the third, tenth, or laſt tun in the ſhip. Yelv. 200. Hill. 8 Jac. B. R. Kenicot v. Bogan.

(R. 5) Priſage. *Subject to what Charges*, &c.

1. KING Charles 1. *granted to J. S. and his heirs the duty of priſage of all wines imported to hold diſcharged of all aids and taxes.* The queſtion was, whether J. S. ſhould *pay tunnage* for this upon the 9 & 10 W. 3. cap. 23. The duty of tunnage was firſt impoſed by 12 Car. 2. cap. 4. viz. 4 l. 10 s. on all French wine; then comes 1 Jac. 2. cap. 3. and impoſes 8 l. a tun, with a clauſe, that grantee of the priſage ſhould pay the duty; then comes 7 W. 3. cap. 20. which impoſes 25 l. a tun; after-

afterwards comes 9 & 10 W. 3. cap. 23. which impoſes over and above a duty of 4l. 10s. to be levied as it was by 12 Car. 2. It was adjudg'd in the Exchequer, that the grantee ſhould not pay this duty of tunnage. Upon error brought, it was inſiſted, that it was an ancient royal revenue, and if the Crown held it, the Queen could not pay tunnage out of her own priſage, and that the grantee ought to have the ſame privilege, eſpecially becauſe it was granted with this immunity. But it was reſolved in the Exchequer Chamber by eight Judges, that immediately upon importation this duty of tunnage attach'd upon the wine, and the grantee receives whatever part he takes for priſage charg'd with the duty. For it cannot be imagin'd, that the law meant to raiſe this duty on the people to enrich a private man, which would be the effect, if he might have his priſage cuſtom-free; and he paid the tunnage impoſed by all former laws. It is true if the priſage had *remained in the Crown, it could not have been paid by reaſon of the unity of poſſeſſion*, it being abſurd that it ſhould be chargeable with a duty to itſelf; but *this exemption is only perſonal*, and the duty revives when priſage comes to a ſubject, who may pay it to the Crown; as where a parſon leaſes his glebe. And the clauſe of diſcharge could extend only to the tunnage then in being, which he, tho' King, had himſelf, and not to what he had not, but might be given to his ſucceſſors. And the judgment was reverſed. 2 Salk. 617. Hill. 8 Ann. Paul v. Shaw.

(S) King. *What Things the King may do.*

[1. THE Pope ſent to E. 1. to have *annuum cenſum, in quo Romanæ eccleſiæ ratione regni ſui Angliæ pro octo prædictis annis tenetur &c.* To which the King anſwered by his letter to the Pope, that the parliament was diſſolved before that it could be determined, and ſaid, *Quod ſine prælatoribus & proceribus communicato conſilio ſanctitati veſtræ ſuper prædicta non poſſumus reſpond. & jurejurando in coronatione noſtra preſtito ſumus obſtricti quod jura regni noſtri ſervabimus illibata, nec aliquod, quod diadema tangat regni ejuſdem, abſque illorum requiſito conſilio faciemus.* 3 E. 1. Rot. Clauſ. Memb. 9. 40 E. 3. Rot. Par. N. 7. The ſpecial cauſe of the ſummons of the parliament was to have advice what anſwer ſhould be given to the Pope, who had ſent to the King by proceſs to have the annual tribute of 1000 marks by force of a deed, which he ſaid King John made to him in perpetuity to do him homage for the realm of England and Ireland, and to render to him the ſaid annual tribute. To which it was [561] unanimouſly anſwered by the Lords and Commons, that King John nor any other can *put him nor his realm in ſuch ſubjection without their aſſent*, and as it appears by ſeveral evidences, that if this was done it was done without their aſſent, and againſt his oath in his coronation, and that if the Pope attempt to make the

the King do that which he claims, that they would reſiſt, and oppoſe [him] with all their puiſſance.]

2. The *King cannot record a ſurrender of* land or letters patents made to himſelf extra curiam, but it ought to be before his Chancellor or ſome other authoriſed. Br. Recognizance, pl. 19. cites 2 E. 6. in Colpeper's Caſe.]

Fol. 164.

See (E. a).

(T) What Things the King may do [*or grant*] *by Prerogative.*

Note, that *cuſtoms* are good *of ancient demeſne, borough engliſh, gavelkind, deviſe of land by teſtament* &c. and yet the King *cannot grant thoſe things* by his patent; quod nota, per Littleton in precipe in capite, quod nullus negavit. Br. Prerogative, pl. 103. cites 37 H. 6. 26, 27.

[1. THE King can *not alter the courſe of deſcent.* 49 E. 3. 4. 49 Aſſ. 48.]

See the note on pl. 1.

[2. The King can *not grant* by charter *that land ſhall be departible* where it deſcends to one ſole heir by the common law. 49 E. 3. 4. 49 Aſſ. 8.]

See the note on pl. 1.

[3. *So* the King can *not make land deviſeable* by his charter. 49 E. 3. 4. 49 Aſſ. 8.]

S. P. For the Pope nor the King cannot change the laws of the land by their bull of diſpenſation nor grant. Br. Prerogative, pl. 15. cites 11 H. 4. 73.—— The common law hath ſo admeaſured the prerogative of the King, as he *cannot take or prejudice the inheritance of any.* 2 Inſt. 36.—S. P. 2 Inſt. 63.

[4. *So* the King can *not grant* to a man *that he ſhall hold his lands after his entry into religion and profeſſion;* becauſe it is contrary to the common law of the land, and the heir [is] inheritable by his entry into religion. 11 H. 76. per Till.]

[5. 4 E. 1. Rot. Cart. Memb. 3. Part 17. *Ad regiæ celſitudinis poteſtatem pertinet & officium, ut partium ſuarum leges & conſuetudines, quas juſtas & utiles cenſuerit, ratas habeat, & obſervari faciat inconcuſſas; illas autem, quæ regni rõbur diminuere potius quam augere aut conſervare videntur, abolere convenit, aut ſaltem in melius commutare*; at the inſtance of John of Cobham he ouſted gavelkindam as to thoſe lands &c.]

The King cannot grant that if a man does a *treſpaſs* to me, that I *ſhall not have action* againſt him. Dav. Rep. 75. a. cites 8 H. 6. 19.—— Or that a man ſhall *be his own judge.* Dav. Rep. 75. a. cites 8 H. 6. 19.

[6. The King can *not* grant to any *that he ſhall not be impleaded*, and if he makes ſuch grant it will be void. 8 H. 6. 19.]

But the King may *privilege his debtor that none ſhall have execution againſt him till the King be ſatisfied.* Br. Prerogative, pl. 105. cites F. N. B. fo. 28.

[7. If a man is indebted to me, and the King grants to him *that I ſhall not have action* againſt him, it is void 8 H. 6. 19.]

The King *by his charter cannot*

[8. The King cannot grant to another *to hold pleas according to the courſe of the civil law*; for the King can * *not alter the law.*

8 H. 4. in Agar's office, where such grant made to the university of Oxford was held void by all the Justices of England. Cited by Coke.]

cust the common people of their right of inheritance,

which they have in the common law; per Gascoign. Br. Prescription, pl. 82. cites 8 H. 4. 19.—S. P. *nor change a law*. Br. Prerogative, pl. 18. cites 14 H. 4. 9.— [562] S. P. Jenk. 97. pl. 88. cites 8 H. 6. 19.——He can neither alter his temporal nor his ecclesiastical laws within this realm by his grant or commission. 12 Rep. 19. in the Case of the HIGH COMMISSIONERS, cites 5 Rep. Cawdrie's Case.—The law and customs of England cannot be changed *without an act of parliament*; for they are the inheritance of the subject, of which he cannot be deprived without his assent in parliament. 12 Rep. 28. in Case of the Oath ex officio.

[9. The King cannot grant by patent *a Chancery* to another; for the common law is the inheritance of every man, and the King cannot *prejudice any in his inheritance*. M. 5 Ja. B. between *Andrew* and *Webb*, per Curiam.]

The King cannot *make a Court of Equity by* his *charter* or commission; but he may make Courts of common law, and the trial shall be by jury. Jenk. 285. pl. 18. cites Trin. 10 Jac. Archbishop of York's Case.

[10. The King cannot grant *that the council of York shall hold plea by English bill of an obligation or matters triable at common law*; for he cannot alter the law which is the inheritance of every man. M. 10 Ja. between *Guy and Sedgewick and the Bishop of York*, per Curiam.]

The Crown may *grant conusance of pleas to proceed secundum legem terræ*; *but not to proceed by other laws*; for that would be to make new laws, which the Crown, as being but one branch of the legislative power, cannot do. Admitted per Cur. 10 Mod. 126. Hill. 11 Ann. B. R. University of Cambridge's Case.

[11. 7 E. 1. Rot. Pat. Mem. 13. fo. 10. Commission in quamplurimis comitatibus ad inquirendum, qui dicebant regem *inhibuisse, ne quis blada sua meteret, vel prata sua falcaret*; & quod omnes tales sine dilatione in prisona custodiantur donec authores suos invenerint, & tunc liberent & autores in prisona custodiant donec pro deliberatione eorum mandatum habuerint speciale.]

[12. 28 H. 8. cap. 17. *Power* given *to the successor* of the King at his age of 24, *to repeal by his letters patents any acts to which he assents before the said age.*]

See pl. 19.

[13. Rot. Parl. 15 E. 3. Memb. 2. N. 14. it is prayed, that *the election of* the great officers of the King, as *Chancellor, Treasurer, &c.* ought to be in parliament.]

Prynne's Cott. Rec. Abr. 32. No. 14. That they

be chosen in open parliament, and that they be also *openly sworn to observe all laws* as aforesaid.—The King by his prerogative may *make a sheriff without the usual election*, notwithstanding any statute to the contrary. D. 225. pl. 35. Mich. 5 & 6 Eliz. Anon.

[14. Rot. Parl. 15 E. 3. Memb. 2. N. 14. it is prayed, that divers *commissions to inquire of the Chancellor, Treasurer, and other great officers* be repealed; because such have not been used to be granted without assent of the parliament.]

Prynne's Cott. Rec. Abr. 32. No. 14. That many commissions whereby sundry men have been fin'd by the commissioners outragiously, may be revok'd and new granted to others.

[15. If

[15. If a man be *attainted of treaſon of record*, the King *cannot reverſe this judgment without legal proceſs*, but he may pardon and reſtore the forfeiture. 29 E. 3. 25.]

[16. The King cannot *give* to me *power to ouſt another of his land*. 29 E. 3. 25.]

Fol. 165.

[17. If *my tenants by* reaſon of their *tenures ought to collect my rents, the King cannot diſcharge any of them* of this collection; becauſe it is my inheritance. 21 E. 4. 47. by Redmain.]

[18. 15 E. 3. among the ſtatutes at large; the King *revoked by his letters patents, with the aſſent of earls, barons, and other proud men of his realm, certain ſtatutes* made before in the ſaid year, becauſe they were againſt the cuſtoms of the realm and his prerogative royal, and aſſented to them by him by way of diſſimulation in caſe of neceſſity, and the ſaid ſtatutes have been reputed as repealed ever ſince; for in another ſtatute in the ſaid year cap. 7. it is ſaid by the Lords and Commons, *and that it pleaſe the King to perform the grace which he has promiſed to great men in right to be attached and impriſoned now in this parliament*, which refers it to the ſaid ſtatutes ſo repealed, cap. 2. Vide this Rot. Parl.* 17 E. 3. n. 23. This is repealed by a ſpecial ſtatute, vide the Roll of Parliament, by which it appears that the King never aſſented fully to it. Quere. Vide Rot. Parl. 15 E. 3. N. 6. 7.]

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* Prynne's Cott. Rec. Abr. 38. No. 23.

[19. 28 H. 8. 17. It was enacted that the Kings of England, after their age of 24, ſhould have power to repeal any *ſtatute* to be [made] in time of any King *before his age of* 24. But in 1 E. 6. 11. this is repealed; but *power given to make ſuch* ſtatutes *void from the time of the revocation* made, and *not ab initio*, with this proviſo, *Provided* always, and be it enacted, *that no King* of this realm ſhall *have authority*, power, or prerogative *to repeal any act* of parliament or ſtatute that ſhall be *made in the time of any King before the ſaid age of* 24 *years, other than ſuch as be or ſhall be made in his own time*, any thing above-mentioned to the contrary in any wiſe notwithſtanding.]

The King cannot delay a ſuit commenc'd by a ſubject or againſt a ſubject without ſpecial cauſe

20. The King *may diſcharge* or annul a *commiſſion of oyer and terminer*; but he can *not delay*, diſcharge, or ſtay *the proceedings* of juſtice between the ſubjects by any mandate under the great or privy ſeal, the commiſſion or patent of the Juſtices being in force; *but* he may *in his own caſe*. Jenk. 9. pl. 16. cites 12 Aſſ. 21.

concerning the publick good. By the Judges of both Benches. Jenk. 133. pl. 71. cites 13 E. 4. 8.

21. The King may *grant writ of warrantia diei* to any perſon, who *ſhall have his default for one day*, be it *in plea of land or other action*, and be the cauſe true or not, and this by his prerogative; quod nota. Br. Prerogative, pl. 142. cites F. N. B. fol. 17.

22. The *ſubjects appeal* cannot be taken away from him *for rape, murder, felony, or robbery*, by any pardon granted by the King. Jenk. 307. pl. 83. cites 2 H. 7. 9. D. 59. 93. 323. Stamf. 102. Hob. 146. 7 Co. Caſe of Monopolies.

23. The

23. The King, *though* he be *not party* to the record, yet *ſhall* he *take advantage of the eſtoppel*; for he is ever preſent in Court. 2 Inſt. 39.

In judgment of law the King himſelf is *always preſent to miniſter juſtice by his Judges* in his Courts of Juſtice, according to his kingly office, to all his ſubjects, ſecundum legem & conſuetudinem Angliæ. 2 Inſt. 549.—S. P. 2 Inſt. 55.—S. P. 2 Inſt. 31.—The King himſelf by the great charter is preſumed in law to ſit in Court. 2 Inſt. 269.

24. The words of the ſtatute of 1 *R.* 2. *cap.* 12. are, *unleſs it be by writ or other command of the King*; and it was reſolved by all the Judges of England, that the King *cannot* arreſt a man *by any commandment but by writ*, or by *order* or rule *of ſome of his courts* of juſtice where the cauſe depends, according to law. 2 Inſt. 186.

25. If the *King's goods be wreck'd*, and caſt upon ground where a ſubject has wreck of the ſea, who ſeiſes the ſame, the King may make his proofs at any time when he will, and is *not confined to a year and a day* as the ſubject is. 2 Inſt. 186.

The ſubject ſhall not gain *property* by it againſt the King. Pl. C. 243. b. Trin. 4 Eliz. in Caſe of Wyllion v. Ld. Barkley.——*So* of *goods* of the King *waived*, or *eſtrays*. Ibid.

26. The King being a body politic, *cannot command but by matter of record*; for Rex præcipit & Lex præcipit are all one; for the King muſt command by matter of record according to law. 2 Inſt. 186.

27. Huſſey Ch. J. reported, that Sir John Markham ſaid to King E. 4. That the *King could not arreſt any man for ſuſpicion of treaſon* or felony as one of his ſubjects might; becauſe if the King did wrong, the party could not have his action: if the King commands me to arreſt a man, and accordingly I do arreſt him, he ſhall have his action of falſe impriſonment againſt me, albeit he was in the King's preſence. Reſolved by the whole Court in 16 H. 6. which authority might be a good warrant for Markham to deliver his ſaid opinion to E. 4. 2 Inſt. 186, 187.

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28. The King for his pleaſure *may afforeſt the woods* of any ſubject, and he thereby ſhall be ſubject to the law of the foreſt; *and* he may *take the proviſion* of any man by his purveyor for his own uſe, but at reaſonable prices, and without abuſe. *And* the King may take *wines* for his proviſion, *and alſo timber* for his ſhips, caſtles, or houſes, in the wood *of any man*, and this is for public benefit; per Baron Clark. Lane 23. Mich. 4 Jac. in Scacc. in Bates's Caſe.

See Purveyance.

29. A ſubject may *gain a title* againſt a ſubject *by diſſeiſin* and a deſcent; but the *King cannot*; for he can * do no wrong. Jenk. 177. pl. 57.

* S. P. Pl. C. 246. b. —S. P. 2 Inſt. 681.—The prerogative of the King can *not do a tort* to the ſubject. Dav. Rep. 75. a. cites 13 E. 3. 8. a. 35 H. 6. 29. b. 5 Coke 55. b. Knight's Caſe.—S. P. Jenk. 133. pl. 71.——S. P. Jenk. 204. pl. 28.——S. P. Jenk. 312, pl. 96.—S. P. 10 Mod. 5.—S. P. And this maxim takes away the *diſcontinuance* of the reverſion of a ſubject depending upon an eſtate tail in the King where the King's grant by his patent of land in tail paſſes it in fee; for that is a wrong. Jenk. 308. pl. 84.——Every diſcontinuance is a tort, which the King cannot do. Pl. C. 233. a. per Southcott.—The King can *not be a uſurper of a church* upon a preſentment by lapſe where there was no lapſe; *nor* can he be a *diſſeiſor* of land. Reſolved by all the Judges. Jenk. 244. in pl. 28.

S. P. 10 Rep. 33. b. in Sutton Hospital's Case cites 49 E. 3. 4. a. 49 Ass. 8.——*And* he may *make one corporation out of another*, and both will stand. Jenk. 270. pl. 88.——*And* he may give *power to a subject to name a corporation*; and when it is named, it is the King's corporation. Jenk. 270. pl. 88.

30. The King only can *make a corporation*. Jenk. 270. pl. 88.

The King may *erect guildam mercatoriam*, i. e. a fraternity or society, or incorporation of merchants. 6 Rep. 125. a. Hill. 7 Jac. in Case of the City of London.——2 L. P. R. 144. cites S. C.

31. A *bargain and sale* by the King *for any consideration to a corporation* is good, altho' the King cannot stand seised to the use of another. Jenk. 270. pl. 88.

32. Regularly the King by his commission may *authorize* whom he pleases *to execute an act of parliament*. 2 Hawk. Pl. Cr. 37. cap. 8. f. 28.

33. It seems that the King himself cannot *sit in judgment upon* any *indictment*; because he is one of the parties to the suit. 2 Hawk. Pl. Cr. 2. cap. 1. f. 2.

34. It seems to be clearly agreed that the King cannot *give* any *addition of jurisdiction to an antient Court*. 2 Hawk. Pl. Cr. 2. cap. 1. f. 2.

(T. 2) Prerogative of the King *in general.*

1. THE prerogative of the King *shall not prejudice any*. Pl. C. 487. Mich. 17 & 18 Eliz. Nichols v. Nichols.

2. The King may bring his writ of *quare impedit in a foreign county*, if he will. Br. Prerogative, pl. 115. cites 4 E. 3. 9. and Fitzh. Brief 705.—But Brook says quære at this day.

3. The King shall not be *amerced*, nor *nonsuited*. Br. Prerogative, pl. 100. cites Fitzh. Brief 898. H. 26. E. 3.

4. The *writ of the King shall not abate for false Latin*. Br. Prerogative, pl. 114. cites 28 E. 3. 97. and Fitzh. Brief 429.—But the contrary was adjudged there, pl. 910. 29 E. 3. 44. Ibid.

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5. The King is *not bound by estoppels*; *nor* by * *recoveries* had *betwixt strangers*; nor by the fundamental jurisdiction of courts, as appears 38 Ass. 20. where a suit was for tithes in the Exchequer, being a mere spiritual thing. Per Hobart Ch. J. Godb. 299. Pasch. 21 Jac. in Sir Edward Coke's Case.

* S. P. where he has a reversion expectant upon an estate-tail; *nor by abeyance*, *nor by collateral warranty* of his ancestor without assets. He is not bound by *fictions of law*. Jenk. 287. in pl. 21.

S. P. as derelict land, treasure trove, and the like. 2 Ventr. 268. Hill. 2 & 3 W. & M. in Case of Woodward v. Fox.——*So* of *extraparochial tithes*, tho' things of an ecclesiastical nature. Ibid.——*So* it is said elsewhere *of land* &c. Br. Prerogative, pl. 12. cites 8 H. 4. 2.

6. All *goods* in England, *in which no man has property*, shall be adjudg'd to the King by his prerogative &c. Per Gascoigne, quod nullus negavit. Br. Prerogative, pl. 12. cites 8 H. 4. 2.

7. Where

7. Where a *right appears for the King in a ſuit, altho'* he be *not party* to the ſuit, he ſhall recover the thing. Jenk. 219. pl. 65. cites 11 H. 4. 71. 16 H. 7. 12. 12 H. 7. 12. F. N. B. 38. As in quare impedit between two ſubjects, if a title for the King appears to the Court, the Court ſhall ex officio award a writ to the biſhop; for the King is intereſted where right appears for him in the ſuit of any one. Jenk. 25. in pl. 47.

8. The *King ſhall not pay* * *toll, pontage, nor paſſage*; nor ſhall *lapſe by ſix months of a benefice* bind the King; ſo of *alienation by his villein before ſeiſure*; for † *nullum tempus occurrit regi*: but *contra of cuſtom, which may have lawful commencement*, as *gavelkind, borough-engliſh, deviſing land* by teſtament, and the like; but *the King's horſe ſhall not be forfeited, as waif or ſtray*; nor ‡ *twenty deſcents ſhall not toll the King's entry*; *nor wreck of the ſea of his goods, and not claiming within the year ſhall not prejudice him*; *nor ſale in* ‖ *market overt*; for the King ſhall not be bound *by any cuſtom which goes to the perſon or to the goods; contra of cuſtom upon the land*, as borough-engliſh, gavelkind &c. And yet, per Priſot, if land which ought to pay a *fine at the alienation* be aliened to the King, he ſhall not pay fine. Br. Cuſtoms, pl. 5. cites 35 H. 6. 25. S. P. Jenk. 83. in pl. 62.—* S. P. *Nor cuſtom.* Br. Prerogative, pl. 112. cites 23 H. 3. and Fitzh. Tolle 5.—† Pl. C. 243. a. 263. b. S. P.—‡ It was held clearly by the Court, that againſt the Queen a *deſcent is no plea*, nor any title againſt the Queen, becauſe *nullum tempus occurrit regi*; neither ſhall *laches* be imputed to her; for the poſſeſſions of the Queen are large, and it is not fit that ſhe ſhould be bound, or ty'd, to look to her affairs concerning her poſſeſſions, or to incur any damage in default thereof; for ſhe is to intend and manage the publick affairs of the kingdom and ſtate. 2 Le. 31. pl. 37. 31 Eliz. in the Exchequer, Norris's Caſe.

No * *laches* ſhall be imputed to the King. Co. Litt. 57. b.—S. P. And therefore there can be no *trial by proviſo* in the King's Caſe. Reſolved per Cur. 6 Mod. 247. Mich. 3 Ann. B. R. in Caſe of the Queen v. Banks.——S. P. per Fleetwood Serjeant. 2 Le. 110. Trin. 29 Eliz. in Caſe of Kivet v. Taylor.—S. P. 2 Hawk. Pl. Cr. 408. cap. 41. ſ. 11.——* See (Q. 6) pl. 2.——‖ S. P. 2 Inſt. 713.—Pl. C. 243. b. S. P.

9. Where an *advowſon held of the King deſcends to four parceners, and the one is within age*; becauſe the advowſon is not parted, the whole advowſon ſhall remain in the hands of the King until the infant be of full age, and then all ſhall ſue livery. Br. Prerogative, pl. 44. cites 38 H. 6. 9. Br. Preſentation, pl. 35. cites S. C.

10. *Founderſhip* may come to the King by eſcheat. Br. Petition, pl. 26. cites 5 E. 4. 118.

11. *A. was bound to two* in an obligation *in* 40 *l.* and the *one was felo de ſe*, which was found by office; and per Choke J. it *is all forfeited* to the King: but Young contra; for the ſurvivor took place before the office. Br. Traverſe de office, pl. 36. cites 8 E. 4. 4. So if one of them is outlawed, the King ſhall have the whole duty; ſo he ſhall have the intire ox or horſe of the outlaw held in common. Pl. C. 243. a. Trin. 4 Eliz. Wyllion v. Ld. Barkley.

12. Where an *alien has a ſeigniory* or manor, and the *tenan's are amerced*, the King ſhall have it by avowry; quod non negatur. *Quære* how, without matter of record. Br. Prerogative, pl. 97. cites 11 E. 4. 2. and Fitzh. Avowry, pl. 223. [566]

13. Where the King *leaſes* for years, *rendring rent with condition of re-entry* for non-payment, the King is not bound to demand S. P. Pl. C. 213. b.—*And* the

mand the rent as a common perſon is, per Huſſey and Brian; for, per Huſſey, this ought to be found by office. Br. Prerogative, pl. 101. cites 2 H. 7. 8.

King *is not bound to offer acquittance* to any man; but the ſubject who pays to the King ought to bring with him acquittance, and to demand it of the King. Br. Prerogative, pl. 101. cites 2 H. 7. 8.

14. In a *thing newly given by ſtatute* the King cannot have prerogative. Br. Prerogative, pl. 63. cites 12 H. 7. 19. per Frowike.

But by Segewicke, the King may have prerogative of a thing newly given by ſtatute, * *if the ſame was at common law before.* Ibid. Br. Parliament, pl. 46. cites S. C.—* The year-book 9. b. mentions the ſame thing being inlarged by ſtatute.—*As* if *forger of deeds* be *made felony by ſtatute*, there if a man ſeiſed of lands be thereof convicted, the King may have *annum, diem & vaſtum* by his prerogative, tho' it be not expreſs'd in the ſtatute. Pr. Prerogative, pl. 63.—S. P. For by law it *is annexed to the nature of the felony.* Br. Parliament, pl. 46. cites S. C.—*Contra where* a thing is enacted by ſtatute, of which *no ſuch like thing was at common law before*, as to have the ward of the heir of ceſty que uſe. Br. Prerogative, pl. 63. Br. Parliament, pl. 40. cites S. C.

15. If the King *aliens land parcel of his dutchy of Lancaſter within age*, there he may avoid it by non-age; for he has the dutchy as Duke, and not as King; *contra of the land which he has as King*; for the King cannot be diſabled by non-age, as a common perſon ſhall be; quod nota. Br. Prerogative, pl. 132. cites 1 E. 6. and anno 6 and 26 E. 3. accordingly.

16. No man can *enter upon the poſſeſſion of the King for condition broken*, but is put to his ſuit; for the land ſhall not be plucked from the King without trial or matter of record, any more than it can be veſted in him without matter of record. Arg. D. 139. pl. 33. Hill. 3 and 4 P. & M. The Duke of Norfolk's Caſe.

17. The King *can hold of none* D. 154. b. pl. 18. Mich. 4 & 5 P. & M. The King v. Archbiſhop of Canterbury.

18. The treatiſe of Prærogativa Regis does not contain all the prerogatives of the King, but part of them. Arg. Pl. C. 322. Mich. 9 & 10 Eliz. Caſe of Mines.

19. Without ſeiſure no *property* is *changed by waiver* &c. unleſs in caſe of the King. Per Catlyn Ch. J. D. 338. b. pl. 40. Mich. 16 & 17 Eliz. Anon.

20. Prerogative *is no protection againſt* that which is hard and tortious. Per Periam J. Mo. 204. Paſch. 27 Eliz. cites Pl. C. . . . Barkley's Caſe.

6. C. Cited 2 Vent. 267. Hill. 2 & 3 W. & M. C. B. in Caſe of Woodward v. Fox.

21. Manwood Ch. B. took this diverſity, viz. Where it is ordained by *ſtatute, that* by feaſance, miſfeaſance, or non-feaſance, of a thing, the *offender ſhall forfeit* ſuch a ſum of money, *and does not expreſs to whom* he ſhall forfeit it, there the forfeiture ſhall be intended to the King, *unleſs the penalty be for taking of goods* &c. *in which the ſubject has a property*, then the ſubject ſhall have the forfeiture in recompence of his property loſt. Mo. 239. Paſch. 29 Eliz. Anon.

22. Pre-

22. Prerogative cannot *alter eſtates*. Per Fenner. Owen. 90. Mich. 29 & 30 Eliz. in the Biſhop of Lincoln's Caſe.

23. Always when the *title of the King and of the ſubject concur*, the title of the King ſhall be preferred. 3 Le. 251. Per Egerton Solicitor. S. P. 2 L. P. R. 144. —S. P. *Detur digniori* is a rule in

the caſe of concurrence of titles between the King and ſubject. 2 Vent. 268. Hill. 2 & 3 W. & M. C. B. in Caſe of Woodward v. Fox, cites 9 Rep. 24.—*As the King-lord, meſne and tenant*; the *tenant pays his rent at the day before noon*, and then the ſame day *before* night the meſne dies, his heir within age, the King ſhall be paid the rent again; for here the title of the King and the ſubject concur together * *at one time*, and in that the King ſhall be preferr'd. 3 Le. 251. Per Egerton Solicitor, cites 43 E. 3.—* S. P. Pl. C. 259. a. *But* where the title of the ſubject is *elder* than that of the King's, he ſhall avoid the title of the King. [567]

24. All pretence of prerogative *againſt magna charta* is taken away. 2 Inſt. 36.

25. In the King's Caſe *all the coparceners ſhall do ſuit*, as well *after partition* as before, and ſo ſhall their ſeveral feoffees; for the ſtatute of Marlebridge, cap. 9. does not extend to the King. 2 Inſt. 119.

26. A *niſi prius* ſhall *not* be *granted where the King is party*, or where the matter toucheth the right of the King, *without a ſpecial warrant* from the King, or the aſſent of the King's attorney. 2 Inſt. 424. S. P. 2 Hawk. Pl. C. 411. cap. 42. ſ. 2.

27. Every prerogative is as *ancient* as the Crown, and no preſcription lies in it; per Clerk J. Arg. Lane 26. Mich. 4 Jac. And per Flemming Ch. B. accordingly. Ibidem.

28. Every thing *for the benefit* of the King ſhall be *taken largely*, as every thing againſt the King ſhall be taken ſtrictly; per Hobart Ch. J. Godb. 295. Paſch. 21 Jac. in Sir Edward Coke's Caſe.

29. *Any ſubject may* have an *appeal* againſt the *perſon who ſteals the Kings* or Queens *goods*. Jenk. 25. pl. 47. S. P. Jenk. 83. pl. 62. —S. P. Jenk. 3 pl. 77.

30. The Judges ex officio, and *every one* elſe in his ſtation *ought to aſſiſt the King in his rights*, and the Judges are bound ex officio to take notice of every ſtatute which concerns the King. Jenk. 303. pl. 67.

31. Upon an *information* for the King he may have a *diſtringas with* a *tales before* there be any *default of the appearance of a jury* upon the venire facias, and if any *perſon* returned in the venire facias be *omitted or miſnamed* in the diſtringas with the tales, it ſhall be *amended*. Jenk. 87. pl. 70.

32. The King *cannot be ſued, nor* can a * *diſtreſs* be taken *upon land in his poſſeſſion*. Jenk. 112. pl. 18. * S. P. 2 Hawk. Pl. C. 60. cap. 12. ſ. 26.—

None may diſtrain for ſeigniory or rents in the land of the King, which he takes in the capacity of his body natural, nor have execution of them. Pl. C. 242. b.

33. It is clear that the King *cannot be deveſted of any of his prerogatives by general words in an act of parliament*, but that there muſt be plain and expreſs words for that purpoſe, tho' all his

other rights are no more favour'd in law than the rights of his ſubjects. 8 Mod. 8. Mich. 7 Geo. in Caſe of the King v. the Archbiſhop of Armagh.

(U) *What* Thing *may be done without Licence of the King.*

[1. ROT. Pat. 12 E. 1. M. 15. Letter to Dean and Chapter Sancti Pauli London, *quod cemiterium includere poſſint muro lapideo.*]

2. Before the ſtatute 18 E. 3. no ſubject might *paſs over the ſea* without ſpecial licence of the King. But there it is enacted, that the ſea ſhall be open to all merchants. Dav. Rep. 56 b. Mich. 8 Jac. in the Caſe of the Royal Piſchary of the Banne.

3. Before 31 Eliz. which was the next year after the Spaniſh Invaſion, there was not any licence or commiſſion of any King or Queen of this realm for the *taking of ſalt-peter;* but in the ſaid 31 year there were *two licences* granted, the one particular to George Conſtable Eſq; and the other general to George
[563] Evelin, Richard Hills, and John Evelin. The *firſt* gave Conſtable power and authority for 11 years to *dig, open, and work for ſalt-peter within the counties of York, Nottingham, Lancaſter, Northumberland, Cumberland, and the biſhoprick of Durham,* as well within the lands, grounds, and poſſeſſion of the Queen, as within the lands, grounds and poſſeſſions of the ſubjects within the counties aforeſaid, and the conſideration of the patent was for a great quantity of ſalt-peter yearly by the ſaid George Conſtable, to be made and provided for the ſtore of the Queen at a lower rate than before was paid. 12 Rep. 14. in the Caſe of Salt-Peter.

4. *The other* commiſſion to Evelin &c. *extends to all* the realm of England and Ireland, and all other *dominions of the King*, as well within the lands, grounds, and poſſeſſions of the Queen, as within the lands, grounds, and poſſeſſions of any of the ſubjects. 12 Rep. 14. in the Caſe of Salt-Peter.

5. *And* after, viz. 18 October 2 Jac. commiſſion was granted to Evelin and others to take ſalt-peter in the lands, poſſeſſions, and other convenient places, and in convenient times; ſo that there were but three licences or commiſſions ever made, and *in none of them* any *power* by expreſs words is given *to dig in any manſion-houſe* &c. And in none of them is any prohibition to the ſubject to dig in his own land. 12 Rep. 14. in the Caſe of Salt-Peter.

(X) * Impoſitions.

* Impoſition is properly a thing which is exacted of the people, of which they ſhall have no benefit, ſo that a *diſcharge of impoſitions*

[1. †1 E. 3. cap. 5. THE King wills that *no man be charged to arm himſelf* otherwiſe than he was wont in the time of his progenitors *Kings* of England. *And* that no man be compelled *to go out of his ſhire*, but where neceſſity requireth, and ſudden coming of ſtrange enemies into the realm, and then it ſhall be done as hath been uſed in times paſt for the defence of the realme.]

exempts not from finding armor which continues in their own cuſtody. Savil. 52.—‡ Bacon, Of Government, 2d Part 102, 103. takes notice of this ſtatute, and ſays that the words thereof are variouſly ſet forth in the books in print, and ſays, that the words in Engliſh are verbatim thus, viz. And that none be diſtrained to go out of the counties, *if not for neceſſity of ſudden coming of ſtrange enemies into or in the kingdom*; whence he infers, that probably the invaſion muſt be actual before they are drawn out of their counties, and not fear'd only; and it muſt be a ſudden invaſion, and not of publick note and common fame foregoing.

[2. 11 H. 7. cap. 1. The King calling to remembrance the duty of allegiance of his *ſubjects* of this his realm, and that they by reaſon of the ſame are *bound to ſerve their Prince* and Sovereign Lord *for the time being, in his wars for the defence of him and the land* againſt every rebellion, power and might reared againſt him, and with him to enter and abide in ſervice, *i. e.* in battell, if caſe ſo require &c.]

This ſtatute has been the ſubject of great controverſy.

3. 11 H. 7. cap. 18. Every ſubject, by the duty of his allegiance, is bound to ſerve and aſſiſt his Prince and Sovereign Lord, at all ſeaſons when need ſhall require.]

[4. 31 E. 1. Rot. Fin. Memb. 2. Inquiſition of thoſe that *were preſſed to go into Scotland*, and did not go &c.]

[5. 2 H. 4. 24. recites, That whereas [by the] 23 R. 2. it was commanded throughout the realm, and to *certain people* of the realm *charged upon their allegiance to* * *come to the Duke of York*, then being *Lieutenant of England, to go and tarry with him at the wages of the King* &c.

* Fol. 166.

[6. 5 H. 4. N. 24. A commiſſion agreed by parliament to be ſent into every county, thereby giving *power* to commiſſioners *to impoſe arms upon thoſe who are able to find them at their own coſts*, and to ſerve in perſon, and for thoſe who are able in eſtate and not in perſon to find others for them, to the intent that for the defence of the realm they may ſtay in their country at their own coſts &c. as the commiſſioners ſhall ſhew them, and ſhall find for the defence of the country as need ſhall be, and prepare beacons &c.]

[569] Prynne's Cott. Rec. Abr. 428. No. 24. The Commons do amend the commiſſion for the arraying or muſtering of men or

watching of the beacons, and pray the King, that from thenceforth there ſhou'd no other form thereof be made. Whereunto the King with the aſſent of the Lords, after conſultation therein had with the Judges of the realm, conſented.

[7. *Quære*, Whether the ſubjects of England are bound by their allegiance to *go with the King*, or upon his command, *to*

By the law of the land *no man can*

war in a foreign dominion, which is not any part of the dominions of the King, to ſubdue it. It ſeems * Yes.]

be exil'd or baniſh'd *out of his native country*, but either by authority of parliament, or in caſe of abjuration for felony by the common law.

8. 25 E. 1. † In the monaſtery of Giſburne the King would have the conſtable and marſhall of England, and other lieges, *to go into Flanders*, who refuſed it, becauſe (as they ſaid) they were not bound to go out of the dominions of the King, and upon this they levied war againſt the King.]

And therefore the *King cannot ſend any ſubject* of England *againſt his will to ſerve him out of the realm*; for that ſhould be an exile, and he ſhould perdere patriam; no, he can *not* be ſent againſt his will *into Ireland, to ſerve* the King *as his deputy there*, becauſe it is out of the realm of England; for if the King might ſend him out of the realm to any place, then under preſence of ſervice as ambaſſador, or the like, he might ſend him into the fartheſt part of the world, which being an exile is prohibited by the act 9 H. 3. cap. 47. 2 Inſt. 47, 48.——* Orig. (Que.)

† Orig. (en l'Amoigne de Giſburne) but what the words (l'Amoigne) ſignify can only be gueſs'd at; that there was ſuch a religious houſe, appears in Brompt. Chron. among the Decem Scriptores 1209. l. 33, 34. And that it lay in Cleveland, and was founded by Robert de Breus in the time of H. 1. appears Ibid. 1018.

[9. 34 E. 1. 5. There is a *pardon of the conſtable, marſhall, and others*, and all others being of their fellowſhip, confederacy and bond, and alſo to all others that hold 20 l. land in our realm, whether they hold of us in chief or of other *(that were appointed at a day certain to paſs over with us into Flanders,)* [of] *the rancour and evil will born againſt us*, and all other offences that they have done againſt us unto the making of this preſent charter.]

The opinion of Thirning here is to be underſtood thus, that an Engliſh ſubject is not compellable to go out of the realm without wages,

[10. 7 H. 4. Br. Tenures, 44. 73. By Thirning, a man is *not bound to go with the King to war extra regnum, but for wages*; but men are bound by their allegiance to go at the King's command *within the realm*, and in defence of the realm by their tenures.]

[11. 7 H. 4. Protect. 100. By Thirning, the King cannot compel a man *to go out of the realm.*]

according to the ſtatutes 1 E. 3. c. 7. 18 E. 3. c. 8. 18 H. 6. c. 19 &c. 7 H. 5. c. 1. 3 H. 6. c. 5. &c. in anno 25 E. 1. Bigot Earl of N. and S. and Earl Marſhal of England, and Bohun Earl of H. and High Conſtable of England, did exhibit a petition to the King in French (which Ld. Coke ſays, he has ſeen anciently recorded), on the behalf of the Commons of England, concerning how, and in what ſort they are to be employ'd in his Majeſty's wars out of the realm of England, and the record ſaith, that poſt multas & varias altercationes, it was reſolved, that they ought to go, but in ſuch manner and form as after was declared by the ſaid ſtatutes, which ſeem to be but declarative of the common law. And (after citing many caſes) it was concluded, that the liegeance of a natural born ſubject was not local and confin'd only to England. 7 Rep. 7. b. 8. a. Trin. 6 Jac. in Calvin's Caſe.

12. Where impoſts or impoſitions are generally named in diverſe acts of parliament, the ſame are to be intended of lawful impoſitions, as of tonnage and poundage, or other ſubſidies impoſed by parliament, but none of thoſe acts or any other do give the King power at his pleaſure to impoſe. 2 Inſt. 64.

(Y) *Money.*

See (K. a).

[1. MIrror of Juſtices, fol. 3. b. It was ordained, that no King of this realm might *change his money, nor impair, nor amend, nor make other* money *than of ſilver*, * without the aſſent of all the counties.——Rot. Parl. 17 E. 3. N. 15, 16. ordains, that the money be ‡ *of the allay of the ancient eſterling*, and that it ſhall *not be* ‖ *tranſported out of the realm.*]

S. P. 2 Inſt. 576.—No ſubject can be inforc'd to take in buying or ſelling or other payment any money made, but only of lawful metal, that is of ſilver and gold, as the Mirror hath told you. 2 Inſt. 577.——* 2 Inſt. 576. cites Mirror, cap. 1. ſ. 3. and ſays, that the words (ſans l'aſſent de touts ſes counties) ſignify without aſſent of parliament.——‡ Prynne's Cotton's Records Abr. 37. No. 15. cites the ſame Roll, that ſilver be coin'd according to the old ſterling in poize and allay, to be current among the ſubjects, and not to be carried over upon pain of death. And if the Fleming ſhould coin their ſilver accordingly, that the ſame be current among merchants.—‖ *Tranſportation* of money is an *offence* againſt the ſtate, policy, and ſafety of the kingdom, and ſo *puniſhable by the common law.* Hob. 270. Courteen's Caſe.——Ibid. 293. cites ſtat. 5 *R.* 2.

[2. Rot. Parl. 20 E. 3. 17. The Commons pray, that the *receivers of* payments of our lord *the King, receive of the people* in every place *as well gold as ſilver at the price aſſeſſed*, * as of the part of the people it is articled herein to receive for payment the change of money of gold, nor of ſilver, nor this do without aſſent of parliament. Anſwer, as to the firſt point of this article, be it held; as to the making exchanges, be the article ſhewn to our lord the King, and ‡ as grants que ſont per deniers luy which they have ordained and conſented to.]

Prynne's Cott. Rec. Abr. 48. No. 17. That the King's receivers may receive as well gold as ſilver, and that the changers thereof be not without parliament. The anſwer was, that the firſt is granted, the ſecond reſpited.—* Orig. (deſicome le people eſt article de cel receiver pur payment la change de money d'or ne d'argent ne ceo face)—‡ Quære how to tranſlate this.

[3. Rot. Parl. 25 E. 3. 2 Part, N. 38. The Commons pray, that *exchange of money* ſhall *not* be *limited to any place in London*, but where every one liſts. The King aſſents to this.]

Prynne's Cott. Rec. Abr. 80. No. 38. ſays, The print touching the exchange of gold and ſilver agreeth with the record.

4. It appertains to the King only *to put a value to the coin*, and to make a price of the quantity, and to put *a print to it*, the *which being done the coin is current* for ſo much as the King has limited. Arg. Pl. C. 316. in the Caſe of Mines.

2 Inſt. 576. cites S. C. and P.—Dav. Rep. 19. a. cites S. C.——It was reſolved, that as the King by his prerogative may *make money of what matter and form he pleaſes, and eſtabliſh the ſtandard thereof*, ſo may he *change the money in ſubſtance and impreſſion, and inhance or abaſe the value* thereof, or utterly decry and annul it, ſo as to be only bullion, at his pleaſure. Et nota, that bullion eſt moneta defenſa & prohibita quæ, videlicet, uſu caret. Dav. 20. b. in the Caſe of Mixt Monies.

5. It was reſolved, that it *belongs ſolely to the King* of England *to* make or *coin money* within his dominions, ſo that no other perſon can do it without ſpecial licence or command of the King; and if any preſumes to do it of his own head, this is treaſon againſt the perſon of the King by the common law; and

and this appears by the ſtatute 25 E. 3. cap. 2. which is only a declaration of the common law; and by Glanvil, Britton, and Bracton, before this ſtatute. Dav. Rep. 19. a. Trin. 2 Jac. in the Caſe of Mixed Monies.

6. As wax is not a ſeal without a print, ſo metal is *not money without an impreſſion.* Dav. Rep. 19. b. in Caſe of Mixed Monies.

[571] 7. The King by his prerogative may put a price or valuation upon all coins, as appears by a notable caſe. 20 E. 3. fol. 60. b. Dav. Rep. 20. a. in the Caſe of Mixt Monies.

Every piece of money ought to have its denomination or *valuation*, for which it ſhall be accepted or paid, as for a penny, a groat, or a ſhilling; and all this ought to be done by authority and command of the Prince, and *ought to be* publiſh'd *by proclamation* of the Prince; for before this the money is not current. Dav. Rep. 19. b. in the Caſe of Mixed Monies.—The King by his *proclamation may make any coin lawful money of England*: a fortiori he may, by his proclamation only, eſtabliſh the ſtandard of monies coin'd by his authority within his proper dominions. Dav. Rep. 19 b. in the Caſe of Mixt Monies.—Cites 5 Rep. 114. b.

8. 15 & 16 *Geo.* 2. *makes it* high-treaſon to counterfeit the coin *by waſhing, gilding, or colouring any lawful or counterfeit ſhilling or ſix-pence, with intent to make it reſemble or paſs for a guinea or half-guinea; or to file or any ways alter, waſh, or colour any halfpenny or farthing with intent to make it reſemble or paſs for a ſhilling or a ſix-pence.*

And any perſon uttering falſe money knowingly, ſhall ſuffer ſix months impriſonment, and find ſecurity for two years more; for the ſecond offence two years imtriſonment, and ſecurity for two years more; and for the third offence ſhall be adjudged guilty of felony without benefit of clergy.

And if ſuch perſon ſhall either the ſame day or within ten days next after utter any more ſuch money knowingly, or ſhall, at the time of uttering, have in his or her cuſtody one or more piece or pieces of counterfeit money beſides what was ſo uttered, then ſuch perſon ſhall be deemed a common utterer, and being convicted ſhall ſuffer one year's impriſonment, and find ſecurity for two years; and being a ſecond time convicted of ſuch offence, ſhall be adjudged guilty of felony without benefit of clergy.

Blood not to be corrupted though perſons ſuffer for treaſon or felony.

Evidence to be the ſame as now uſed againſt counterfeiting the lawful coin.

And any coining or counterfeiting any braſs or copper money, and their abettors and procurers, being convicted, ſhall ſuffer two years impriſonment, and find ſecurity for two years.

Perſons apprehending ſuch as have committed treaſon or felony by this act, or who have made or counterfeited any ſuch copper money, and convicting them, ſhall receive of the ſheriff for every ſuch offender convicted of treaſon or felony 40 l. and for every ſuch offender convicted of counterfeiting the copper money 10 l. within one month after conviction and demand thereof made, tendering a certificate to the Sheriff &c. from the Judge or Juſtices.

Sheriff refuſing to pay the reward according to the certificate, ſhall forfeit to ſuch proſecutor and proſecutors ſeverally double the ſum directed

victed by the ſaid certificate to be ſeverally paid to them, to be recovered in any of his Majeſty's Courts at Weſtminſter, by action of debt, bill, or information, with treble coſts of ſuit. Sheriff to be allowed ſuch payment for rewards in his accounts.

If offenders being out of priſon ſhall impeach two others, they ſhall be pardoned.

And if an perſon convicted of uttering any falſe or counterfeit money, ſhall afterwards be guilty of the like offence in any other county &c. the clerk of aſſiſe, or clerk of the peace for the county &c. where ſuch firſt conviction was had, ſhall at the requeſt of the proſecutor, or any other on his Majeſty's behalf, certify the ſame by a tranſcript in few words, containing the effect and tenor of ſuch conviction, for which two ſhillings and ſix-pence only ſhall be paid, and ſuch certificate produced in Court ſhall be ſufficient proof of ſuch former conviction.

(Z) *In what Courts he may ſue.* [572]

[1. THE King may have a *quare incumbravit in B. R.* tho' it be a common plea. 17 E. 3. 50. b.] Fol. 167.

[2. The King may have a * *quare impedit in B. R.* tho' it be a common plea. 17 E. 3. 50. b.] * The King may have this and any other action in B. R. *or in what Court he will;* per Fitzherbert. Br. Prerogative, pl. 127. cites F. N. B. fol. 32.

3. In *quare impedit by the King*, the *defendant made title and travers'd the title of the King*, and it was ſaid, that the King might take his ſuit *in the Exchequer, or* in *what Court he pleas'd.* Br. Prerogative, pl. 78. cites 4 E. 3. 11. All that touches the King and is in his advantage lies in conuſance of the Court, and the *right of tythes was try'd in the Exchequer* per patriam for this cauſe; cited by Doderidge J. 2 Roll. R. 295. in Sir Edward Coke's Caſe. —as 44 E. 3, 43.

4. The King has a prerogative of *ſuing in what Court he pleaſes.* Reſolved 9 Rep. 74. b. 75. a. Paſch. 13 Jac. in Magdalen College's Caſe. S. P. Jenk. 14. pl. 24. —S. P. 2 Hawk. Pl. C. 287. cap. 27. ſ. 27.

(A. a) Honours. Serjeants. [*Puniſhment of Refuſal to be Serjeants at Law*, pl. 1, 2. *Knights*, pl. 3, &c.]

[1. *Diverſe apprentices were called* by the King, by the advice of his counſel, *to be ſerjeants at law*, and *they refuſed* it, upon which they were commanded in parliament by the King to haſten to take this eſtate, and they pray'd reſpite till Trinity Term, and promiſed then to take it, the which is granted to them; Prynne's Cott. Rec. Abr. 553. No. 10. cites fam. Roll. that Martin, Babington,

them; but if they do not then accordingly, that they ſhall ſtand to the grace of the King. Rot. Parl. 5 H. 5. N. 10.]

Poole, Weſbury, Fame and Ralfe apprentices at law, and ſerjeants appointed, had refuſed the ſame; where, upon the charge of the warden of England, they took the ſame upon them.——S. C. cited Dugd. Orig. Jurid. 110, 111. who ſays, that they declining to take upon them that degree and ſtate, being called by writ in 3 H. 5. Membran. 20. were complained againſt in the parliament of 5 H. 5. whereupon they were compelled thereto. And ſays, that the firſt writ of ſummons to the degree of Serjeant which he had met with, was in 6 R. 2. unto John Cary, Edmond Clay, and John Hill; tho' Serjeants were before that time, they being taken notice of in the ſtatute of Weſtm. 1. in 3 E. 1.——As to the ancient form and order in making them, ſee Ibid. 111. cap. 42.——And as to the after manner in H. 7th's time, Ibid. 113. cap. 43.—And how afterwards, ſee the next following chapters.

[2. If they *do not come at the firſt day of the return*, they ſhall *not be received to have the order after, but* ſhall be *fined for the contempt.* 7 H. 6. 15.]

[3. Rex &c. Salutem. Cum 18 die Feb. anno regni noſtri viceſimo tibi preceperimus quod in pleno com. tuo proximo publice proclamatio [fiat] & omnibus illis de balliva tua quorum intereſſet *ſcire faceres* ex parte noſtra *quod illi de com. prædict. qui haberent* 40 *l. terræ in feodo* heredit. & *qui* terram illam & tenementum per triennium ante diem pred. & amplius tenuiſſent & *milites eſſe debuiſſent & non erant arma milit. reciperent* ante feſtum Natalis Domini proximi jam preteritum licet quidam de balliva tua arma militaria juxta formam mandati noſtri predict. recepiſſe debuiſſent & tamen, ut accepimus, nondum receperunt in ejuſdem mandati noſtri contemptum manifeſtum per quod nos inde certiorari volumus, tibi precipimus quod inquiſitum [ſit] inde per ſacrum. tam milit. quam alior. probor. & legalium hominum de comitat. predict. per quos rei veritas &c. Dat. 2 Jan. 21 E. 1.]

[4. *And* after the *ſheriff return'd an inquiſition indented* of thoſe who have 40 l. per annum, and then deducted the charges iſſuing out of it; and ſome ſheriffs returned thoſe who have ſome land in his bayliwick, and [were] received to make it 40l. per annum in other counties. But diverſe returned how much they have in his bayliwick, and that they are ignorant of the value of that in the other county. And the ſheriff of Oxon and Berks returned, that the value of their land cannot be known in his county; but they returned their names, who are ſuppoſed to have 40 l. in Oxon and other counties, viz. in Scaccario in Baga.]

[5. 3 E. 1. Clauſ. Memb. 5. A man was *amerced* to 20 l. *quia nondum miles.*]

[6. The King *may compel* every man who has land of inheritance to the value of 40 l. *per annum to be a knight*, or otherwiſe to be ſubject to a fine. 7 H. 6. 14. b. 1 E. 2. Stat.]

[7. H. 3. came into the Exchequer and cauſed the ſheriffs of the counties to be amerced; becauſe they had not diſtrained all thoſe that had ſuch eſtates as the law limits to be knights or to pay their fines. Speed. 533.]

[8. 6 E. 1. Rot. Clauſ. Memb. 8. The King ſent to the ſheriff,

* Orig. is (proclamato) without the word (fiat.)—— By 16 & 17 *Car.* 1. *cap.* 20. *none ſhall be hereafter compelled by writ or otherwiſe,*

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to take upon him the order of knighthood, and all proceedings concerning the ſame ſhall be void.—And 12 *Car.* 2. *cap.* 24. *ſ.* 1. *enacts that all tenures by knight's ſervice of the King or of any other perſon, and by knight's ſervice in capite and by ſocage in capite, and the fruits and conſequents thereof happened, or which ſhall or may hereafter happen or ariſe thereupon, or*

ſheriff, *Quod omnes qui habent* 20 *l. terræ vel feodum unius militis integrum valens viginti libras per annum, & de nobis tenent in capite & milites eſſe debent & non ſunt, ſine dilatione diſtringas ad arma militaria citra* ſuch a day *a nobis ſuſcipiendum, &* alſo *quod ſummoneat* all ſuch &c. *de quocunque tenuerint*, and there Memb. 6. *quia certis de cauſis rex non voluit* * *quod W. H. diſtringat. ad arma militaria ſuſcipiendum, mandatum eſt* the ſheriff *quod non &c. diſtringat.* 7 *E.* 1. *Rot. Pat. Memb.* 21.]

[9. 8 E. 1. Rot. Clauſ. Memb. 1. *Pro fine* 20 *Mar.* given by W. the King gave him *reſpectum de ſe milite faciendo* from ſuch a time to ſuch a time, and after he is amerced by the Juſtices itinerants, becauſe he does not ſhew them his charter.]

[10. 13 E. 1. Rot. Clauſo Memb. 9. Cum de conſuetudine regni &c. qui habent 20 libratas terræ vel feodum milit. valens 20 libratas per annum diſtringerentur *ad arma militaria ſuſcipiend.* nos, ob ſervitium &c. in Walia a communitate regni noſtri, volumus quod non habentes tum libratas terræ hac vice non diſtringantur.]

[11. 20 E. 1. Rot. Clauſ. Memb. 8. dorſo. Preceptum eſt ſingulis vice-com. per Angliam & Juſtic. Ceſtrie quod proclamari faceret, quod *omnes qui habent* 40 *libratas terræ* in feodo & hereditate ſumerent militaria arma. 21 E. 1. Rot. Fin. Memb. 25. accordingly, and commanded to ſeiſe the lands of thoſe that would not take the degree. 20 E. 1. lib. Parl. 34.]

[12. 6 E. 1. Rot. Pat. Memb. 5. Rex omnibus &c. Quia *acceptimus* per inquiſitionem &c. *quod Johannes de G. non habet* 20 *libratas terræ nec feodum mil'tis int.grum valens* 20 *l. per annum.* Conceſſimus eidem Johanni quod de cetero *non diſtringatur* ad arma militaria, contra voluntatem ſuam &c.]

[13. There are ſeveral ſpecial grants to diverſe men that they ſhall not be compelled to be knights for a time, and ſome during their lives. 21 E. 1. Pat. Memb. 5 & 17.]

[14. If a man holds *land in burgage to the value of* 20 *l. per ann.* yet he is not compellable to be a knight. 1 E. 2. Stat.]

15. None by reaſon of any *land*, which he holds in manors, which are now *in ancient demeſne of the Crown*, as a ſokeman, and which land ought to give *tallage* when the demeſnes of the King are tailed, ſhall be diſtrained to be a knight. 1 *E.* 2. *cap.* 1.]

[16. He that holds *land in ſocage of other manors than of the manors of the King doing no foreign ſervice*, yet he is compellable to be a knight. Vide the Writ of Summons to be made knights, always is, *Quod omnes qui habent* 20 l. *terræ vel feodum milit. integrum valent.* 20 *l. per annum &c.* So the firſt 20 l. beforementioned, as it ſeems, cannot have other intendment but of ſocage land. Vide Stat. of 1 *E.* 2. *cap.* 1. *De Militibus*, where it is ſaid that the rolls of the Chancery ſhall be ſearched, and that it ſhall be done as it had uſed to be before.]

thereby, be taken away or diſcharg'd, any law, ſtatute, cuſtom or uſage to the contrary thereof in any wiſe notwithſtanding; and all tenures of any honours, manors, lands, tenements, hereditaments, or any eſtate of inheritance at the common Law held either of the King, or of any other perſon or perſons, bodies politick or corporate, are hereby enacted to be turned into free and common ſocage, to all intents and purpoſes.

* Fol. 168.

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S. 2. *And that the ſame ſhall forever hereafter ſtand, and be diſcharged of all tenure by homage, eſcuage, voyages royal, and charges for the ſame &c. and all other charges incident to tenure by knight ſervice; and of and from aid to marry his daughter, and aid to make his ſon a knight.*

S. 4. *And that all tenures to be created by the King, his heirs or ſucceſſors upon any grants &c.*

of

of any manors &c. of any eſtate of inheritance at the common law, ſhall be in free and common ſocage, and ſhall be ſo adjudged, and not by knights ſervice or in capite.

S. 11. Provided that nothing therein contained ſhall infringe or hurt any title of honour, feodal or other, by which any perſon hath or may have right to ſit in the Lord's Houſe of Parliament, as to his or their title of honour, or ſitting in Parliament, and the privilege belonging to them as Peers.

(B. a) *In the Sea.*

At this day, by the laws of England, the King may interdict any nation or people whatſoever to paſs thro' his ſeas, without leave firſt obtained to that purpoſe; and may viſit all ſhips, be they of war or traffick, that ſhall occur or be in the ſame. 2 Molloy 375. cap. 16. ſ. 2.

[1. Rot. Parl. 8. H. 5. N. 6. THE Commons pray, that whereas the King and his progenitors always have been *lords of the ſea*, and now it happened that the King is *lord of the coaſts of both ſides of the ſea*, and therefore pray the King to lay an *impoſition upon ſtrangers paſſing* over the ſea.]

[2. If the *ſea overflows my land for* 40 *years, and afterwards reflows again, I ſhall have my land*, and not the King. M. 7. Ja. B. per Coke and Foſter.]

[3. M. 23 E. 3. B. R. Rot. 26. Abbas Sancti Petri de burgo implacitatur per preſentationem factam per diverſ. hundred. & wapent. quod *perquiſivit* 300 *acres* **warecti* in Goſberlick in com. Lincolne *licentia regis non obtenta* &c. that they *dicunt quod conſuetudo patriæ eſt* & fuit a tempore quo &c. *quod omnes & ſinguli domini maneria terras* ſeu † tenem. *ſuper* ‡ *caſteram maris habentes* particulariter *habebunt warectum & †fabulonem per fluxus & refluxus maris ſecundum magis & minus prope tenem. ſua projecta* & ſic dic. quod habet quoddam manerium in predicta villa unde plures terræ ejuſdem adjacent coſtere maris & ſic habet per fluxus & refluxus maris circit. . . . . acras warecti terris ſuis adjacentes & per temporis incrementum ſecundum patriæ conſuetudinem & abſque hoc quod perquiſivit &c. Ideo. ven. jur. &c.]

* i. e. Waſt or uncultivated land. See Spelm. Gloſſ.

† Fol. 169.

‡ This word ſhould be coſtera, and ſignifies coaſt or ſhore. See Somn. Gloſſ. & Spelm. Gloſſ.

† This word ſhould be fabulonem, and ſignifies ſea-ſand.

This does not belong to this head, but to (K. a)

[4. The King may *dig the ſoil of another man*, ſcilicet, *in the out-houſes*, but not in the dwelling-houſes. M. 10 Ja. B. per Curiam. *Sir Robert Johnſon's Caſe.*]

And the ſoil of all rivers, as far as

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there is

[5. Every water which flows and reflows *is called arm of the ſea* ſo far as it flows. 22 Aſſ. 93. Da. Piſcar. Ban. 56. ſuch river participates of the nature of the ſea, and is ſaid arm of the ſea ſo far as it flows.]

fluxum & refluxum maris, *it in the King*, and not in the lords of manors &c. without preſcription. Sid. 149. Trin. 15 Car. 2. B. R. in Caſe of Bulſtrode v. Hall.

[6. If the *arm of the ſea runs between two ſeignories, and the ſoil of the one* ſeigniory *is taken away* by the arm of the ſea, and *the ſoil of the other* ſeigniory *increaſed*, whether the other lord ſhall loſe his ſoil? 22 Aſſ. 93. Quere.]

[7. 8 E. 2. Itin. Canc. Corone 399. Nota by Stanton, that it is not * the ſea where *a man can ſee that which is done of each ſide of the water*, as to ſee from the one land to the other, that the coroner ſhall come in this caſe, and ſhall do his office; † as where an adventure happens in an arm of the ſea, there another man may ſee from the one part to the other, of the adventure that in this place happens the country may have conuſance.]

* Orig. is (paſſance de mere.)
† Orig. is (auxy come aventure avient.)

[8. In the ſtatute of 7 Jac. cap. 18. it is recited, that where diverſe in Devon and Cornwall, having lands adjoining to the ſea-coaſts there, have of late *interrupted the bargemen*, and ſuch others as have uſed their free will and pleaſures *to fetch the ſea-ſand, and* to *take the ſame under the full ſea-mark*, as they have heretofore uſed to do, unleſs they make compoſition with them at ſuch rates as they themſelves ſet down, tho' they have very ſmall or no damage thereby, *to the great decay of huſbandry* &c. and therefore *enacts, that it ſhall be lawful to* take and *fetch ſea-ſand at all places under the full ſea-mark*, where the ſame is, or ſhall be, caſt by the ſea, and it ſhall be lawful to caſt on land one of their ſea-barges in ſuch places as it hath been uſed to be landed within 50 years laſt paſt.]

[9. 45 E. 3. In Regiſter Ramſey cited D. 15. 16. El. 326. 2. Norff. de quodam *proceſſ.* de ſcaccario fact. verſus abbatem de Ramſey *ad oſtend. quare* 60 acres mariſci in manus regis non debent ſeiſiri quas abbas appropriavit ſibi & domui ſuæ ſine licentia regis ſuper quadam preſent. virtute cujuſdam general. commiſſ. de *terra a rege concelat. & detent.* Abbas *reſpond. quod* ipſe tenuit *manerium* de Brancheſt quod *ſcituatum eſt juxta mare* & quod *eſt ibidem quidam mariſcus qui aliquando per influxum maris minorat. & aliquando per defluxum maris auget.* abſque hoc quod appropriatum ſibi &c. prout per preſent. predict. ſupponitur. And the attorney of the King maintains the preſentment, and thereupon iſſue was joined, and a verdict for the abbot at Niſi Prius &c. 45 E. 3. and upon this judgment given, that eat inde ſine die ſalvo &c.]

The Prince ſhall have all lands left by or gained from the ſea. D. 326 b. pl. 2. marg. ſays, he had ſeen and peruſed a treatiſe of it, and that there are ſeveral examples of Romney-marſh and Broomhill in Kent, of which they are farmers to the King; and there is vouch'd a memorandum accordingly. Trin. 4 E. 3. Rot. 13. ex parte Rememb. Theſaur.—— If the *ſea-marks are gone, ſo that it cannot be known*, in ſuch caſe the land gained from the ſea belongs to the King; but if the ſea covers the land at the flux of the ſea, and retreats at the reflux, ſo that the ſea-marks are known, if ſuch land be gain'd from the ſea, it belongs to the owner. D. 326. b. pl. 2. marg. cites 8 Eliz. Corporation of Romney's Caſe.

[10. P. 17 El. in Scacc. *Diggs* informer for the Queen againſt *Hammond*, for Marſh circa Sandwich, in like manner as this before cited of 45 E. 3. and a verdict given for Hammond againſt the Queen, which ſee cited D. 15, 16 El. 326. 2.]

[11. If the *ſalt water* of the ſea *leaves a great quantity of land upon the ſhore*, the King ſhall have this land by his prerogative, and the owner of * the land next adjoining ſhall not have it as a perquiſite. D. 15. 16 El. 326. 2. Davis Piſcar. de Bann. 56.]

* Fol. 170.

If the ſea leaves the land gradatim, and for but a little quantity, the owner of the ſoil ſhall have it; but if in a great quantity, and

and at a time, it goes to the King. 2 Vent. 188. 2 W. & M. C. B. in Case of Woodward v. Fox, cites Dav. 5. 6. [but it should be 56] and Sid. 86. and Dyer 126. [but it should be 326. b. pl. 2.]

*[12. The *soil* upon which the sea flows and reflows, scilicet, *between high-water mark and the low-water mark, may be parcel of a manor of a subject.* 5 Rep. *Sir Henry Constable's Case* 107. per Curiam; and there said that so it was adjudged in *Lasce's Case.* Tr. 25 El. B. R. P. 16 Car. in Ca. Scacc. in the Case between the Attorney of the King and *Sir Samuel Rolle, Sir Richard Buller,* and *Thomas Arundell.* Resolved and adjudged by decree of all the Barons upon hearing of the cause by English bill.]

[13. D. 16 El. 326. 2. De alluvione accrescent. & *inundatione maris seu fluminis subito* & extraordin. *per vehementes tempestates,* & quando *per naturales* & ordinarios *fluxus maximos,* viz. spring-tides, qui fiunt bis quodlibet mense *differentia magna est by gaining of land,* surrounding or overflowing of banks when the metes and certain limits by trees and bounds are utterly defaced by the sea.]

The reason why the King has interest in such navigable river as high as the sea flows and reflows in it, is, because such river participates of the nature of the sea, and is said a branch of the sea as high as it flows. Dav. 56. a. S. C.

[14. Da. Rep. *Royall Piscarie of the Banne.* 56. Every navigable river, so high as the sea flows and reflows therein, is *flumen regale,* and the fishery of it is also *royal fishery,* and belongs to the King by his prerogative. But in every other *river not navigable,* and in the fishery of such river *the terretenants of either side* thereof have interest of common right. And ibidem the King's Bench has the same interest in the arms of the sea and navigable rivers so high as the sea flows and reflows in them, as it has in alto mari, appears by several authorities and records.]

The King shall have the great fishes of the sea, as whales, sturgeons &c. which are pisces regales, and no subject can have them without special grant of the King. Dav. 56 a. in Case of the Royal Pischary of the Banne. Cites Prerog. Regis, cap. 11. Stanford 37. 38. Bracton, lib. 3. cap. 3. 30 E. 3. 35. a.

[15. And ibidem 97. Resolved that the river of the Banne, so far as the sea flows and reflows therein, is *flumen regale*; and the pischary of salmons there, a *royal pischary,* which belongs to the King as a *several pischary,* and not to those who have the soile ex utraque parte to which; but of the other part it was agreed that *every inland river, not navigable, belongs to the owners of the soile where it has it's course.*]

[16. Rot. Pat. 23 E. 1. Licence given *hominibus Hollandi, Zealandi & Frizlandi quod piscari possint in mari nostro prope Jernemoth* & commodum suum inde facere; et mandatum Johanni B. custodi maritime sue Jernemouth & ballivis Jernemouth quod semel vel bis in qualibet septimana proclamari faciant ne quis eos molestiam inferrent &c.]

Prynne's Cott. Rec. Abr. 547. No. 33.

[17. Rot. Parl. 3 H. 5. 1 Part, N. 33. The Commons pray that where the lieges of England have *fished* in diverse places for fish, and for 6 or 7 years *in island* being of the parts of Norway from Denmark, have procured the King's prohibition to the English to fish in those parts, and pray that it be enacted that

they may fiſh there and in any place, any proclamation or ordinance to the contrary notwithſtanding. Anſwer, The King will be adviſed.]

[18. 6 R. 2. Protect. 46. By Belknap, *The ſea is of the ligeance of the King, as of the Crown of England.*] The ſea is not only under the dominion of the King, as is ſaid 6 R. 2. Fitz. Protection 46. but it is alſo his proper inheritance; and therefore the King ſhall have the land which is gained out of the ſea. Dav. 56. a. cites Dier 15 Eliz. 326. b. 22 Aſſ. p. 93.

19. 17 *E.* 2. *cap.* 11. enacts, That *the King ſhall have* wreck *of the ſea throughout the realm;* * whales *and* † great ſturgeons *taken in the ſea, or elſewhere within the realm, except in certain places privileged by the King.* Pl. C. 315. b. Arg. in the Caſe of [577] Mynes ſays, that this is not a new law, but only a declaration of the common law before; and that Britton, who wrote long before the treatiſe of Prærogativa Regis, ſhews in his chapter of Trover, that the King ſhould have all fiſh by the common law in his time.—Britt. 27. cap. 17.—The Lord of the Manor preſcribed to have royal fiſh, and thereby claimed a porpoiſe taken; but by Belknap, where a fiſh is taken in the high ſea, it belongs to the taker. 39 E. 3. 35. b.——Br. Prerogative, pl. 35. cites S. C.

* Of a whale, it is ſufficient if the King has the head and the Queen the tail. Seld. Fleta 61. lib. 1. cap. 46.——† But of a ſturgeon the King ſhall have the whole by his royal privilege. Seld. Fleta 61. lib. 1. cap. 45.

20. It was reſolved that the King ſhall have *fletſam, jetſam, and ligan*, when a ſhip periſhes, or when the owner of the goods cannot be known; for in 46 E. 3. 15. it appears that goods caſt into the ſea for fear of a tempeſt, are not forfeited. 5 Rep. 107. a. b. Paſch. 43 Eliz. in Sir Henry Conſtable's Caſe. S. P. By his prerogative, tho' they are in or upon the ſea; for the ſea is of the allegiance of the King, and parcel of his Crown of England. Ibid. 108. b. in S. C

21. The King ſhall have *wild ſwans*, as volatilia regalia, upon the ſea and branches thereof. Dav. Rep. 56. a. cites 7 Rep. the Caſe of Swans.

22. *Wreck* of the ſea is a perquiſite royal. Dav. Rep. 56. b. cites 5 Rep. 107. Sir Henry Conſtable's Caſe.

(C. a) *Impoſitions.*

[1. THERE is an ancient impoſition *in Spain called the alcavella*, which is the tenth part of all that which is bought and ſold. Lib. Succeſſ. 208.]

[2. The *Kings of France* cannot juſtly impoſe taxes upon their ſubjects, without the aſſent of the 3 eſtates, unleſs it be in caſe of *preſent neceſſity*; and Lewes 11th King of France was the firſt who uſurp'd this power. Philip de Commines, Lib. 5. fol. 197.]

(D. a) Impoſitions. *Cuſtoms. Who may impoſe* them *or take* them.

[1. IF a man *takes 2d. for every barrel of ale which ſhall be landed at a certain place near the ſea coaſt, it is not lawful tho' it be his own land*, and the parties cannot ſell there without his conſent; for *it is levying a new cuſtom when he takes a conſtant certain ſum*, which he cannot do without the King's licence; *but he may make particular agreements with every one that comes there*, for his conſent to land their goods there. P. 11 Car. B. R. between the *King* and *Morgan*, upon a trial at bar in an information againſt him, for levying of 2d. for every barrel landed at Crockernepill in com. Somerſet near Briſtol; reſolved per Curiam, and he found guilty accordingly, and fined 100 marks, and impriſoned by judgment of Court upon an information upon one of the articles in Eire, that it ſhall not be lawful for any to raiſe a tax, rate or cuſtom upon the King's ſubjects in his own land.]

2. Babington Ch. J. ſaid, that the *Kings* of England *are intitled to have the petit cuſtom of merchandizes*, but *not* the *great cuſtom*, and that he has it but for a certain time by act of par-
[578] liament; but this *great cuſtom is called ſubſidy*; and ſo ſee that King H. 6. had this ſubſidy, and after King E. 4. obtained grant thereof by act of parliament for term of his life, and ſo every King after him has obtained ſuch grant by parliament, *which is granted* to the intent *that the King by his Admiral ſhall keep the ſea that merchandizes may paſs and re-paſs in ſafety*. Br. Cuſtoms, pl. 26. cites 9 H. 6. 12.

(E. a) *What* Impoſitions *the King may grant without Parliament.*

[1. THE King *may charge the ſubject where it is for the ſubject's benefit*, ſcilicet, where the ſubject has *quid pro quo*. 13 H. 4. 14. b.]

See pl. 20. —S. P. but he may not charge them without ſpecial aſſent of parliament *to their charge*. 12 Rep. 32. cites 13 H. 4. 16. —— For the benefit of the ſubject the King may make an impoſition or toll within the realm; as, *to repair highways, bridges, and to make walls for defence*; but then the ſum impos'd ought to be *proportionable to the benefit*. 12 Rep. 34. cites 13 H. 4. 16.—Impoſitions, neither in the time of war or other the greateſt neceſſity or occaſion that may be (much leſs in the time of peace), neither upon foreign nor inland commodities of what nature ſoever, be they never ſo ſuperfluous or unneceſſary, neither upon merchants, ſtrangers, nor denizens, may be laid by the King's abſolute power without aſſent of parliament, be it for never ſo ſhort a time. 2 Molloy 320. cap. 12. ſ. 1.

[2. *As* the King may *grant to another, that he ſhall incloſe a vill, and* that he ſhall *take a half-penny* or other ſum of every horſe and cart-load which paſſes thro' the ſame vill for the incloſure. 13 H. 4. 14. b.]

[3. *So*

[3. *So* the King may grant *pontage*, and that he ſhall take of every * load a certain ſum for making the bridge with the ſame money; for it is for the people's profit. 13 H. 4. 14. b.] * Orig. (ſummage).

[4. *So* the King may grant that I ſhall have *a * ferry* over a certain water adjoining to my own land, and take of every one a half-penny more or leſs; and this is good, becauſe thoſe who ſhall make the payment have *quid pro quo*. 13 H. 4. 15.] * Orig. (fair-).

[5. 32 E. 1. Rot. Pat. M. 26. In ſchedula annexa quidam conſtituuntur ad aſſidendum tallage in civitat. burgis & dominicis Regis per Angliam *per capita vel in communi* prout ad commodum noſtrum viderit expedire *ſecundum facultat. tenent.*]

[6. 9 E. 1. Rot. Pat. Memb. 27. *De ſubventione facienda pro reparatione * Pontis London.*] * See pl. 7. 11, 14.— London-Bridge being in great decay, and like to fall, not only King John by his charter 3 Johan. No. 2. commanded it to be repaired, but likewiſe E. 1. granted a patent for a charitable collection through all England towards its reparation. And alſo impoſ'd a cuſtom or impoſition of pontage for ſundry years upon ſeveral commodities, and on every cart, packhorſe, other carriages and paſſengers, towards its repairs, Prynne's Animadv. on 4 inſt. 183, 184. cites Pat. 9 E. 1. M. 27 Pat. 10 E. 1. 8. and Pat. 10 E. 1. M. 18. and which are printed there at length.

[7. 14 E. 1. Rot. Wall. Memb. 6. in 19 E. 1. The King granted *to a vill cuſtom de rebus venalibus* for ſuch time, *ad tuitionem & ſecuritatem partium illarum*, and now recites, that the time is paſt, de gratia ampliori he grants it to them for other time *ad vill. claudend. & pontes reparand. for four years, completo autem termino illo dictæ conſuetudines penitus ceſſent & deleantur &c.*]

[8. 3 E. 1. Rot. Pat. Memb. 13. *Villa Salop * paviandа*, the King grants to *the vill to take* ſo much *of all things ſold there for* 3 *years* &c. Ita quod completo termino it ſhould ceaſe &c.] * See pl. 10, 13.——An impoſition was granted the citizens of London to pave and mend the ſtreets and highways, Temple-Bar, and Weſtminſter, Chancery-Lane, Shoe-Lane, Fetter-Lane, from Portſoken to Tyburn, and from London to Highgate. Prynne's Animadv. on 4 inſt. 186. cites Pat. 9 E. 2. Part 1. M. 25. Pat. 37 E. 3. Part 2. M. 47. Pat. 40. 3 E. Part 2. M. 40. Pat. 51 E. 3. M. 7. Pat. 4 R. 2. Part 1. M. 21. [579]

[9. 3 E. 1. Rot. Pat. Memb. 17. *Pro * muragio* of a vill in Ireland, the King grants to the vill *conſuetudinem of things ſold there for 7 years*, ita quod completo termino it ſhould ceaſe &c. M. 22. Grant of Cuſtom as above to the vill of Nottingham pro muragio for a certain term &c.] * See pl. 12, 14.——So for murage of the city of London, which was then very much out of repair. Prynne's Animadv. on 4 inſt. 184. cites Pat. 10 R. 2. Part 1. M. 30. which is there ſet forth at length.

[10. 6 E. 1. Rot. Pat. Memb. 3. *Toll for* 5 *years* granted to the burgeſſes of Salop *for paving the vill*, and the toll put in certain how much they ſhall take for every thing ſold.] Fol. 172. bis.

[11. Memb. 4. fol. 10. Toll to the town of *Huntingdon pro reparatione pontis for three years.*]

[12. 7 E. 1. Rot. Pat. Memb. 22. Toll is granted for three years to the mayor, ſheriff, and citizens of *London* of all merchandizes Prynne's Animadv. on 4 inſt.

chandizes *in auxilium reparationis muror. & clauſurarum civitat. prædictæ.*]

86. ſays, he finds an impoſition granted to the citizens of London by E. 2. towards the *building of a new tower on the wall near the Freers Minorites.* Pat. 10 E. 2. Part 2. M. 11.

See pl. 8.

[13. 1 E. 2. Rot. Pat. 1. Par. Memb. 1. *Conſuetudines* granted *de rebus venalibus* &c. *for pavement.*]

[14. 18 Memb. 10. 12. & 1 E. 2. Pars 2. Memb. 11. accord. & Memb. 7. *for Murage*, and Memb. 8. *Murage and Pont.*]

[15. 16 E. 1. Rot. Fin. Memb. 1. *De 4 ſolidis captis de ſingulis doliis vini de Breglaw captis*, per mandatum domini regis, more at large in 8 and 10.]

[16. 18 E. Rot. Fin. Memb. 13. Cum Rex dudum precepiſſet ut *de ſingulis doliis vini* honori Sancti Cumham & etiam alior. apud Petram fixam vel Lyſternam Mar. & ad terram regis venientibus quorumcunque eſſent ad opus regis ob certas cauſas *caperentur quatuor ſolidi* ſterlingor. commanded to levy them as arrearages. A. 18 Maii, 16 E. 1. plus in 14 to ſuch purpoſe &c.]

Pynne's Coll. Rec. 1. 13. 84. ſays, the grant was a diſme and a fifteenth to be

[17. 6 E. 3. Rot. Parl. Memb. 4. The parliament granted to the King a 15th, and the King at the requeſt of them granted that the commiſſions lately granted to aſſeſs *tallage* in all cities, boroughs, and demeſnes throughout England ſhould ceaſe, and the like ſhould be no more.]

ſaved of the laiety, ſo as the King will live of his own without grieving his ſubjects with outragious taxes or ſuch like; and thereupon revok'd the new commiſſions for rearing of tallages, and promiſed thenceforth to remiſe the ſame according to the old rate.

Repealed by 1 Car. 2. 4.

[18. 1 E. 3. cap. 7. Whereas commiſſions have been awarded to certain people of ſhires to *prepare men of arms, and to convey them to the King into Scotland or Gaſcoign*, or elſewhere, *at the charge of the ſhire*, the King hath not before this time given any wages to the ſaid preparers and conveyers, nor ſoldiers whom they have brought, whereby the commons of the counties have been at great charge and much impoveriſhed, the King wills that it ſhall be ſo done no more. 4 H. 4. cap. 13. this ſtatute is confirmed.]

[19. 14 E. 3. cap. 1. It is enacted upon the grant of the King, that the *Prelates, Earls*, Barons, and Commonalty ſhall *not be* from thenceforth *charged* or grieved *to make any aid* or ſuſtain charge *if it be not by the common aſſent of the Prelates, Earls*, Barons, and other great men and Commons of our ſaid realm of England, and that in the parliament. (This was upon a grand ſubſidy granted to the King.]

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See pl. 1.

[20. The King *cannot charge the ſubjects* by an impoſition, *unleſs it be for the benefit of the ſubjects who ſhall be charged*, and where they ſhall have *quid pro quo*. 13 H. 4. 14. b. Co. 11. Monop. 86. b.]

[21. The hoſpital of St. Leonard of York was founded by the King of England, and *endowed* by him *of a thrave of corn to be taken*

taken yearly of every plough earing within the counties of York, Cumberland, Weſtmorland, and Lancaſter, within the province of York, of which thrave the hoſpital was ſeiſed time out of mind, and after in time of H. 6. * denied to have this, *whereof they have no ſufficient nor convenable remedy at the common law,* and for this prayed aid by parliament, and it was granted. 2 H. 6. cap. 2.]

* Orig. (deien).

[22. Among the ordinances of 5 E. 2. made by commiſſaries, there is ſuch ordinance, That all manner of *cuſtoms raiſed ſince the coronation of E. 1.* be utterly void, notwithſtanding the charter of E. 1. made to merchants-ſtrangers, becauſe it was *againſt the great charter, and the * liberties of the city of London,* and without the aſſent of the baronage, ſaving to the King for wool, leather, &c.]

* Fol. 1 bis.

[23. Rot. Parl. * 20 E. 3. N. 13, 14. The King *confirms the ordinance of the laſt parliament, not to charge the ſubjects with arms* &c. The like 21 E 3. N. 17. 44.]

* Prynne Cott. Rec. Abr. 48. No. 13 That ſuch as were fin'd for not arraying of men may therefore be diſcharged; to which the King anſwe that he will be adviſed. And ibid. No. 14. is, That all within 6 miles of the ſea may have a ſu ſedeas for arraying of men. The anſwer was, that ſuch as keep the ſea coaſts ſhall have ſuperſedeas.

[24. 25 E. 3. cap. 8. It is accorded and aſſented, that *no man* ſhall be *conſtrained to find men of arms,* hoblers, nor archers, other than thoſe which hold by ſuch ſervice, if it be not by common aſſent and grant made in parliament. 4 H. 4. cap. 13. this ſtatute is confirmed.]

[25. Rot. Scot. 8 E. 2. M. 8. dorſo. The King prays every vill to ſend *unum peditem.*]

[26. 36 E. 3. cap. 11. Rot. Parl. 36 E. 3. N. 26. The Commons make a grant to the King of *wools, leather, and woolfells* for three years, but that it ſhall not be had in example or charge of the commons in time to come, and that the merchants-denizens may paſs with their wools as well as the * merchants ſtrangers, without being reſtrained, and that no ſubſidy or other charge be laid or granted upon the wools by the merchants, nor by any other in time to come, without the aſſent of the parliament † 17 E. 3. Rot. Parl. N. 28. The merchants grant to the King a tax upon wools, and upon this the commons complain in parliament, becauſe the merchants gain by it, and the other commons of the realm pay for it, for the merchants ſell more dear, and for that reaſon.]

* Orig. is (foreigne + Prynne Cott. Re Abr. No 28. is, th cuſtoms o wool ma be at a ma according to the old der, and th 40 s. re vok'd, ſ ing the ſa was the grant of th merchan

which bindeth not the commons. The anſwer was, that it cannot be hurtful to the commons, ſin upon their price ſet, order was, that no man ſhould buy under.

[27. Rot. Parl. 25 E. 3. 1 Part, N. 22. Commons complain of a grant of 40 *s. upon a ſack* made by the merchants, which falls in charge of the people, and not of the merchants; but upon ſhewing of the neceſſity of the King, it is granted to him for three years by parliament.]

Prynne's Cott. Re Abr. 78 No. 22. that th petition was, th the ſu

of wool, viz. of every ſack may ceaſe. The anſwer was, that the ſame was granted for a tim enduring.

[28. Rot. Parl. 22 E. 3. N. 4. Fifteenths granted to the King upon condition to be entred upon the roll in parliament, ſcilicet, among other things that the ſubſidy granted of 40s. upon a ſack of wool for 3 years, ceaſe at the end of it, and that from henceforth no ſuch grant be made by the merchants, * ſince it is only in grievance and charge of the commons, and not of the merchants who buy † for ſo much, be it better or worſe. Another condition is, that the merchants who have deceived the King in a ſack of wool be not pardoned &c.]

* Orig. is (deſicome.) † Orig. is (de tant de leiux au meiux.)

[29. 25 E. 1. cap. 7. And foraſmuch as the more part of the commonalty of the realm find themſelves ſore *grieved with the* * *male-tolt of wools*, that is to ſay, a toll of *40 s. for every ſack* of wool, and have made petition to us for to releaſe the ſame, We at their requeſt have clearly releaſed it, and have granted for us and our heirs, that we ſhall not take ſuch things without their common aſſent and good will, ſaving to us and our heirs the cuſtom of wool-ſkins and leather granted before by the commonalty aforeſaid.]

* They are called mala tolneta, when the thing demanded for wares or merchandizes do ſo burden the commodities as the merchant cannot have a convenient gain by trading therewith, and thereby the trade itſelf is loſt or hindred. And in divers ſtatutes maletout or maletot or maletout is a French word, and ſignifies an unjuſt vexation. 2 Inſt. 58.—The King cannot *ſet any new impoſt* upon the merchant, and therefore the act 9 *H.* 3. *cap.* 30. *provides not only affirmatively*, viz. *per antiquas & rectas conſuetudines, but privately alſo*, ſine omnibus malis tolnetis, within which words new impoſitions are included, and here called *mala tolneta*, as oppoſite to ancient and rightful cuſtoms or ſubſidies granted by authority of parliament. 2 Inſt. 58.—Male-tolt was an impoſt upon ſtaple commodities, per Fleming Ch. B. who ſaid, that a great ſubſidy was given to the King for the repeal of this maletot, with this clauſe, viz. that it ſhould never be drawn into precedent, which ſhews that this maletot was rightly impoſed, or otherwiſe the parliament would never have given ſo great a recompence for the abrogation of it. Lane 30. Mich. 4 Jac. in Scacc. in Bates's Caſe.—But after in the 13 E. 3 becauſe it was a thing of ſo great conſequence to the Crown, it was reviv'd and made 40s. for wool and woolfells, and 3l. for leather for denizens, and double for ſtrangers; and in the 14 E. 3. a petition in parliament was to abate it, and for a great ſubſidy it was releaſed; and in the 18 E. 3. it was reviv'd again, and a new petition was made in parliament, and this petition was continued until the 36 E. 3. and then it was abated, and alſo by the 45 E. 3. it was again abated (ſo that it ſeems that between theſe times it was reviv'd), but it did not continue long; for in 48 E. 3. it was again reviv'd, and for wool the impoſt was 50s. & ſic de ſingulis. And in 1 R. 2. after, it was anſwer'd to the King, as appears in the accounts here. And in 5 R. 2. it was again ſuppreſs'd by parliament for a ſubſidy granted to the King, with a ſaving of ancient rights. All theſe ſtatutes prove expreſsly, that the King had power to increaſe the impoſt, and that upon commodities of the land, and that he continually uſed this power notwithſtanding all acts of parliament againſt it. Per Fleming Ch. B. Lane 30. Bates's Caſe.

[30. 34 *E.* 1. *cap.* 3. *Nothing from henceforth ſhall be taken of ſacks of wool by colour or occaſion of maletolt.* It ſeems by 22 E. 1. Rot. Fin. Memb. 2. that this cuſtom was granted by the merchants.]

The King had obtained by free conſent and good will in parliaments precedent aids, ſubſidies or taſks, for

[31. 25 E. 1. cap. 5. 6. Foraſmuch as divers people of our realm are in fear that the aids and taſks which they have given to us before-time towards our wars, and other buſineſs of their own grant and good will (howſoever they were made), might turn to a bondage to them and their heirs, becauſe they might at another time be found in the rolls, and likewiſe for the priſes taken throughout the realm by our miniſters, We have *granted for us and our heirs, that we ſhall not draw any ſuch aids, taſks nor priſes, into a cuſtom*, for any thing that hath been done heretofore, be it by roll or any * other precedent that

* Fol. 174 bis.

that may be found. And further we have granted to all, Spiritual, Temporal, and Commons, that for no buſineſs *from henceforth we ſhall take ſuch manner of aids, taſks, nor priſes, but by the common aſſent of all the realm, and for the common profit thereof, ſaving the ancient aids* and priſes due and accuſtomed.] the maintenance of the his wars in foreign parts, which howſoever they were granted in

full parliament, yet (as here appeareth) many men doubted might turn in ſervage of the ſubjects of the realm; for that it was holden that they ought not to contribute to the maintenance of the King's wars out of the realm; and thereupon Bohun Earl of Hereford and Eſſex, High Conſtable of England, and Bigot Earl of Norfolk and Suffolk, and Marſhal of England, (for that it concerned matter of arms and war) exhibited a petition to the King in French, in anno 25 E. 1. before the making of this act, which Lord Coke ſays he has ſeen a ciently recorded on behalf of the Commons of England, concerning the ſaid matter; and thereupon the King at this parliament yielded to this act, that ſuch aids, taſks or takings ſhould not be drawn to cuſtom for any thing that had been done in that behalf. 2 Inſt. 528. [582]

[32. 34 *E.* 1. *cap.* 1. *No tallage or aid ſhall be taken or levied by us or our heirs in our realm, without the good will and aſſent of archbiſhops, biſhops, earls, barons, knights, burgeſſes, and other freemen of the land.* Rot. Parl. 25 E. 2. 2 Part. N. 12. accordingly.] * 12 Rep. 32. S. P.

[33. Rot. Parl. 22. E. 3. N. 4. That no impoſition, tallage, nor charge * by way of loan or other whatſoever manner be laid by the Privy Council of the King without the aſſent of the Commons in parliament.] Prynne's Cott. Rec. Abr. 69. No. 4. ſame year and roll. but not S. P.—* Orig. is (da preſter.)

[34. Rot. Parl. 22 E. 3. N. 4. Upon grant of fifteenths, the Commons ſhew their great charges, ſcilicet the reaſonable aid which was pardoned by the ſtatute in the 14th year, whereby every fee is charged of 40s. without grant of the Commons, whereas by ſtatute the fee ſhould be charged but of 20 s. * the which charges are levied of the Commons; and thereupon they granted the fifteenths upon certain conditions.] Prynne's Cott. Rec. Abr. 69. No. 4 —— See ſupra, pl. 28.— * Orig. is (la que.)

[35. Rot. Parl. 8 H. 5. N. 6. The Commons pray, that where the King and his progenitors time out of mind have been lords of the ſea, and now by the grace of God it is come to paſs, that our lord the King is lord of the coaſts on both parts of the ſea, to ordain, that upon *all ſtrangers paſſing over the ſaid ſea* ſuch impoſition to the uſe of the King [be laid] to take what to him ſhall ſeem reaſonable *for the ſafeguard of the ſea.* Anſwer. The King will be adviſed.]

[36. 2 H. 4. N. 22. Becauſe now of late diverſe *commiſſions* were made to diverſe cities, boroughs, and vills of the realm, *to make certain barges* and balingers without aſſent of parliament, and otherwiſe than has been done before this time, the ſame *Commons pray* the King, *that the ſaid commiſſions be repealed,* and that they be of no force nor effect. To which it was anſwered, that the ſaid King wills that the ſaid commiſſions be repealed in all points; but for great neceſſity which he has of ſuch veſſels for defence of the realm, in caſe the wars * happen, the King will commune of this matter with the Lords, and Prynne's Cott. Rec. Abr. 406. No. 22.— * Orig. is (ſe preignent.)

then after ſhew it to the ſaid Commons for the having their counſel and advice thereupon.]

Prynne's Cott. Rec. Abr. 70. No. 8. That all wool and other merchandizes may freely paſs without any loans or other ſubſidies over the due cuſtoms.

[37. Rot. Parl. 22. E. 3. N. 8. The Commons pray, that *paſſage of wools and other merchandizes be open without making* * *loans* over, and beſides the cuſtom from the merchants, and † other the cuſtoms of the King for a certainty, ‡ the which loan turns all to the profit of the ſaid merchants in outragious grievance and miſchief of your Commons. Anſwer, Be the paſſage open, and that every one paſs freely, ſaving to the King that which is due to him.]

——* Orig. is (Appreſts)——† Orig is (aunt.)——‡ Orig. is (le a Priſt.)

* Orig. is (Arſt.)

[38. Rot. Parl. 38 E. 3. N. 11. enacted, That *merchants may freely merchandize all manner of merchandizes* without being * confined to any, notwithſtanding any charter.]

[583]

* Orig. is (de pardela.) Prynne's Cott. Rec. Abr. 537. No. 40 of

[39. Rot. Parl. 1 H. 5. N. 41. The Commons pray that all merchants may *export to any* place * *from any place, or import any goods (except goods of the ſtaple) at their pleaſure, paying the cuſtoms and other duties due* to you, any proclamation to the contrary notwithſtanding &c.]

the ſame year, ſeems to be ſame roll, and is as here, but mentions arras in particular, and that they may ſell to all men except to the merchants of Jeane, paying their due cuſtoms: and the anſwer was as in pl. 40. here.

[40. Anſwer. The King will be adviſed by his council. (It ſeems *this was againſt companies*).]

Fol. 175. bis.

[41. Rot. Parl. 45 E. 3. N. 42. Pray that no impoſition or charge be laid upon *wool-fells*, * *wools and hides*, other than the cuſtom and ſubſidy granted to the King, without aſſent of parliament. Anſwer, The King conſents, and that none be laid after the ſtatute be repealed.]

* Orig. is (Launts & Queres.)

Prynne's Cott. Rec. Abr. 114. No. 42. ſays, The print touching the impoſitions on wools, cap. 4. agrees with the record.——Rot. Parliam. 45 E. 3. No impoſition or charge &c. ſhall be ſet without aſſent of parliament. 2 Inſt. 61.

[42. 9 H. 6. 13. By Babington, in this grant (ſcilicet, of the ſubſidy *of tonnage and poundage*) the *king is not inherited* but for certain time by authority of parliament; *but of petit cuſtoms he is* inherited. Br. Cuſtoms, 26.]

Prynne Cott. Rec. Abr. 75. No. 21. That the payment of merchants for waſting over their goods, may ceaſe.——Mr. Prynne adds, that

[43. Rot. Parl. 25 E. 3. 1 Part, N. 21. The Commons pray that where 6d. of the pound and 2s. of a ſack of wool, and 40d. a ton of wine, was *granted by the merchants for having conduct over the ſea*, for ſaving their lives and merchandizes there, *whereas no conduct at any time was*, by which the merchants have loſt their lives and merchandizes, to great diſhonour of our lord the King, undoing of the merchants, and to the great damage of his people, *that it pleaſe the King that the merchants may make their own conduct* for ſaving of their lives and merchandizes, and that the cuſtoms aforeſaid ceaſe, and

be

* be not demanded. Anſwer. The King will be adviſed, and thereupon will anſwer them in † proper manner.] ſuch payments in ſhort time grew to

a cuſtom called tonnage and poundage.——* Orig. is (ne ſolent mes demandes)——† Orig. is (coveable.)

[44. 47 E. 3. A ſubſidy of 6d. of every pound of merchandize (except wools &c.) exported and imported, and 2s. of every tun of wine for one year without conſideration, but for the ſecond year upon conſiderations, if the war continue &c.]

[45. 5 R. 2. *cap.* 3. *Upon the proffer made in parliament by the mariners of the weſt, to make an army upon the ſea for two years, the Lords and Commons grant to the King a ſubſidy of* 2s. upon every tun of wine, and 6d. of the pound for all merchandizes exported and imported as well of woollen clothes, as of other merchandizes (except wools, woolfels, and leather), beſides the cuſtoms due by two years &c. *So always that the money thereof coming be wholly applied upon the ſafe keeping of the ſea, and no part elſewhere;* and at the requeſt of the Commons, the King willed, that two men there named ſhould be the receivers and keepers of the ſaid ſubſidy, and certain other perſons to be aſſigned by the King to be comptrollers to the ſaid collectors; *and the people being in the ſaid army ſhall have wholly all their gains and profits to be parted betwixt them during the ſaid army aboveſaid; and the admirals and other of the ſaid army ſhall be aſſured to ſave the King's friends and allies without damage to be done to them or any of them by any way; and if they do, and that be duly proved, they ſhall bind them upon a grievous pain thereof duly to make amends.*] [584]

46. 50 E. 3. No. 182. Prynne's Cott. Rec. Abr. 138. The Commons petition, that ſuch as ſhall of their own authority *lay new impoſitions without aſſent of parliament*, may *loſe life, member*, and other forfeitures. Anſwer, Let the common law, heretofore uſed, run.

47. In the Parliament Roll at large, of 51 E. 3. No. 25. the prelates, dukes, earls, barons, commons, citizens, burgeſſes, and merchants of England, in this parliament, petition the King not only for a pardon in general, and of fines and amerciaments before the Juſtices of Peace, not yet levied in ſpecial (which Cotton's Abridgment only toucheth), but they likewiſe ſubjoin thereto this memorable requeſt (totally omitted by the Abridger), which Mr. Prynne ſays he thought meet here to ſupply; viz. *That* in time to come, your ſaid prelates, earls,&c. *may not be henceforth charged*, moleſted, nor grieved *to make any common aid*, or ſuſtain any charge, *unleſs it be by common aſſent* of the prelates, dukes, lords and barons, and other people of the commons of your realm of England, *and that in full parliament*: nor no impoſitions put upon their wools, wool-fells, and leather, or any the ancient cuſtom; that is to ſay, of one ſack of wool, half a mark, and of 300 wool-fells, half a mark; and of one laſt of ſkins, one mark of cuſtom only; according to the ſtatute made the 14th year of your reign; ſaving to you the

the ſubſidy, granted unto you the laſt parliament for a certain time, and not yet levied. To which laſt clauſe the King then gave this anſwer; and as to that, That no charge be laid upon the people without common aſſent the King is not at all willing to do it without great neceſſity, and for the defence of the realm, and where he may do it with reaſon. And as to that, That impoſitions be not laid upon their wools without aſſent of the prelates, dukes, earls, barons, and other people of the commons of his realm; there is a ſtatute already made, which the King wills that it ſhall ſtand in it's force. Prynne's Cott. Rec. Abr. 152. where Mr. Prynne deſires the Reader to take notice of this.

2 Inſt. 63. Lord Coke ſays, that the common opinion was, that this judgment was againſt law and divers expreſs acts of parliament.— But 12 Rep. 32. Lord Coke ſays, Note, upon a conference between Popham Ch. J. and myſelf, upon a judgment given lately concerning the impoſition on currants; and upon conſideration of diverſe books and ſtatutes, and diverſe records which we have ſeen, it ap- [585] peared to us that the King cannot at his pleaſure put any impoſition upon any merchandize to be

48. An information was exhibited againſt B. a merchant of the Levant, reciting that the *King by his letters patents under the great ſeal*, had *commanded his treaſurer to command the cuſtomers* and receivers *to aſk and receive of every merchant denizen, who brings* within any port within his dominions *currants, 5 s. a hundred for impoſt above 2s. 6d. which was the poundage* by the ſtatute of every hundred; and it was alleged that B. had notice thereof, and that he had brought currants into the port of London, and refuſed to pay the ſaid 5s. in contempt of the King. B. *pleaded that he is an Engliſh merchant*, and an adventurer, and a denizen, and that he made a voyage to Venice, and there bought currants, and imported them into England; *and recited the ſtatute 1 Jac. 33. which grants 2s. 6d.* for poundage, *and ſaid that he had paid that, and therefore refuſed to pay the 5s.* becauſe it was impoſed unjuſtly and unduly againſt the laws of the land; whereupon the King's attorney demurr'd. And Fleming Ch. B. in his argument ſaid, that the ſtate of the caſe is touching a new cuſtom; that impoſitions or cuſtoms are duties, or ſums of money newly impoſed by the King without parliament on merchandizes; and that here the impoſition is not upon B. nor the Venetian merchants, but upon all men who import currants. That the *impoſition is properly upon currants, and for them*, and *not upon the defendant nor his goods, who is a merchant*; for *upon him no impoſition ſhall be but by parliament*. And the Duke of Venice having impoſed upon our merchants a ducat by the hundred, which was foreſeen to be a means that in time would waſt the treaſure of the land, therefore Queen Elizabeth granted to the company of merchants of the Levant, that none ſhould bring currants but by their licence, and they impos'd upon them who did import, and were not of their company, if he were a denizen 5 s. if he were a ſtranger 10 s. and that this was paid by the merchants without contradiction. And after judgment was given for the King. Lane 22. to 31 Mich. 4 Jac. in the Exchequer, Bates's Caſe.

imported to this kingdom, or exported, *unleſs* it be *for advancement of trade and traffick* (which is the life of every iſland) *pro bono publico*; as if in foreign parts any impoſition is put upon the merchandizes of our merchants non pro bono publico, and to make equality, and advance trade and traffick, the King may put an impoſition upon their merchandizes; for this is not againſt any of the ſtatutes, which are made for advancement of trade and merchandize, or of the ſtatute of *magna charta cap.* 30. which is *ſi aliqui mercatores de terra contra nos guerrina inveniantur in terra noſtra in principio guerræ, attachientur &c. Quo modo mercatores terræ noſtræ tractantur,*

qui

qui nunc inveniantur in terra illa contra nos guerrina ; et ſi noſtri ſunt ibi, illi ſalvi ſunt in terra noſtra ; for the end of all ſuch reſtraints is ſalus populi : and ſo in this caſe of currants the impoſition was impoſed upon the ſaid reaſon to make equality, and for the advancement of trade and traffick ; and therefore ſuch inquiſition was lawful.

49. 1 *W. & M. Stat.* 2. *cap.* 2. *ſ.* 1. *declared among other things, that levying money for the uſe of the Crown by pretence of prerogative, without grant of parliament for longer time, or in other manner than the ſame is or ſhall be granted, is illegal.*

(F. a) * Tonnage and † Poundage.

* Vide (E. a) pl. 43. in notis there—— Tonnage *is* a ſubſidy out of wines of all ſorts, and was firſt granted by parliament 5 R. 2. where 2s. for every ton of wine, to be imported into England, was granted to the King for 2 years ; and this was for maintenance of a fleet upon the ſea, to ſuppreſs the pirates ; but after by parliament 3 E. 4. tonnage was granted to this King for term of his natural life in this manner, viz. 2s. for every ton of wine, and (over and above thoſe 2s.) for every tun of ſweet wine 3s. more. See the ſtatute 12 E. 4. cap. 3. And this ſubſidy was granted to H. 8. and E. 6. with this addition in the time of E. 6. that for every awm of Rheniſh wine, alſo 12d. ſhall be paid. And after the time of E. 6. this ſubſidy of tonnage was granted by ſeveral acts of parliament to Queen Mary, Queen Elizabeth, and King James, during their natural lives. Dav. Rep. 11. a. b. Mich. 5 Jac. B. R. in the Caſe of Cuſtoms. ——2 Molloy 341. cap. 1. ſ. 8. S. P.

† Poundage *is* a ſubſidy granted out of all commodities exported and imported, except wines and the ancient ſtaple wares, and payable by all merchants, denizens and aliens, and is the twentieth part of the value of merchandizes, viz. 12d. in the pound, and was firſt granted by parliament in England 31 H. 6 during the life of this King ; which grant was immediately reſumed. But after this, viz. 3 E. 4. this ſubſidy of poundage was granted to the ſaid King during his life ; and the ſame grant was renewed to E. 6. Queen Mary, Queen Elizabeth, and King James, during their ſeveral lives, by ſeveral acts of parliament. Dav. Rep. 11. b. in the Caſe of Cuſtoms.—— 2 Molloy 341. cap. 1. ſ. 8. S. P.

[1. 1 H. 4. N. 50s. upon ſack of *wool* granted *for three years.*]

[2. 2 H. 4. N. 9. For defence and good government of the realm, 2s. of every ton of *wine*, and 8d. of the pound of *all merchandizes* (except wool-ſkins and * ſheep-ſkins &c.) granted to the King *for two years.*] Prynne's Cott. Rec. Abr. 404. 405. No. 9. * Orig. is (peaux launts)

[3. Rot. Parl. 1 H. 5. N. 17. It was granted *for* * *a year under certain conditions.* 2 H. 5. 2 Part. N. it was granted *for three years*, 3 H. 5. 2. N. 5. it was granted *for life*, but that it ſhould not be put in example.] * Prynne's Cott. Rec. Abr. 535. No. 17. ſays it was granted for 4 years.

[4. Rot. Parl. 3 E. 4. N. 24. The ſubſidy of tonnage and poundage granted by bill indented to Edward 4. *for life, with diverſe proviſo's added by the Commons.*] Prynne's Cott. Rec. Abr. No. 24. but is there mentioned as in 4 E. 4. and takes no notice of any proviſoes.

[5. Rot. Parl. 14 E. 4. N. 46. *The ſtatute of tonnage and poundage recites, that where it was enacted in the parliament held* 3 *E.* 4. *whereas in the book printed it is recited to be held the* 4 *E.* 4.] [586] Fol. 176. bis. Prynne's Cott. Rec. Abr. 700. No. 46. ſays the print touching ſubſidies, cap. 3. agreeth with the record.

[6. Rot. Parl. 1 R. 3. The ſubſidy of tonnage and poundage granted to R. 3. *for life, ſaving* to the merchants of Caleis the cuſtoms of morling and ſhorling, and other proviſoes.]

(G. a) * Cuſtoms.

* Cuſtoms are duties certain and perpetual, payable to the King, as inheritance of his Crown for merchandizes tranſported over ſea from one realm to another; for for things vendible by way of merchandize, carried from one port to another within the ſame realm by ſea or by land, no merchant is bound to pay any cuſtom. Thoſe duties called cuſtoms are divided into *three kinds*. 1ſt. *Magna & antiqua* cuſtuma. 2dly. *Parva & nova* cuſtuma. 3dly. *Priſage and butlerage*. And in all theſe the Crown has a certain and perpetual inheritance. 1ſt. The grand and ancient cuſtom is payable out of native or home-bred commodities of three ſorts, viz. wool, woolfels and hides. 2. The new and petit cuſtoms is 3d. in the pound, payable by merchant ſtrangers only for all commodities by them imported and exported, as is expreſſed in the charter of 31 E. 1. 3. Priſage is a cuſtom taken of wines of all ſorts, [for which ſee (R) ſupra.] Dav. Rep. 8. a. b. Mich. 5 Jac. B. R. in Ireland, in the Caſe of Cuſtoms.——The ancient and grand cuſtom is parcel of the ancient inheritance of the Crown, and is as ancient as the Crown itſelf; inheret ſceptro, and is due of common right, and by preſcription, and not by grant or benevolence of the merchants, or by act of parliament. Dav. Rep. 8. b. cites D. 1 Eliz. 165. b.——But becauſe every thing which is due of common right and by preſcription ought to have reaſonable cauſe of commencement, it was noted and obſerved that this cuſtom was firſt paid to the Crown for four principal cauſes or reaſons. 1ſt. For leave to depart the realm, and to carry the commodities of the realm out of it. Vide D. 1 Eliz. 165. b. and the ſtatute of 18 E. 3. cap. 3. 2. For the intereſt which the King has in the ſea, and in the arms thereof. 22 Aſſ. pl. 93. 15 Eliz. D. 326. 3. Becauſe the King is guardian of all the ports and havens of the realm, which are oſtia ſeu januæ regni, and the King is cuſtos totius regni. 4. For waitage and protection of merchants upon the ſea againſt the enemies of the realm, and againſt pirates, who are common enemies to all nations. Dav. Rep. 9. b. in the Caſe of Cuſtoms.——The petit and new cuſtom payable by merchant ſtrangers only had commencement in the † time of E. 1. for before this time the duties payable by merchant ſtrangers for all foreign commodities imported (except wine) and for all native commodities exported (except the ſtaple-ware of wool, woolfels and hides) were uncertain; for the King by his prerogative took to his uſe and at his price, ſo much and ſuch portions of their merchandizes as he had need, by name of priſes, which were always uncertain. Dav. Rep. 9. b. in the Caſe of Cuſtoms.——Priſage of wines is alſo a cuſtom due by preſcription, [but for this ſee (R).] Dav. Rep. 10. a. in the Caſe of Cuſtoms.

† 31 E. 1. No. 44. and ſee the charter at large, and matters relating thereto, Prynne's Animadv. on 4 Inſt. 22 to 26.——2 Molloy 330 to 341. cites the ſame charter; and ſee 2 Molloy 327. 328 ſ. 6. 7. S. P. as to magna cuſtuma & antiqua & parva cuſtuma.

Hale Ch. B. ſaid, that certainly a cuſtom was due to the King at the common law for wool, woolfells and leather, long before the giving of half a mark by the ſtatute of E. 1. and that appears by the Red Book in the Exchequer, but not according to the proportion ſettled by that ſtatute; but ſome cuſtom was due and paid. Hard. 214. Mich. 13 Car. 2. in Scacc. in Caſe of Vere v. Sampſon.——But ſee Vaugh. 161. 162 Hill. 23 & 24 Car. 2. C. B. in Caſe of SHEPPARD v GODNOLD, that thoſe cuſtoms called the old or antiquæ cuſtumæ, were granted to King Ed. 1. in the third year of his reign by parliament as a new thing, and was no duty belonging to the Crown by the common law.

‡ Prynne's Cot. Rec. Abr. 418, No. 28. mentions the grant, but not the reaſon of giving it.

——‖ Orig. is (Blee Beſtaile.)

[1. †4 H. 4. N. 28. HAving conſidered of the war of Scotland, and rebellion in Wales, and ſafeguard of the ſea, and of the marches of Calais, Guienne, and land of Ireland, granted to the King, eſpecially for the defence of the realm of England, 50 *s. a ſack of wool, woolfells, and of ſkins* &c. for three years; and for defence of the ſaid realm 3s. of every ton of wine (except thoſe which are taken to your uſe for priſe), and 12d. a pound (except the things aforeſaid, and ‖ corn for cattle &c. but cloth is not excepted), to have it for two years and a half.]

Prynne's Cott. Rec. Abr. 406. [587] No. 18 ſeems to be the ſame as mentioned

[2. 2 H. 4. N. 17. The Commons ſhew to the King, that whereas at the laſt parliament they granted the *ſubſidy of wools* to continue for certain time &c. and now lately the Commons have underſtood, that the ſame *King has granted to diverſe perſons certain annuities* to take for term of their lives of ſubſidies of wools againſt the form of the ſaid grant, and in very great diſcomfort

diſcomfort and deſolation of the ſaid Commons, by which the ſaid *Commons pray, that* all patents ſo granted of the ſaid annuities to take of the ſaid ſubſidies be utterly revoked and repealed, and *that the ſame ſubſidy be* * *diſpoſed of to the uſe for which it was granted*, which prayer ſeems to our lord the King juſt and reaſonable, and he has conſented to it.] here to be No. 17.

* Orig. is (dependus en le Ueps.)

[3. 51 H. 3. 113. B. Stat. of the Exchequer, the two principal collectors of the cuſtom of wools ſhall pay all money which they have received of the ſaid cuſtom, and ſhall make account from year to year of all parcels received in any ports or other places of the realm. Vide reſiduum. (It ſeems this cuſtom was given for a time.]

[4. Among the petitions of the parliament of the 18 E. 1. there is ſuch petition, Ballivi Johannis de Brittan in com. Eborum exigunt novam cuſtumam *de quolibet animali, excepto* &c. videantur recorda &c. & mandatur ſeneſchallo quod ſit coram juſticiariis ad placita regis oſtenſurum &c. & interim animalia replegientur.]

[5. 16 E. 1. Rot. Pat. M. 13. Cuſtodes nove cuſtume per totum regnum de lanis pellibus & coriis. 13 E. 1. Rot. Pat. M. 5.]

[6. 10 E. 1. Rot. Clauſo Memb. 4. Mandatur vic. Northumb. de levanda pecunia nove cuſtume &c. & ſpecial. fuit ad Memb. 5. 24 E. 1. Rot. Clauſo. Memb. 5. collectoribus nove cuſtume.]

[7. 14 E. 3. 21. *The King grants* for him and his heirs *not to demand*, aſſeſs, or take, or ſuffer to be taken of any Engliſhman *more cuſtom of a ſack of wool than 6s. 8d.* and upon woolfels and leather the ancient cuſtom.] Prynne's Cott. Rec. 23. No. 21. is not to this purpoſe.

8. 3 E. 1. Rot. Finium Memb. 24. By the new cuſtom, which is granted by all the great men of the realm, and by the prayer of the commons of the merchants of all England it is provided, that in every in the vill where the port is, ſhall be choſen two of the moſt knowing and moſt puiſſant, that the one * piece ſhall be in the cuſtody of one, and one who ſhall be aſſigned by the King ſhall have another piece, and ſhall be ſworn, that they will duly receive and anſwer the King's money, that is to ſay, of every ſack of wool half a mark, of every 300 † pelts, which are a ſack, half a mark, and of every laſt of ‡ hides a mark, iſſuing out of the realm, as well in Ireland, in Wales, as in England, within franch. and without in every port, ‖ where, if they may iſſue, ſhall be two honeſt men ſworn, who ſhall not ſuffer the pelts nor hides &c. under pain of forfeiture &c. ib. eadem Memb. 1. in Latin more often called *nova cuſtuma*. In dorſo & tota communitate Angliæ.]

* Orig. is (le une pece de un ferra en garde)

† Fol. 177. bis.

‡ Orig. is (Quire.)

‖ Orig. is (ou ſi pount iſſerleques.)

[9. 25 E. 1. cap. 7. The King releaſes the *maletolt* of wool, *ſaving the cuſtom of wool &c. granted before by the commonalty.* Vid. ſame Cuſtom mentioned in 27 E. 3. cap. 1. * Such Rot. Pat. 3 E. 1. Memb. 1, 2. Vide Rot. Fin. Memb. 24. in dorſo, this grant is recited, and the King demands ſuch grant to be

* Orig. is (tel.)

made in Ireland &c. Convocatis omnibus &c. Ibidem in dorſo recited to be granted by parliament *pluribus de cauſis ad rogationem regis* &c. three or four foris ibidem in dorſo, and grant † thereof in Ireland by the parliament of England. Note, that this grant was *to E. 1. and his ſucceſſors* &c. Vid. ib Memb. 23. in dorſo plus &c. Vid. Memb. 25. 6 E. 1. Rot. Pat. Memb. 20. Collectors & cuſtodes made of this new cuſtom in Ireland &c. and vid. this.]

† Orig. is (de cela.)

[588] [10. 10 E. 1. Rot. Fin. Memb. 5. De nova cuſtuma regis in Hibernia commiſſa &c.]

[11. 10 E. 1. Rot. Fin. Memb. 4. the ſame.]

[12. 28 E. 1. Rot. Fin. Memb. 5. The King aſſigned one to receive *cuſtuma lanæ coriorum* &c.]

Prynne's Cott. Rec. Abr. 598. No. 12. does not touch this point.

[13. 9 H. 6. 12. The Queen had an annuity granted to her by the King out of magna cuſtuma.]

—S. C. cited Dav. Rep. 9. a. b. in THE CASE OF CUSTOMS. And adds, that this is an argument that the King has a greater eſtate in the grand cuſtom than for his own life.

[14. 36 E. 3. cap. 11. it is enacted, That after 3 years (which was the time that more was granted by the parliament) that *nothing ſhall be taken* or demanded of the commons, *beſides the ancient cuſtom of half a mark upon a ſack of wool* &c.]

[15. 1 E. 1. Rot. Pat. Memb. 5. *Proclam. quod mercatores exerceant per antiquas conſuetudines abſque onere novarum conſuetudinum & exactionum &c.*]

[16. 22 E. 1. Rot. Fin. Memb. 2. Pro mercatoribus Hiberniæ de cuſtuma lan. pell. & corior. &c. licet in ſubſidium guerre quam pro recuperanda terram noſtram Vaſcon. contra Gallicos movere intendimus mercatores regni noſtri gratanter conceſſ. quod de quolibet ſacco lane fracte, que per biennium vel triennium, ſi tantum durant guerra noſtra, de noſtro regno ad partes tranſmarinas ducet. habeamus 5 marcas; & de quolibet ſacco lane alterius vel pellium lanatarum que ſimilit. tranſducent. tres marcas; & de quolibet laſto corior. quæ ſimilit. tranſducent. quinque marcas; volentibus tamen mercatoribus Hibern. quibuſdam de cauſis gratiam in hac parte facere ſpecialem vobis mandamus quod de quolibet ſacco lane vel pellium lanatarum & ſimilit. de quolibet laſto corior. de quibus dimid. marc. prius capi ſolebat ad cuſtuma, capi faciatis unam marcam durante guerra predicta &c.]

[17. 31 E. 1. Rot. Fin. Memb. 16. *De nova cuſtuma in Hibernia colligenda* &c.]

[18. 35 E. 1. Rot. Fin. Memb. 13. *De exitibus cuſtumæ vinorum in Hibernia &c.*]

[19. 31 E. 1. Rot. Fin. Memb. 5. Cuſtomer aſſigned ad colligend. tam novas cuſtumas quam antiquas conceſſas &c. a mercatoribus &c. Memb. 6. De ſupervidendo negot. nove cuſtume de mercatoribus Angl. colligend. at large throughout &c. Memb. 12. De nova cuſtuma in London colligend. Memb. 20. Of removing of officers de * nova cuſtuma, and making of others &c. Memb. 14. De nova cuſtuma colligenda &c.]

* Fol. 178. bis.

[20.

[20. 31 E. 1. accordingly throughout. 1 E. 2. Memb. 9. 2 E. 2. M. 5.]

[21. 35 E. 1. Memb. 10. Recital of a *grant of nova cuſtuma by the merchants &c.* Ibid. Memb. 11. which [was] granted *pro libertatibus.*]

[22. 30 E. 1. Rot. Pat. M. 1. 34 E. 1. Rot. Fin. M. 5. Grant of Cuſtom *pro vino for liberties* 4. *in ducatu* for all ſuch wine *quod in regnum & unde frettum marinariis ſolvere tenebantur.*]

[23. 16 E. 2. Rot. Fin. Memb. 4. De cuſtuma 2s. de vinis colligend. 35 E. 1. Rot. Fin. M. 13. De exitibus cuſtume vinor. in Hibernia &c.]

[24. 4 E. 2. Rot. Fin. M. 14. De cuſtuma vini colligenda granted to E. 1 for liberties.]

[25. 31 E. 1. Rot. Chart. Memb. 3. 44. King grants diverſe liberties to merchants-ſtrangers, for which the ſaid merchants grant to the King and his heirs increaſe of their ancient cuſtoms of wine, hides, pellium lanatarum &c. diverſe other things, and the time and in the end the King grants for him and his heirs, *that nothing more ſhall be impoſed* &c. Vid. the *Cuſtom of Srangers* mentioned in 27 E. 3. cap. 1. ſcil. of every ſack of wool 10s. of every 300 woolfells 10s. of every laſt of leather 20s.] [589]

[26. 5. E. 3. Rot. Fin. M. 15. De novis cuſtumis colligendis recited to be granted to E. 1. pro libertatibus.] Prynne's Cott. Rec. Abr. 10. No. 15. does not concern this point.

[27. 1 E. 2. Rot. Pat. Part 1. M. 4. confirms novam cuſtumam lanar. pell. &c. ultra antiquam cuſtumam per mercatores alienigenos conceſſam &c.]

[28. Vid. 27 E. 3. cap. 26. mentions the charter made by his grandfather to the merchants ſtrangers, and by himſelf confirmed, by which 3d. in the pound is to be paid to him for merchandizes imported.]

[29. 30 E. 1. Rot. Fin. Memb. 13. grants *cuſtodiam peſagii plumbi averii de pondere & tronagii lanarum* in villa noſtra de *Kingſton ſuper Hull qui* valent &c. rendring farm &c.] See pl. 31.

[30. 33. E. 1. Rot. Fin. Memb. 16. De *tallagio* aſſidend. *in* villa de *Stamford & Grantham* ad opus regis, que ſunt de antiquo dominico corone noſtre &c.]

[31. 2 E. 2. Rot. Fin. Memb. 5. De *cuſtodia peſagii de Kingſton ſuper Hull cuſtod. peſagii plumbi averii de pondere & tronagii lanarum &c.*] See pl. 29.

[32. K. H. 3. granted *to the Freres of St. Bartholomew* of Smithfield *de duobus piſcibus de quolibet onere piſcium tranſeunt. Pont. Lond.* verſus dict. civitat. quos reges ſemper habere ſolebant &c. 4 E. 2. lib. Parl. fol. 83.]

[33. 1 E. 1. Rot. Pat. Memb. 18. Cum rex *novum auxilium in regno diverſis mercatoribus ad certum tempus commiſerat ſalvis foris facturis* ratione predict. auxil. extra regnum aſportat. vel etiam non ſolut. Commiſſion was awarded to inquire of the forfeiture of which the merchants have not anſwered.]

[34. 25 E. 1. 7. The cuſtom of *male-tolt of wools raiſed without parliament, diſcharged*, and enacted that *no ſuch cuſtom ſhall be raiſed without* their *common aſſent*, ſaving to us and our heirs the

the cuſtom of wools, ſkins, and leather, granted before by the commonalty aforeſaid &c.]

Tho' the word (bays) is not mentioned in this act, yet the generality of the words cloths, as well kerſies as others, compriſe all; and there cannot be more ſignificant and comprehenſive words to include all manner of cloths. Per Hale Ch. B. Hard. 215. Mich. 13 Car. 2. in Scacc. in Caſe of Vere v. Sampſon & al.

[35. 17 R. 2. 2. Every man may *make and ſell clothes*, as well *kerſeys* as other, *of ſuch length and breadth as him pleaſe, paying the aulnage*, ſubſidy, *and other devoyres*, ſcilicet, of every piece of cloth after the rate 17 R. 2. cap. 3. The merchants and workers of clothes called worſted, may bring their bolts of ſingle worſted to what parties them pleaſeth (ſaving to * the King's enemies) paying the ſubſidies and cuſtoms thereof due, without the devoyres of Calice.]

* Fol. 179. bis.

[36. 27 E. 3. cap. 4. ſtat. 1. A *ſubſidy* granted of every cloth ſold (in England) to take of the ſeller over the cuſtoms thereof due, ſcilicet, *of every cloth of aſſiſe wherein there is no graine* 40*d.* &c.]

[37. 11 H. 6. cap. 9. recites divers ſtatutes of proviſo that *every one may ſell clothes called ſtreits, paying* to the King *the aulnage, ſubſidy*, cuſtoms, *and other devoires*, that is to ſay, of every cloth, and of every piece of cloth after the rate contained in the ſaid ſtatutes. (But nota, that no cuſtom nor ſubſidy is mentioned in any of the ſtatutes there recited, but one of them has the clauſe, (paying the aulnage, ſubſidy, and other devoires, for every piece of cloth after the rate.)]

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By an act of parliament 31 H. 6. a. ſubſidy was granted to the ſaid King of 43s. and 4d. out of every pack of wool, and 43s. and 4d. of every 240 woolfells; but after, in the ſame parliament, this ſubſidy was abated, and reduced to 33s. and 4d. for a ſack of wool, and 33s. 4d. for 240 wool-fells, and the payment limited for five years only. Dav. Rep. 11. a. Mich. 5. Jac in the Caſe of Cuſtoms.

[38. 31 H. 6. cap. 6. N. 55. For 33s. 4d. to be paid for ſack of wool by the ſaid ſtatute of 31 H. 6. as had been paid all the life of H. 6. but no anſwer to it.]

[39. The cuſtom of poundage in Ireland, ſcilicet, to give 12d. to the King for every pound of merchandize exported and imported, was not due by the common law before the ſtatute of 34 H. 6. but only by the ſaid ſtatute. M. 6. Ja. in the Exchequer. The *City of Dublin's Caſe* reſolved. 3 Jac. cap. 16. ordains that *kerſeys ſhall not exceed* 24 *yards in length, and* that for every kerſey of 24 yards there ſhall be paid as much in cuſtom and ſubſidy ratably, as ſuch perſons ſhould pay unto his Majeſty for one piece, and a third part of a piece containing 18 yards.]

[40. 12 E. 4. cap 3. Such *cuſtoms and ſubſidies due to the King* for the ſame clothes *ſhall be paid*. 11 H. 7. 6. accordingly.]

[41. 14 *El. cap.* 10. *Act made to reform the length and breadth of* kerſeys, *and weight, and recites that the Queen ought to have cuſtom and ſubſidy according to the quantity of the cloth.*]

[42. 27 *El. cap.* 18. *for white ſtreits* in the laſt proviſo remedy is ordained againſt defrauding the King of his cuſtoms of it.]

[43.

[43. 14 *E.* 3. 21. *The King conſents not to increaſe the cuſtom of wool &c. unleſs by aſſent of the parliament.*]

[44. 9 *H.* 5. 10. Of every chaldron of *ſea-coal* which ſhall be ſold to the people not franchiſed in the port of the town of Newcaſtle upon Tyne 2*d.* be due to the King of cuſtom.]

[45. 21 E. 3. N. 31. Item pray the Commons that there where the *merchants* are wont to *buy clothes*, and are wont *to carry them over the ſea*, and alſo merchants-ſtrangers who are wont to come into England to buy clothes, and by reaſon of a cuſtom de novo made, ſcilicet of every cloth 14d. of merchants of England, and of ſtrangers 21d. ſo that by reaſon of this grievous cuſtom no ſtrangers come, and all the community of the land, of merchants and labourers impoveriſhed, of which they pray remedy, and that this cuſtom be ouſted. Item, for clothes of worſted a new cuſtom levied upon every cloth 1d. and of ſtrangers 1d. ob. and of every * Lit. 10d. and of a ſtranger 15d. to great damage of the people and labourers, and that this cuſtom be ouſted. Anſwer, It pleaſes our Lord the King, the prelates, counts and other people, that this cuſtom ſtand in force; for it is as good reaſon that he take ſuch profit of clothes † work'd within the realm, and carried out of the realm, as of wools carried out of the land, ‡ according to the carrying of cloths made of ſack.]

Prynne's Cott. Rec. Abr. 57. No. 31. but not ſo full.—
* Inf. 207. pl. 1. Litt. ſignifies a bed.
‡ Orig. is (overs.)
‡ Orig. is (ſolonc la ferant de draps overes du ſack) ratable the cloth as the ſack.
Prynn's Abr. Cot. 57. No. 31.

[46. Rot. Parl. 21. E. 3. N. 11. A *new cuſtom* of wool and wine raiſed *without aſſent of the Commons* &c. See Anſwer to this.]

Prynne's Cott, Rec. Abr. 52. 53. No. 11.

Whereas in a council holden by Lionel the King's ſon, the guardian of England, it was in the 21ſt year of the King ordered without the Commons, that for keeping the realm and ſafe conduct of ſhips, ſhould be taken upon every ſack of wool paſſing the ſeas, 2s. upon every ton, 2s. upon every pound defavoires brought back into the realm 6d. and this charge to continue until Michaelmas next coming, which charge is yet demanded; that the King will be pleaſed that the ſame charge may be let fall, and to write his letters to the collectors thereof, that it ceaſe.

[47. Rot. Parl. 25 E. 3. 1 Part, N. 37. Touching the cuſtom of wool.]

Prynne,s Cott. Rec. Abr. 76. No. 37. A com-

plaint for taking 46 s. 8 d. for every 300 wool-fells, where the old cuſtom was 3s. 4d. for every 100. The anſwer was, The old cuſtom received ought not to be withdrawn.

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[48. Rot. Parl. 43 E. 3. N. 10. A ſubſidy granted for three years, ſcilicet, 43s. of every ſack of wool exported &c.]

Prynne's Cott. Rec. Abr. 109. No. 10.

Upon declaration of the King's great neceſſity, the Lords and Commons granted to the King for 3 years, of denizens for every ſack of wool, 43 s. 4d. of every 20 dozen of fells, 43 s. 4d. and of every laſt of ſkins, 4l.—of aliens for every ſack of wool, 3 s. 4d. of every 20 dozen of fells, 53 s. 4d. and of every laſt of ſkins 5 l. 6s. 8d. over the old cuſtoms.

[49. Rot. Parl. 25 E. 3. 1 Part. N. 22. The Commons pray, that where the merchants have granted to the King 40*s. of a ſack of wool* which falls in charge of the people, and not of the merchants, that it pleaſe the King, for relief of his people, that the ſaid 40s. be not demanded, nor levied hence forward &c. pray remedy &c. Anſwer, Becauſe the ſubſidy was granted to the King for great neceſſity, which yet continues, and is

Fol. 180. bis.

Prynne's Cott. Rec. Abr. 75. No. 22. is only, that the ſubſidy

of wool, viz. of every ſack may ceaſe; the anſwer was, that the ſame was granted to the King for a time yet enduring.

*is ſeen ten times more in other things, which things being ſhewn to the great men and commons at this parliament aſſembled, the ſaid Lords and Commons of common aſſent have granted to the King the ſaid ſubſidy to take from the Feaſt of St. Michael next enſuing for two years.]

—* Orig. is, (ſe monſtre pluis de 10. en auter.)

Prynne's Cott. Rec. Abr. 93. No. 26. The print agrees with the record.

[50. Rot. Parl. 36 E. 3. N. 26, *enacted, That where the Commons have granted a great ſubſidy, that it ſhall not be drawn into example, nor other thing demanded by grant of the merchants, or otherwiſe, but the ancient cuſtom of half a mark of a ſack &c.* See this print 36 *E.* 3. *cap.* 11.]

Prynne's Cott. Rec. Abr. 541. No. 34. is a different matter.

[51. Rot Parl. 2 H. 5. 1 Part, N. 34. The Commons pray that where the people of Devon and Cornwall have not uſed at any time paſt to pay any *cuſtom called cocket*, of any cloth called ſtreit, the colour ruſſet or white, be compelled to pay &c. pray remedy &c. Anſwer, The King will be adviſed.]

Prynne's Cott. Rec. Abr. 555. No. 21.—

[52. Rot. Parl. 5 H. 5. N. 21. In a petition of the Commons it is, that the merchants ought not to be charged for cuſtoms ſhewing their cockets. Anſwer, The lieutenant will ſend to the King to know what grace the King will make and grant.

* Ibid. No. 20.

* 5 H. 5. N. 20. pray the Commons that the merchants be not charged to pay the tenths, taxes, and tallages, but in the cities, vills, and burghs where they are reſiant. Anſwer, Be it done as has been uſed before this time.]

[53. 18 *E.* 3. *Stat.* 2. *cap.* 3. *That the ſea be open to all manner of merchants to paſs with their merchandizes where ſhall pleaſe them.*]

Prynne's Cott. Rec. Abr. 418. No. 24. is, That if they carry the goods by water to London, they ſhall not pay ſeawage, *provided they bring teſtimonials from the cuſtomers*, at Southampton.

[54. 4 H. 4. N. 24. Upon the petition of the merchants of *Jean*, it was ordained by the King, that if they bring any merchandize to the vill of *Southampton*, and there land them, and pay the cuſtoms due, and *after bring the goods by land to the city of London*, they ought not to pay there the cuſtom called *ſeawage*. It is ſaid in the petition, that the ſaid cuſtom was once before paid at Southampton, and that the city of London ought not of right to have the ſaid cuſtom of any merchandizes ſo brought by land, nor by ſea, unleſs only of merchandizes coming over the ſea to the ſaid city firſt.]

Prynne's Cott. Rec. Abr. 395. [592] No. 114. ſays, The print touching ſubſidies for Kerſies, cap. 19. agrees with the record.

[55. 1 H. 4. N. 114. The Commons pray that no cloth of *Kerſey*, Kendall cloth, friſe of Coventry, cogware, nor no other ſtreite nor remnant of England, nor cloth of Wales not uſed to be ſealed of any ſeal ſmall nor great do not pay no cocket nor other cuſtom. And alſo no cloth of what * meaſure ſoever it be not wont to be ſealed of any ſeal called the *farthing ſeal*, till John Waltham late biſhop of Sarum, in time of Rich. 2. was treaſurer of England, made miniſters in all counties throughout the realm to ſeal all manner of clothes aforeſaid, and all other clothes which were wont to be ſealed of cuſtom &c. And upon this

this petition it is anſwered by the King as it is imprinted by the ſtatute of 1 *H.* 4. 19. See 4 H. 4. N. 45. This ſtatute prayed to be continued for the life of the King, but the King will be adviſed. Simile 5 H. 4. N. 70.]

—* Orig. is (laieur) which in Richelet's French Dictionary 1732, ſignifies (metateur.)

56. Where one *merchant cuſtoms his merchandizes in the name of another merchant*, this is good; for the intent of the ſtatute is, that the King ſhall be ſurely ſerved of his cuſtom. Br. Cuſtoms, pl. 76. cites 2 H. 7. 14, 15.

(H. a) *For the Goods of whom* Cuſtom ſhall be paid.

[1. THE *patentee* of the King *of the goods of pirates* ſeiſed by him ſhall pay no cuſtom to the King; for the goods are given by the law to the King, and therefore he ſhall not have * cuſtom of his own goods. Mich. 5 Jac. in the Exchequer. Per Curiam.]

S. P. Lane 15. Hill. 4 Jac. Anon.

* Fol. 171. bis.

2. Treſpaſs for taking of goods; the defendants plead Not guilty. The jury find that the plaintiff was ſeiſed of the manor of D. and that time out of mind he and all &c. had and uſed to have all goods &c. wreck'd upon the high ſea caſt on ſhore upon the ſaid manor, as appertaining thereto: that the goods were wreck'd upon the ſaid manor, and that the plaintiff ſeiſed them as wreck. They further find, that by the act of 12 Car. 2. there was granted to the King a ſubſidy called poundage, viz. *of all goods and merchandizes of every merchant, natural-born ſubject, denizen and alien, to be exported out of the kingdom of England, or any of the dominions thereto belonging, or imported into the ſame by way of merchandize, of the value of* 20 *s. according to the particular rates and values of ſuch goods and merchandizes as they are reſpectively rated and valued in the book of rates, intitled the rates of merchandizes, after in the ſaid act mentioned and referred to, to one ſhilling &c.* Then they find that at the time of the ſeiſure of the goods, the defendants were the King's officers duly appointed to collect the ſubſidy of poundage, by the ſaid act granted; and that for the duty of poundage not paid at the ſaid time, they ſeiſed and arreſted the ſaid goods untill the plaintiff had paid them the ſaid poundage. And whether the ſaid goods ſo wreck'd as aforeſaid be chargeable with the ſaid duty of poundage, was the queſtion? And per Vaughan Ch. J. in delivering the opinion of the Court, *wreck'd goods are no goods imported within the intention of the act*; and conſequently not to anſwer the King's duties; for goods as goods cannot offend, forfeit, unlade, pay duties, or the like, but men whoſe goods they are. And wrecked goods have not owners to do theſe offices, when the act requires they ſhould be done; therefore the act intended not to charge the duty upon ſuch goods. And judgment for the plaintiff. Vaugh. 159. 160. 172. Hill. 23 & 24 Car. 2. C. B. Sheppard v. Goſnold & al'.

(I. a) *The Cauſe for which* they were granted.

[1. THE ſubſidy of *tonnage of wines* was granted to E. 4. in the fourth year of his reign in ſpecial, *for the ſafeguard and cuſtody of the ſea*, and this appears by the 12 E. 4. cap. 3. where proviſion is made to prevent the deſceit uſed not to pay the ſubſidy. B. Cuſtomes. 26. 9 H. 6. 12. 1 E. 6. cap. 13. recites that as well King H. 8. as H. 7. and other progenitors Kings of England time out of mind &c. *have had granted unto them, and enjoy'd of the commons of this realm by authority of parliament for the defence of the ſame, and keeping and ſafeguard of the ſeas for the intercourſe of merchandize ſafely to come into the ſame your realm, and to paſs out of the ſame, certain ſums of money named ſubſidies, of all manner of goods and merchandizes coming in and going out of the ſame your realm*, and now for the great charge of the King &c. grants the ſubſidy of tonnage &c. and if any be after robbed by pirates or loſes his goods by misfortune, he ſhall have power to ſhip ſo much again without paying cuſtom. 1 *Ma. cap.* 18. *ſame ſtatute renewed.* 1 *El.* 19. *accordingly.*]

(I. a. 2) Cuſtoms. *Defrauding the King* of his Cuſtoms; *puniſhed* or relieved; and what ſhall be ſaid a Defrauding; and *Pleadings* as to Forfeitures.

1. AN *information* for the King *for tranſporting* 1200 *clothes*, the cuſtom not being paid; the defendant *pleads*, that he *did not tranſport any* uncuſtom'd clothes; a verdict is *found*, that the defendant tranſported 1100 *ſtatute clothes, which amount to the* 1200 clothes mentioned in the count, *and that* the defendant *has not paid cuſtom for* 600 of theſe 1100 clothes, and has paid cuſtom for the reſidue of them: the King had judgment for all the 1200 clothes, and affirmed in error. The defendant pleaded in the principal caſe, that he did not ſhip any that had not paid cuſtom, and it was found that he ſhipped 600, cuſtom not being paid. *If he had pleaded Not guilty*, the *King had been barred for ſo much as he had paid cuſtom for.* Note, *Neither the quality nor* the *meaſure* of the clothes are mentioned *in the declaration*; and yet it is well. In the principal caſe the verdict of the jury for 600, that had not paid cuſtom, is a full verdict, which gives a forfeiture of the whole to the King. The finding that cuſtom was paid for 500 clothes is out of the iſſue, and ſurpluſage. Jenk. 191. pl. 96. cites 21 H. 7.

2. The

2. The ſtatute of 1 *E.* 6. *c.* 12. *ordains, That if any merchant unlades any of his goods, the cuſtom not being paid, or the collector agreed with, the goods ſhall be forfeited.* Jenk. 207. pl. 38. The law for non-payment of cuſtom is, that *if any part be not cuſtomed, the whole is forfeited*; but *not the ſhip for a ſmall matter not cuſtomed.* 38 E. 3. Jenk. 191. pl. 96.

A merchant ſtranger in his voyage, by reaſon of a *great tempeſt* which happened to him in his voyage, *to lighten the ſhip threw ſo much of his merchandize into the ſea*, that he did not certainly know how much it was; upon his arrival in port he *notified it to the collector*, and they agreed for ſo much, and if more was found in the ſhip, that he ſhould pay for it. Reſolved that this uncertain agreement was ſufficient, becauſe of the ſaid caſualty, and the merchants *invincible ignorance* of the contents of the lading. Jenk. 207. pl. 38.—Pl. C. 1. Mich. 2. E. 6. Reniger. v. Fogoſſa.

3. A tinner articles to deliver tin to the merchant *cuſtom-free*; after delivery it is ſeiſed for cuſtom; and the merchant ſues to be relieved, but is not, but his bill diſmiſſed; for it is *in fraudem regis*. Hill. 26 & 27 Car. 2. Chan. Caſes 256. Papilion v. Hix. [594]

[*For more of* Cuſtoms &c. *ſee the* Acts *of* Parliament *under that Head, which are too many to take in here.*]

(K. a) *Mines.*

See (Y.)

[1. 1 E. 2. ROT. Fin. Memb. 15. De minera *plumbi capta in manus Regis.*]

[2. 1 E. 2. Rot. Chartar. Memb. 9. pro Petro de Gaveſton comite Cornubie. The *King granted* totum comitatum &c. Petro Gaviſton militi &c. and *all the mines which were of ſuch county of Cornwall &c.* and that he ſhould be viſcount &c.]

[3. 3 E. 1. Rot. Pat. Memb. 29. De minera commiſſa rendring rent &c.]

[4. 10 E. 1. Rot. Memb. 9. The King had minera de *Aldeveſton in Cumberland.*]

[5. 8 E. 2. Rot. Pat. part 2. dorſo; *Ne ſtannum ducatur extra regnum antequam cuneat. apud Loſtwithiel.* M. 4. and 7.]

[6. Rot. Parl. 8 E. 2. Memb. 6. dorſo. *Upon the petition of the town of Loſtwithiel in Cornwall, it was* ordained per auditores petitionum, *that tin ſhould be weighed, coined, ſealed &c. there &c.*]

[7. Rot. Parl. 8 E. 2. Memb. 7. Upon the petition of the commons of Devon, complaining that their arable *lands were waſted by ſuch as work'd in the ſtannaries*, J. de F. and Jo. de T. are *appointed guardians* of the ſtanneries *to enquire of theſe complaints*, and do what ſhall be for the profit of the King and country.]

[8. Ibid. Memb. 12. Petition of the Commonalty of Cornewall for the *ordering of the ſtanneries*, where they complain that A. de Piſane, to whom the King had granted ſtanneries of the ſaid county, diſtreined them to weigh the tin at Loſtwithiel, and to ſell it to him weigh'd by unlawful weight, and did not give for the * beſt but 40 s. where they might, of other merchants, take ſix marks, wherefore by reaſon that the tinners cannot have the † value of their workmanſhip of the tin, by which, whereas he had before 3000 tinners working in Cornwall for the profit of the King, now he has but 500 tinners, thereby the King will loſe

* Orig. is (mil'er) which it ſeems ſhould be (melieur.)

† Fol. 171.

loſe this year 600 l. at leaſt, and more afterwards; and there they ſay, that in taking their tin againſt their will, and by the ſaid falſe weights he has gain'd 2000 l. and all taken for the King &c. ſo that they cannot have other merchandizes for their tin &c. Vide this.]

* Orig. is (que eſt icy louteyne que les gents des enquelts d'eſtruerent de venir a les Courts &c.)

[9. Other petition there is *to have Juſtices to come there every year or once in two*, to take inqueſts for the diſtance of the place to go to the Courts of the King's Bench, Common Pleas, and the Exchequer;* that it is the cuſtom here that the people of inqueſts ought to come to the Courts &c.]

* This belongs not to this letter, but to (R).

* Orig. is (come ils uſent ore.)

[10. Other petition, that where in all England, a man * ought not to take *priſes of wines till after* the ſale of 10, and 9 ton and an half, and his miniſters in Cornwall take the priſes after the ſale of 9 ton and an half to the damage of the people, wherefore they pray that they may pay the common priſes as others in England. Other petition that the Juſtices ſhould not come as they uſed to do in Auguſt, and in Lent, when the people ought to ſave, and get their living, to the great grievance of the people &c. And that his miniſters and others in Cornwal do not uſe other meaſures than other people in other counties of England * now uſe &c.]

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[11. Reſponſ. aſſignentur Jo. de Foyle & Rich. Pobhampton ad inquirendum &c. veritat. & ſi ſit ad dampnum Regis & de eo, quod invenerint, certificent Reg. & Conſil. & ulterius ibidem fiat quod de jure fuerit faciendum.]

Prynne's Cott. Rec. Abr. 56. No. 27.

* Prynne's Cott. Rec. Abr. 71. No. 26. is a different matter.

[12. Rot. Parl. 21 E. 3. N. 27. The Commons pray that the *tin* of Cornwall *be ſold to all merchants*, and not that one alone ſhall buy it in groſs, as they complain that one Tidman of Linborgh now does to the great damage of the merchants. To which the King anſwered, that it is the profit which belongs to the prince, and it is lawful for every lord to make his profit of what is his. Simil. * 22 E. 3. N. 26. and anſwer is, that this was anſwered at the laſt parliament.]

* Orig. is (iewer.)

13. It appears in Rot. Parl. E. 3. Anno 11 & 12, that the people **ſued to the King* to dig ſilver in their own land. And therefore it ſeems that mines of gold and ſilver belong to the King; and ſo it is contained in Libro Raſtall de expoſitione terminorum legum Angliæ tit. Treaſure trove, *and at the requeſt aforeſaid King E. 3. granted that they ſhall have it rendring to the King the third part of the ſilver, and ſo that they make the reſt into plate, and bring it after to his coinage for ſuch allowance as others have* who bring plate to the mint. And it ſeems that it is no ſtatute; for the King the Lords and the Prelates aſſented, and there is no mention that the Commons aſſented. Br. Prerogative, pl. 134.

* Br. Corone pl. 175. contra, that all mines of metal, except mines of gold and ſilver, belong to the

14. *And* it is further there agreed, that *of other treaſure the King ſhall have the one moiety, and the owner of the ſoil the other moiety* And therefore it ſeems that mine of gold &c. is taken for treaſure, and in the reading of Fitzjames how that the prerogative of the King is a treatiſe of the common law, and not ſtatute nor declaration by parliament, and good proof of this there in Frowike's reading. And it ſeems by Fitzjames that * *mine of gold*

gold and ſilver is the *owner's of the ſoil*; quære. Br. Prerogative, pl. 134.

owner of the ſoil, and the mines of gold and ſilver *belong to the King*, as appears Libro Raſtal, and by the records of the Tower.

S. P. *For* if the ſubject ſhould have them, he by the law *could not coin ſuch metals*, nor put a print nor value upon them. Dav. 19. a. Trin. 2 Jac. in the Caſe of Mixt Monies; cites Pl. C. 316. The Caſe of Mines.

The money of England is the treaſure of England, and nothing is ſaid to be treaſure trove but gold and ſilver; and this is the reaſon that the *law* doth *give to the King mines of gold and ſilver*, thereof to make money, *and not any other metal* which a ſubject may have, becauſe thereof money cannot be made. 2 Inſt. 577.

15. All the Juſtices and Barons agreed, that by the law all mines *of gold and ſilver* within the realm, in whatſoever lands or ſoil it be within the realm, *belong* by prerogative *to the King*, *with liberty to dig and carry away the ore*, and other ſuch incidents thereto, as are of neceſſity to get at the ore. Pl. C. 336. Mich. 9 & 10 Eliz. in the Caſe of Mines.

The King may *dig in the land of the ſubject* for *gold and ſilver*; becauſe quando lex aliquid alicui concedit, concedere videtur & id ſine quo res ipſa eſſe non poteſt. 12 Rep. 13. Reſolved 4 Jac. in Parl. in the Caſe of Salt-petre.

16. If *gold or ſilver be in ores, or mines of copper, or braſs, tin, lead, or other baſe metal* in a ſubject's ſoil; in ſuch caſe, as well the gold and ſilver as alſo the baſe metal belongs de jure intirely to the ſubject who is proprietor of the land, if the gold and ſilver *exceeds not the value of the copper or other baſe metal. But if* the value of the gold or ſilver *exceeds* the value of the copper or other baſe metal, they were of opinion, that the Crown ſhould have as well the baſe metal as the gold and ſilver; and that in ſuch caſe it ſhall be ſaid *Mine Royal*, or otherwiſe not. But if the baſe metal exceeds the gold or ſilver, then it draws the property of the whole to the proprietor of the land. Per Harper, Southcot and Weſton J. But they three agreed; that becauſe the *information was, that the ore and mine of copper contain'd in it gold and ſilver, and the defendant did not deny it, but fully confeſs'd it, it ſhall be taken that the gold and ſilver were of the greater value*; for the beſt ſhall be taken for the King by intendment, and therefore they aſſented, with all the other Juſtices and Barons, that judgment be given for the King. Pl. C. 336. in the Caſe of Mines.

But all the other Juſtices and Barons contra, that tho' the gold or ſilver in the baſe metal in the land of the ſubject be of leſs value than the baſe metal, yet as well the baſe metal as the gold or ſilver therein belongs by prerogative to the Crown, with liberty to dig for the ſame, and to lay it upon the land of the ſubject and to carry it away, and that in ſuch caſe it ſhall be call'd *Mine Royal*. Pl. C. 336. b. in the Caſe of Mines.—But ibid. 338. b. to the end. The Reporter ſeems to doubt of this; and that if no regard ſhall be had to the quantity of the gold or ſilver in the baſe metal (there being ſome naturally in every baſe metal), the King would have all the mines of baſe metal in the realm, and ſo this reſolution to no purpoſe, there being according to Agricola no ſuch mine, and ſo the reſolution grounded on a defect of knowing the nature of baſe mines. And therefore the Reporter ſays, it ſeems to him, that the nature of baſe mines ought to be conſidered, and the value of the gold and ſilver in the baſe metal, and that it be at leaſt of ſuch value as to countervail the charge of the getting it, or otherwiſe, in his opinion, there is no reaſon that it ſhould draw to the Crown the property of the baſe metal, but that the proprietor of the baſe metal ſhould have the gold and ſilver alſo. But he ſays, that this preciſe point was not put to the judges for their judgment. For by the confeſſal of the defendant, that the ore contained gold or ſilver, which ſhould be intended the beſt for the King, diſcharg'd them of this; for the *defendant ought to have ſhewn that the ore contain'd ſome ſilver but not the greater value, nor ſo much as would anſwer the charge*; *abſque hoc that it contain'd gold or ſilver in other manner*, and then by this or the like pleading the Judges muſt have taken notice thereof in point of judgment, which now by the pleading was pretermitted; and for the more clear underſtanding, whether any baſe mine is without any gold or ſilver, it

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it is good to know authors and experience; for the truth of this matter ought to direct the judgments of the Judges.

17. If ore or mine be *in the ſoil of a ſubject, of copper, tin, lead or iron, in which is no gold or ſilver*, the proprietor of the ſoil ſhall have the ore and mine, and not the King by prerogative; for in ſuch ſterile baſe mettal no prerogative is given to the King; agreed by all the Juſtices and Barons. Pl. C. 336. b. in the Caſe of Mines.

But mines of gold and ſilver do *not* paſs *without ſpecial words*; for they concern the King's prerogative. Jenk. 277. pl. 99.

18. *Mine Royal*, whether of baſe metal containing in it gold or ſilver, or be it of pure gold and ſilver, *may by grant* of the King *be ſever'd from the Crown* and granted to another; for it is not an incident inſeparable, but that it may be ſever'd *by apt and preciſe words*; agreed by all the Juſtices and Barons. Pl. C. 336. b. in the Caſe of Mines.

Not only the Kings of England in their times, but alſo the Dukes of Cornwall in their times, have had the pre-emption of tin; which is a privilege belonging and reſerved unto themſelves by their charters of liberties granted unto the tinners, which appertains unto them, as is conceived by the Learned, Rationepropriietatistanquam ſummis dominis & proprietariis quam ratione prærogativæ fuæ; not unlike that which other Kings have in foreign countries, whereof Cataneus thus makes mention, Præfertur princeps in emptione metallorum, alleging an imperial conſtitution of the code for proof thereof; and of which pre-emption, as by ſome precedents may be proved, both the Kings of England and Dukes of Cornwall have made uſe, when therwith they ſtood in need of money for the managing their affairs. Dod. Hiſt. of the Principality of Wales &c. 96, 97.

19. It was reſolved in the Star-Chamber, Mich. 4 Jac. That the King had not the pre-emption of *tin in Cornwall* by any prerogative. For ſtanni fodina, nor plumbi fodina &c. or other ſuch *baſe mines*, do not *belong* to the King by his prerogative, but *to the ſubject which is owner of the land*. But the *pre-emption of tin in Cornwall* belongs to the King as an ancient right and inheritance due to the King, as well of tin in the land of the ſubject, as in his proper demeſnes. And tho' a reaſon cannot now be eaſily rendered of things done before time of memory, yet it may well be, that all the lands of the county were the demeſnes of the King, and that upon grant of the land, the King reſerved the mines to himſelf; the mines of tin being of great antiquity; and as all land is mediately or immediately derived from, and held of, the Crown, ſuch a profit apprender may have a reaſonable commencement. And where uſage has allowed it to the King, it doth belong to him. True it is that all the county of Cornwall was within the King's foreſt, and that it was diſafforeſted by King John, as appears by Campden. And what conſideration the county gave for it to the King concerning tin, cannot now appear; but it appears plainly, that * *before the* 33 *E.* 1. *all the tin in Cornwall and Devon alſo, to whomſoever the land belonged, appertained to the King*; and this is proved by divers expreſs records. 12 Rep. 9. Mich. 4 Jac. The Caſe of the Stanneries; where ſeveral ancient records are cited.

* In anſwer to an objection that this ſtatute extends only to tin within the land of the King himſelf, it was reſolved, that by the ſaid clauſe *fodere & fundere ſtannum terris noſtris & vaſtis noſtris & aliorum quorumcunque &c. ſicut antiquitas conſuevit &c.*) it is manifeſt that the King hath all the tin, as well in the land of the ſubject as in his own proper land. It ſhall be abſurd that the King ſhall reſerve the emption of his own tin. The King grants ſtannatoribus noſtris, divers liberties and immunities, which are all enjoy'd as well by the tinners in the lands of the ſubject, as by thoſe in the lands of the King &c. 12 Rep. 11. the Caſe of the Stannaries.

20. The

20. The miniſters of the King *cannot* undermine, weaken, or *impair* any of the *walls* or foundation *of any houſes* or out-houſes, or barnes, ſtables, dove-houſes, mills, *or any other buildings*, nor dig in the floor of any manſion-houſe. 12 Rep. 13. Reſolved in Parl. 4 Jac. in the Caſe of Saltpeter.

21. *Nor in the floor of any barn* imployed for houſing corn, hay, &c. *But* they may dig in the floors *of ſtables and ox-houſes*; *ſo that* there be ſufficient room left for the horſes &c. of the owner, and ſo that they repair it in convenient time, in as good plight as it was before. Alſo they may dig in the floors *of cellars and vaults, ſo that* there be ſufficient room for the neceſſaries of the owner, and ſo that the wine, beer, and other neceſſaries of the owner be not removed, or in any ſort impaired; and they may dig any *mudwalls*, which are *not the walls of any manſion-houſe, ſo that* order be taken that the manſion-houſe be well defended as it was before; ſo they may dig *in the ruins* and decays *of any houſe or buildings*, which are *not preſerved for the neceſſary habitation of men.* 12 Rep. 13. Reſolved in the Caſe of Saltpeter.

22. They *ought* to make the places, in which they dig, ſo well and commodious to the owner, as they were before. Reſolved. 12 Rep. 14. Caſe of Saltpeter.

23. *And* to *work* in the poſſeſſion of the ſubject, but *between ſun-riſing and ſun-ſetting*, ſo that the owner may make faſten the doors of his houſe, and put it in defence againſt miſ-doers. Reſolved. 12 Rep. 14. in the Caſe of Saltpeter.

24. *And not* to place or *fix any furnace*, veſſels, or other neceſſaries *in any houſe* or building of the ſubject, without his conſent, or ſo near any manſion-houſe as thereby it may receive prejudice or diſquiet. Reſolved. 12 Rep. 14. in the Caſe of Saltpeter.

25. *Nor* to continue in one place over a *convenient time*, nor to return again into the ſame place before convenient time be paſſed. Reſolv'd. 12 Rep. 14. in the Caſe of Saltpetre.

26. Reſolved *alſo*, that the *owner* of the land *cannot be reſtrained* from digging and making ſaltpetre; for the King hath not intereſt in it, as he hath in gold and ſilver in the land of the ſubject. For the King in caſe of ſaltpetre hath but * purveyance, ſo that the property of it is in the owner, and for that he cannot be excluded of the commodity in his land. 12 Rep. 14. in the Caſe of Salt-petre.

* See Purveyance.

27. The King by his patents *grants to A. ex mero motu, ſpeciali gratia, & certa ſcientia, an honour in fee, and all mines there*; this grant does not paſs mines of gold or ſilver, or if they are mixed with iron, or lead, or tin, ſo that the ſilver to be extracted exceeds the charge of getting it. If there be ſuch mixed mines in the land of a ſubject, and without ſuch proportion of ſilver in them as aforeſaid, they belong to the King. Jenk. 277. pl. 99.

But if the King grants *all mines which belong to the King in the land of a ſubject*, in this caſe mines of gold and ſilver paſs; for the mentioning the lands of a ſubject waives the King's prerogative in this caſe; for the King can have no other mines in the lands of a ſubject. Jenk. 277. pl. 99.

28. 1 *W. & M. Stat.* 1. *cap.* 30. *ſ.* 4. enacts, That *no mine of copper, tin, iron or lead ſhall be adjudged a royal mine, altho' gold or ſilver may be extracted out of the ſame.*

29. 5 *W. & M. cap.* 6. *ſ.* 3. enacts, That *all proprietors of mines wherein any ore ſhall be found, in which there is copper, tin, iron, or lead, ſhall hold and enjoy the ſame, notwithſtanding that ſuch mines or ore ſhall be claimed to be royal mines.*

S. 3. *Provided that their Majeſties, and all claiming royal mines under them, may have the ore of ſuch mines (other than tin ore in the counties of Devon and Cornwall) paying to the proprietors within* 30 *days after the ore is laid upon the banks, and before the ſame be removed, the rates following, viz. for all ore waſhed wherein is copper,* 16*l. per tun; and for all ore waſhed wherein there is tin,* 40*s. per tun; and for all ore waſhed wherein there is iron* 40*s. per tun; and for all ore waſhed wherein there is lead,* 9*l. per tun; and in default of payment, it ſhall be lawful for the proprietors to diſpoſe of the ore.*

S. 4. *Nothing in this act ſhall alter the charters granted to the tinners of Devon and Cornwall, or any of their liberties, or make void the laws of the ſtannaries.*

(K. a. 2) *Relegation.*

[13. IN the time of E. 1. there *was a mine of ſilver.* 1 E. 2. Rot. Pat. 1 part. M. 4. 20 E. 2. Rot. Fin. M. 11. De minere *auri* colligend. pro Rege. Among the petitions in the parliament 18 E. 1. fol. 2. there is ſuch petition, *Stephanus de Aſhby de London petit, quod Rex ei miſereatur, & quod concedere velit quod poſſit ingredi civitatem ad ſupervidenda bona ſua quæ non vidit per quatuor annos &c. Jurat quod non faciet quicquam contra Regem vel coronam, nec contra pacem, & Rex recipit eum ad gratiam, & ad moram in civitate.*]

[14. 2 E. 1. Rot. Clauſo Memb. 13. Rex majori & vicecomitibus London &c. Precipimus &c. quod ſi Richardus A. &c. quos vos occaſione quarundam tranſgreſſionum eis impoſit. cepiſtis & in priſona noſtra de Newgate detinetis, tactis ſacroſanctis evangeliis *juraverint* coram vobis *quod ipſi de cætero in civitate prædict. moram non facient nec* ad eandem ſine noſtra & civium ejuſdem civitatis licentia non *revertentur*, tunc eos a priſona predicta deliberetis & omnia bona & catalla ſua per vos occaſione predicta arreſtata reſtituatis eiſdem &c.]

15. *Exile for a time* is ſaid by ſome to be a relegation. Co. Litt. 133.

(L. a) * War.

Fol. 173. bis.

* When the Courts of Juſtice are open, and

[1. 51 H. 3. † FIct Kennilworth enacted *inter alia*, They that have nothing *ſhall ſwear*, finding ſufficient ſurety, that from thenceforth *they ſhall keep the peace*, and ſuffer ſatiſ-

ſatisfaction and penance after the judgment of the church, except perſons baniſhed, to whom the King only may remit.] the Judges and Miniſters of the ſame may

by law protect men from oppreſſion and violence, and diſtribute juſtice to all, it is ſaid to be time of peace. So when by invaſion, inſurrection, rebellions &c. the peaceable courſe of juſtice is diſturb'd and ſtopp'd, ſo as the Courts of Juſtice be as it were ſhut up, then *it is ſaid to be time of war.* And the *trial* hereof *is by the* * *Records and Judges of the Courts of Juſtice*; for by them it will appear whether juſtice had her equal courſe of proceedings at that time or no; and this ſhall not be tried by jury. Co. Litt. 249. b.——To make a ſolemn war according to the law of nations, two things are required. 1ſt. That the waging thereof muſt on both ſides be by the authority of ſuch as have the ſupreme power in the commonwealth. 2. That certain rites or ceremonies be us'd therein. But of publick war leſs ſolemn, it is otherwiſe; for they may be without thoſe ceremonies, and againſt private perſons, and be waged by any magiſtrate. See Grotius de Jure Belli &c. 1ſt part, cap. 38.—Spelm. Gloſſ. verbo Guarra als. Guerra, tranſlates it Bellum, and that it ſignifies not only that publick war which is waged by Princes, but private war alſo, which is between families, capitali inimicitia (quam *faidam* vocant) conſtitutas.

The *getting of letters of repriſal againſt a nation*, does not make a war between both States; nor can they be ſaid to be at enmity. Molloy 10. cap. Marg. 10. cites 12 E. 3. fol. 13. Coram Rege & Concilio in Camera Stellarum. Mich. 2 R. 3. fol. 2. a.

[2. And after, in the ſame ſtatute, if there be *any* of whom it is *ſuppoſed that he will make* or procure *war*, the Lord Legate and the King ſhall provide ſuch ſurety as ſhall ſeem expedient, by *ſending them out of the realm* for the time, or otherwiſe as they ſhall think convenient.]

[3. P. 13. E. 2. B. R. Rot. 12. The cuſtodes of the truce give *licence* to certain men *to go and ſell and buy* their merchandizes *in Scotland*, which was *then enemy of the King*. And for this the merchants were impleaded; and tho' the licence was void, yet they are pardoned by the King.]

[4. Rot. Parl. 3. H. 5. 2 Part. N. The Commons pray, that where any *malefactors take* any *goods* * *of one coming from Flanders*, and any of them bring part of the goods, to the value of 40s. to the vill of Sandwich; and upon ſuggeſtion to the King a commiſſion was granted to the conſtable of Dover, to levy of the vill aforeſaid 80l. (for ſo much was ſuggeſted to be brought to the vill); and therefore pray that this commiſſion be repealed, becauſe it is againſt Magna Charta, upon ſuggeſtion without proof at the common law. Anſwer; Be the execution in the matter by the Chancellor of England, according to the form and effect of truces lately made between the realm of England and thoſe of Flanders.] * Orig. is (del unvent.)

[5. Rot. Parl. 43. E. 3. N. 25. The King granted to all his lieges, that they ſhould hold to them and their heirs all lands, caſtles, cities &c. in France which they ſhould conquer there &c.] Prynne's Cott. Rec. Abr. 110. No 25. That they

ſhould enjoy and bear all ſuch &c. except to the King, all royalties, and the lands of the church, and that every perſon of his own conqueſt and proweſs ſhould have charters.

[6. 15 H. 6. cap. 7. It was complained that alien friends freighted the ſhips of alien enemies, in ſupportation of the ſaid enemies, by which it is enacted, Inaſmuch as it is not contrary to the league between the King and ſome of his allies, that if it happen that any merchandizes of the aliens of the amity aforeſaid, be taken by the ſaid lieges after &c. or any ſhips or veſſels of the ſaid enemies of the King, not being under the King's

ſafe conduct and protection, that then the ſaid lieges may then retain and enjoy without any impeachment or reſtitution thereof to be made. This was ordained to continue for two years, and longer if the King pleaſe. 18 H. 6. cap. 9. accordingly.]

[7. It is lawful to take the ſhips, goods and merchandizes of the King's enemies, if they have not *ſafe conducts inroll'd in Chancery*. 20 H. 6. cap. 1. 27 H. 3. Rot. Vaſcon. Charter and Patent. In Mr. Selden.]

[8. The King grants licence to to take the goods of his enemies by land and by ſea, ſo that the King have the moiety.]

[600] The caſe was, A Spaniſh merchant brought a bill in the Exchequer Chamber before the King and Council againſt divers Engliſhmen, ſetting forth, that deprædatus & ſpoliatus fuit upon the ſea juxta partes Britanniæ per quendam virum belicoſum de Britannia de quodam navi and of divers merchandizes therein, which were brought into England, and came unto the hands of divers Engliſhmen, naming them; and had proceſs againſt them: they came in and pleaded, that in regard this depredation was done by a ſtranger, and not by the King's ſubjects, they ought not to be puniſhed; for the *ſtatute* 31 *H. 6. cap.* 4. gives reſtitution by the Chancellor in cancellaria ſibi vocato uno Judice de uno Banco, vel altero; and by the *ſtatute* 27 *E.* 3. *cap.* 13. that reſtitution may be made by the Chancellor himſelf without any Judge; it was reſolved, that (*quiſquis extraneus* &c.) who brings his bill upon this ſtatute to have reſtitution, *debet probari, quod tempore captionis fuit de amicitia domini regis*; and alſo that he who took him and robb'd him was alſo ſub obedientia regis, vel de amicitia domini regis ſive principis querentis, becauſe if he was an enemy, and as ſuch took the goods, then non fuit ſpoliatio, nec deprædatio, ſed legalis captio, prout quilibet inimicus capit ſuper unum & alterum. And this was the opinion of all the Judges then in the Exchequer Chamber. Cited by Coke Ch. J. 3 Bulſt. 28. Paſch. 13 Jac. in Marſh's Caſe — S. P. in the Caſe of Samuel Pelagii ambaſſador from the King of Morocco to the States General, who in his return *took a Spaniſh ſhip*. But there *being open hoſtility between Spain and Morocco*, this in judgment of law is not ſpoliatio, but legalis captio. And if one enemy do take the goods of another, this is not felony. Cited by Coke Ch. J. 3 Bulſt. 27. 28.——S. C. 4 Inſt. 152.——Roll. R. 175. S. C. by name of Palachie's Caſe, cited by Coke. And it being agreed by the civilians, that the Spaniſh ambaſſador might proceed civiliter againſt Pelagii for the goods here, becauſe they are *in ſolo amici*, the Reporter ſays quære; for it ſeems that by the *law of nations* one enemy may lawfully take from another.—4 Inſt. 154. ſays it was reſolved by Popham Ch. J. and the whole Court of B. R. Trin. 2 Jac. to be againſt the law of England, to proceed civiliter in the Admiralty; where the caſe was, That the *King of England was in league with Spain and the Hollanders*, and there was *enmity between* the King of *Spain and Holland*; and a *Hollander upon the high ſea in aperto prælio, took the goods of a Spaniard, and brought them into England* infra corpus comitatus; and becauſe the goods were in ſolo amici, the Spaniard libelled for them civiliter in the Admiralty, it was reſolved per tot. Cur. of B. R. upon conference and deliberation, that the Spaniard had left the property of the goods for ever, and had no remedy in England for them; and relied principally upon the book of 2 R. 3. being of great authority. And Lord Coke ſays, That the Solicitor for the King of Spain was at firſt much offended with this reſolution of B. R. but when he had taken advice, and underſtood the reaſon thereof, he was well ſatisfied.——And it was reſolved in Palachie's Caſe, that had he not been an ambaſſador, he could not be a pirate or a felon. Ibid.

End *of the* Sixteenth Volume.